

JUDGMENT : THE HONOURABLE MRS JUSTICE BARON : Family Division. 14th May 2004

1. This is an application by Jenni H (hereinafter referred to as to the Wife) for full ancillary relief arising from the breakdown of her marriage Mr Gary H (hereinafter referred to as the Husband). The parties were married on the 6th September 1997 in Henley and separated finally on the 17th June 2002 – thus, in simple terms, the marriage itself lasted some 5 years. The parties have one child – namely Lewis H ("Lewis") who was born on the 11th October 1996 (thus, he is some 7½ years old). As I shall relate in more detail below, Lewis has complex developmental problems and learning difficulties which mean that he has very special needs.
2. There is little real dispute about the level of assets involved but the special feature in this case relates to the fact that all the assets are held in trusts and, in particular, the Gary H fund of the H Family Trust (hereinafter referred to as "the Husband's Fund") and the Grandchildren's Settlement.
3. This has been a hard fought and expensive piece of litigation. The relationship between the parties has been acrimonious and this has affected the manner in which they have conducted their lives since separation and this case. The Wife has, at times, felt beleaguered, alone and without much assistance with the parties' very demanding son. The Husband has felt that he is expected to provide substantial sums of money in respect of a relationship which he perceives as short-lived and unhappy. *[I have been informed that as late as March 2004, no revised offers of settlement had been made]*. Indeed, the Husband's open offer is dated Sunday 25th April – this case commenced on the 26th April. The consequences of all this are not surprising – a substantial bill of legal costs on each side. The Wife's costs total £241,000 (and that is before any appearance as result of Judgment and the inevitable costs of implementation). The bulk of those costs remain unpaid – the Wife's solicitors having a Sears Tooth type charge on any monies which she recovers. The Husband's bill is £166,000 – the bulk of which has been paid by his father. He was not represented at the Hearing because – as he told me - his father refused to continue to cover the bills. If he had been represented, I have little doubt that his bill would have been similar to that of the Wife. Thus, to date, some £400,000 has been spent on legal fees. In the context of the sums at issue this is an enormous sum, but (unless there are offers about which I know nothing) it seems that the expenditure has been necessary, in order to enable the Wife to achieve a proper home and future for herself and Lewis. At the outset of this case Mr Blair QC (on behalf of the Wife) was seeking an outright lump sum of £650,000. However, as a result of my tentative suggestions during the course of the Hearing, he accepted (given the origin of and manner in which the funds at issue are held) that it would be appropriate for his client's housing fund to be held in a form of life interest settlement. I consider that concession to be well made.
4. **The Factual Matrix.**

For the avoidance of doubt the facts set out hereunder represent my findings. Insofar as they differ from the evidence of any witness, then it is because I have preferred the evidence of another.

 - i) The Wife was born on the 25th April 1967 in Buckinghamshire. Thus she is 37 years old. She has one sister, L, who is married with 4 children and lives in Gerrard's Cross. Her father ran a small garage and her mother was a hairdresser. Her parents divorced when she was 7 years old. Her father now lives in High Wycombe. Her mother runs a bed and breakfast in the Cotswolds. Neither of her parents is well off – although it is fair to say that her mother (and grandmother) have lent monies to enable the Wife to fund about £58,000 of her costs. She went to school locally and left at 16 years old with a couple of O Levels. Her working life was spent in promotions and sales. She had one serious relationship before her marriage. She was never a career girl and during the marriage she did not work outside the home because she cared for the family. It is accepted that she has no real earning capacity because she will continue to make a full and proper contribution by caring for Lewis. Although it is too early to predict, his problems are such that she may have to care for him for the remainder of his life.
 - ii) **Lewis** is a child with very special needs.
 - a) He was one of twins; the other twin had anencephaly and died in utero. Lewis was born by emergency caesarean at 29 weeks. He was underweight and had a bilateral inguinal hernia which required immediate surgical repair. As early as 8 months he was considered to have mild motor delay. At the age of 12 months he was thought to have possible fits. At the age of 22 months he was not yet walking and was vocalising without saying real words. Even at this early age, his behaviour

was difficult to control with aggressive outbursts and general developmental delay in all aspects of behaviour and learning. At 31 months, he was only able to say 3 words with meaning. He was then placed with a speech and language therapist. At the age of 4 years he was referred to the Learning Assessment Centre in Horsham to try to ameliorate his angry outbursts, screaming episodes, sudden mood changes and very demanding, attention-seeking behaviour. He was seen by a psychiatrist for learning difficulties and the initial diagnosis was that that he had global retardation with poor language development and some obsessional features (which his mother told me included continually throwing objects), but not autism.

- b) Lewis then started at mainstream school and has a full Statement of Educational Needs. He made reasonable progress at school and has been able to behave in an acceptable manner in class because he has been able to model his behaviour on other children. But, whilst he is co-operative and quieter than he is at home, he is unable to follow the lessons with ease – *“Lewis conforms in class, is a bit lethargic but is not disruptive. As would be expected from his measured language, it is not possible to have conversations with him, nor does he chat or initiate very much in the way of news..... I gained the impression that almost all the classroom language was a difficulty for Lewis, except that he picks up key words, but he does watch what the other children are doing, laughs when they laugh and hence is using them as a model for behaviour”* [per Dr Gillian Baird].
- c) It was not possible to test Lewis' IQ, because he was unable to undertake all the tests.
- d) The Joint expert – Dr Gillian Baird – a Consultant Developmental Paediatrician, came to the following conclusions:-
- Lewis has mixed complex developmental problems and does not fit neatly into one single diagnostic category.
 - Lewis has learning difficulties which affect all aspects of cognition and learning.
 - He has very significant receptive, expressive language delay disorder and improving articulatory impairment.
 - He has developmental behavioural problems in which emotional regulation and impulsivity feature markedly, but this is combined with obsessional features and some rigidity of thinking.
 - Lewis has an oppositional disorder and shows aggressive, challenging behaviour which, **if it continues at the present rate and type, will be a considerable risk and danger to his mother.**
 - Lewis has social learning difficulties in which peer group social, interactive behaviour is significantly affected and impaired. This is described as pervasive developmental disorder, part of the autism spectrum but not typical of autism or Asperger.
 - *“Total independence cannot be stated with certainty as this depends not only on the rate of learning and degree of learning difficulty but also on motivation and behaviour. Lewis falls into the group of children where certainty cannot be expressed about complete independent living and the situation requires reassessment over time”* [per Baird].
- e) As a result of these proceedings Lewis was also taken to see a Consultant Paediatric Neuropsychologist and Educational Psychologist called Jane Hood. Her findings, in brief, were that Lewis is probably working at the level of a 3-4 year old, while his emotional and social development is possibly further delayed. In the longer term the gap between Lewis and his peers is likely to grow, even with good educational support, as he is learning at a slower rate. Ms Hood anticipated that it would be increasingly difficult to meet Lewis's educational needs in a mainstream classroom. Fortunately, this particular problem has not arisen to date. Both parents are agreed that Lewis should now attend Chiltern Gate School – which is a State School which copes with mild to moderate learning difficulties. Ms Hood's conclusions are
- *“When managing Lewis's behavioural problems, interventions that are based on a degree of verbal understanding and memory will be unsuccessful. Interventions that are based on behavioural paradigms may be more successful, attempting to positively reinforce appropriate behaviour. Programmes for parents, such as the Weber Stratton, are particularly recommended”.*
 - That in time – if and when, Lewis became too hard to handle – it might be necessary to place him in a specialist residential school.

- f) It is clear from the above that Lewis needs **proper therapeutic input** as a matter of urgency. His difficulties probably arise because he was born prematurely – in circumstances where his twin's death in the womb may have affected Lewis's own viability. This is a tragedy of circumstance and Lewis is not a simply a "*difficult child*". I suspect that the wider family have not appreciated the real medical difficulties under which he labours.
- g) From the reports that I have read it does not seem that his behaviour is capable of remedy by the use of language. He responds best to copying good models of acceptable behaviour. Thus, his mother needs to acquire special skills if she is to manage him. The same applies to his father – although, to date, he has not had to bear the brunt of the difficulties because his contact has been somewhat patchy. I have not been asked to make any decisions about contact, but I was shown a schedule prepared on behalf of the Mother which showed that the Father had not seen Lewis as often as he might. I believe that the causes of this are basically twofold. First, I think that handovers have been painful experiences because the parties' unresolved relationship has allowed them to indulge in inappropriate behaviour in front of their child. Secondly, I suspect, that the Father finds it difficult to handle Lewis – who is not as responsive or enjoyable as most young children.
- h) I made it clear to both parents that I regard Lewis' needs as an immediate priority. I was informed that Lewis was on the HNS waiting list and that it was expected that he might see the appropriate expert in 6 – 12 months – possibly longer. This is unacceptable in a family with the resources which are available in this case. This little boy **and his parents** need help and they need it now. I consider that it is in his best interests for the following essential steps to be taken
- Lewis needs to see the appropriate expert privately as soon as practicable. The relevant expert needs to be identified now and I suggest that the parents consult Dr Baird and Ms Hood for names and follow the advice that they are given.
 - An appointment needs to be made as soon as practicable and the recommendations of the acknowledged expert should be followed. The "treatment" will involve not only Lewis but his parents.
 - This input should be funded by a trust – for my part, I consider that the most appropriate is the Grandchildren's Settlement. Mr Cuttiford, who is the lead Trustee, said in his evidence to me that the "*door was ajar*" so far as Lewis's needs were concerned. I think that the door should be fully and wide open. As a child of 7 years, it may be possible to remedy Lewis's behaviour – but it will become much more difficult as he grows older. Both parents need to learn the techniques of managing him. Harsh words or violent reactions will not work with this child.
 - I consider that Lewis's parents need to **undergo mediation** to enable them to manage their own relationship for the overall benefit of Lewis. They both need to understand how their behaviour affects him. In their evidence, they both told me that they thought this would be a good idea. I agree. I consider it essential that a good mediator is found in their locality and they both attend. They must acknowledge that the experience may be difficult and painful but that, if it is completed, it will make their future life as parents (and this is a lifetime commitment) much better. The cost of this mediation is, in my view, for the benefit of Lewis and should be paid for by the Grandchildren's Trust.
- i) The Wife told me that Lewis needed a large garden. She said that space was important because
- his levels of energy can be dissipated in the garden.
 - his obsession with throwing means that he causes havoc if the neighbours are close by – as, for example, they are her at sister's home.
 - he has a go-kart track which he loves – and this needs space.
- She considered that a garden of .75 acre would suffice and the husband agreed that this was appropriate and important.
- In addition, she told me she would like to be able to have a paddock, so that Lewis could have a pony again. His last pony was sold when it bucked. I consider that it would be therapeutic if Lewis could have another pony. But, it is not of the highest priority, thus, only when funds are available should a pony should be purchased.

- iii) The Husband was born on the 24th June 1966. He is one of 4 brothers – namely Shaun (born in 1965); Duncan (born in 1970) and Alexander (born in 1975). His parents are both still alive and currently reside in Gibraltar (where they moved very recently for tax reasons) and Barbados. His father, Mr Derek H, began his working life in what I was informed was a lowly capacity within a company. He went on to develop it into one of the most successful concrete manufacturing businesses in the United Kingdom. The result of his skill and entrepreneurial genius is that he made a great deal of money. I have no idea of his current personal fortune - but I suspect that it is substantial. I so state because he has been able to make generous provision for his 4 sons and for his grandchildren (who are currently 7 in number).
- iv) Until recently, Mr and Mrs H senior lived in a property called Foxlea Manor, Burnham, Buckinghamshire. When the parties separated in mid 2002, the Husband went to live with his parents at that address. He still resides there – although his parents have now moved. I understand that the house is about to be sold, with the result that the Husband will have to find alternative accommodation.
- v) It is fair to say that since the marriage broke up the Husband's parents have (as is to be expected) been very supportive of their son. He has lived with them on a full-time basis and they have paid all his outgoings. Indeed, until recently, Mr Derek H paid legal fees totalling some £150,000. It is the Husband's case that he owes this money to his father. That may well be correct, but I am clear that it is a very soft loan. Until 4 working days before the trial, the Husband was represented by Mr Richard Sax of Messrs Manches and by experienced Leading Counsel. He informed the Court that in recent weeks he had had a major dispute with his father, which led to the latter withdrawing financial support – hence his appearance before the Court in person. The other side consider this to be a tactical ploy. I am not in a position to make a fully informed decision about the state of the Husband's relationship with his father arising from this litigation. However, on balance, I consider it likely that Mr Derek H still has a good overall relationship with his son and will continue to offer support to him (in the widest sense). The Husband had the benefit of a Mr Buckley as his Mackenzie friend. This gentleman is a good friend of Mr Derek H and I do not think that he would have attended this Court unless Mr H senior had been anxious to make sure that his son had an experienced man of affairs to help him and, more importantly, had a person through whom he (Mr H Senior) could keep a full watching brief over these proceedings. Mr Buckley is a man with great commercial experience and is a skilled negotiator – in fact, he is the company broker who, inter alia, was responsible for the sale of Bison Holdings to a group of investors in the late 1980s. Thus, although the Husband has appeared in person, I am of the clear view that he has been able to present his case well and he has made all the points which were relevant to the merits. Moreover, I am sure that his father has been fully aware of events as they have unfolded.
- vi) The Husband had a normal childhood and left school with the ambition to join the Air Force as a helicopter pilot. Unfortunately, he did not pass all the necessary exams and so he was not able to pursue that career but his boyhood aspiration - or at least the wish to fly - has remained undiminished.
- vii) Having failed to enter the RAF, the Husband commenced a 4 year apprenticeship at the Reading College of Technology and in 1988 he started a one year BETEC business and finance course at Maidenhead College. Thereafter, he worked in a shop in Maidenhead and married for the first time. He has one son called **Dominic** from that marriage who was born on the 30th July 1990 and is now approaching 14 years old. He attends a local private school and hitherto the fees of some £10,000 per annum have, in effect, been paid by the Husband. When his first marriage came to an end, the Husband decided to travel and spent the next 3 years in Australia and Europe. On his return from these travels, the Husband began to work with a mobile phone company called Intertalk Communications. Coincidentally, the Wife was helping a friend in a similar job and that is how the parties met.
- viii) They began their relationship in June 1995 and were living together by November 1995. In addition to his earnings, the Husband had the benefit of the income from his share of a substantial family settlement and he also had a pleasant property at 78 Dropmore Road which was owned by the trust. The house was in the course of renovation, and the costs of which were born by the Trust.

- ix) Thus, the parties began their life together in a trust property. Not long afterwards the Husband became a sign maker and fitter; working with two different firms before starting his own small business called Hankin Signs.
- x) The Husband proposed marriage to the Wife in February 1996 and soon afterwards she became pregnant with twins. I regard this as the relevant start date when considering the length of this relationship. By this stage the parties were committed to each other in every sense. Thus the relevant period is some 6 ¼ years. Lewis was born in October 1996 and, about a year later, on the 6th September 1997, the parties married.
- xi) The Husband's sign-writing business does not appear to have been very successful with the result that the Husband decided to work as a self-employed plumber. He earned fairly well although his accounts reflect profits in the region of some £15,000 per annum. Although his earnings were modest, the family were able to live a good lifestyle because their outgoings were augmented by monies received from the Husband's Fund. Accordingly, the parties lived at a standard that was far better than the Husband's work might suggest.
- xii) In about 1999, once it had been fully renovated, the property at 78, Dropmore Road was sold for £350,000. The parties moved into a house called No 2, The Cottage (which was owned by one of the Husband's brothers). On the 21st March 2000, they bought their final matrimonial home - a detached house called Haere Mai, 8 Over Hampton, Prestwood, Great Missenden, Buckinghamshire. The house was bought by the Husband's Fund at a cost of £407,500 plus some £15,000 in respect of adjoining land. The property is detached and, from the pictures that I have seen, it provided a spacious and pleasant home with 3 reception rooms and 4 bedrooms – set in 1.75 acres of garden/paddock. The house was renovated. There has been a dispute between the parties as to monies expended upon it. The Husband says that the trust paid in the region of £53,000 for capital works plus some soft furnishings. The Wife says that some £150,000 was spent. I am not in a position to make a precise finding as to the sums expended. Moreover, I do not think that such a finding is important in the context of this case. Suffice it to say, the renovations were of a high specification – with marble bathrooms and a modern kitchen of good quality.
- xiii) When asked, the Trustees provided the necessary funds. The Husband suggested that they kept a tight watch on expenditure, but I do not accept this evidence. In reality, the Trustees were content to permit such expenditure as the parties wished to make on their home. Moreover, there was no real dispute because the parties did not seek to spend extravagantly and it was clear that monies invested in improvements would be likely to increase the long-term value of the house. So it proved – in the last 4 years the house has grown in value to an agreed £750,000 (that is some £728,000 net of costs of sale).
- xiv) It is interesting that the Husband did not charge the Trust for the extensive plumbing (and stripping out) works that he carried out on the house. Likewise, the trustees originally accounted for all monies spent by deducting them from the Husband's income account. It was only after this litigation was in full swing that a decision was taken to charge some £53,000 to the Trust's capital account. These matters indicate to me that the property was to all intents and purposes regarded as "belonging" to the Husband – albeit that the proper pieces of paper were in place to ensure its formal ownership.
- xv) By this stage, the Husband had renewed his interest in flying. He studied and flew sufficient hours to obtain his private pilot's licence. He told me that his current ambition is to become a commercial pilot. He informed me that, at the age of nearly 40 years, he appreciated that he should acquire a career that will be more fulfilling than plumbing (albeit that recently he obtained a Corgi qualification which means that he can install gas boilers). He thinks that it will take him another 2 years to qualify as a commercial pilot and that is what he wants to do. As a newly qualified pilot he might expect to earn about £30,000 per annum for about 2 years. Thereafter, he would be able to earn some £70,000 per annum gross (say £49,500 net – assuming his tax allowances are used against this income).
- xvi) His parents have been very supportive of his wish to become a pilot. In March 2002 (some months prior to the separation) Mr Derek H advanced the Husband £20,000, which the Husband says was "a loan" to enable him to fund a course of flying lessons. Some £17,000 of these monies were placed in a savings account and remaining £3,000 was paid to the Wycombe Air Centre. Over the ensuing months the Husband invested a further £1,000 (possibly £2,000) in flying lessons but, after the separation, repaid £16,000 to his father. Mr Blair QC tasked the Husband as to the reasons why this

money (which Mr Blair said was a gift) was removed from his savings account. The Husband denied any ulterior motive: however, I consider it likely that the Husband thought it was wise to return the funds before the divorce proceedings began in earnest. In June 2003 Mrs Evelyn H (his mother) wrote a letter to confirm that she had loaned monies to her son for flying lessons. The loan (about £10,000) is said to be interest free and repayable from future income. I consider that Mr and Mrs H Senior have been anxious to ensure that their son has a proper and fulfilling career as soon as possible. Accordingly, they have been and will continue to fund him during his course. The monies may well be termed "a loan", but of the very softest kind. Thus, I do not propose to regard any such loan as a real liability in this case. In fact, on the balance of probabilities, I consider it likely that his parents will do all in their power to ensure that their son qualifies quickly – even if this means that they have to cover all his living expenses for a period and they will not expect any immediate repayment of monies advanced.

xvii) Since the separation, the Husband has not worked in any meaningful way. It is his case that he has had insufficient funds to buy a van or the necessary equipment to work as a heating engineer. Furthermore, he says that he has not had sufficient monies to afford to undertake such course(s) as would enable him to become a commercial pilot. I do not consider his evidence in either respect to be credible. I believe that he has been very distressed and angry by the breakdown of this relationship. This has led him to feel that it would serve no useful purpose – indeed, it might even increase his liability to the Wife - if he worked. Consequently, he has made a deliberate decision to stay at home with his parents. He has assisted them from time to time – for example, when he travelled to Barbados and prepared a report on the defective heating system in that property. The report was necessary in connection with litigation which had been commenced against a local contractor. The report sets out a list of charges including some £1,400 for his services. Of course, that fee was not paid. This small piece of evidence is another indication of the close working relationship between the Husband and his parents.

5. **The Husband's Fund.**

On the 2nd April 1987, Mr Derek H set up 2 Trusts. The first, for his eldest son Shaun (who was over 21 years old) and the second settlement for the 3 younger boys. The trust which is relevant in this case was set up in Bermuda. The current, professional trustees are the well-known Jersey firm Walbrook Trustees (Jersey) Limited ("Walbrook") (initially, they were an offshoot of the English accountancy firm of Deloitte and Touche ("Deloittes") - with whom Mr H Senior had a long standing relationship). The other trustee is a Mr Norman Anfossi (formerly a Deloittes' Bermudan partner who is still apparently non-resident for UK tax purposes). There is a Protector, a Mr C Campbell, of whom nothing is known but whose main role is to appoint/dismiss the Trustees. In reality, the trust is administered by Walbrook although (for historical reasons) the accounts are still completed by Deloittes in London.

The terms of the trust are as follows:-

- i) The Husband is entitled to the income of his fund for life.
- ii) The life interest is capable of being enlarged into an absolute interest in his favour if and when he attains 60.
- iii) There is also a power to apply capital for his benefit in the mean time and to appoint capital to him contingent upon his attaining 60.
- iv) There are wide-ranging powers permitting loans to be made to the Husband and/or allowing the Trustees to guarantee loans on behalf of the Husband.
- v) After death, the Husband's fund, so far as he has not become entitled to it, passes to his children. Meanwhile, there is a power to advance to his children with his consent and he has power to assign his interest, albeit subject to the Protector's consent.
- vi) Chancery Counsel (Mr McCall QC for the Wife and Mr Ham QC for the Trustees) have been unable to agree whether or not there is a power to apply capital for the Husband's benefit without it being paid to him outright. In the event I do not consider that this disagreement is of any direct relevance to the issues which I have to resolve.

- vii) As an offshore settlement the trust is subject to the punitive tax regime whereby stockpiled gains are taxed at 64% when paid out to a beneficiary. Fortunately, some £1.3 million worth of assets will only be bear tax at 40%, but the remainder will be subject to the higher rates of tax.
- viii) Any beneficial loan (for example, at a reduced interest rate) will attract a tax charge based on the assessed benefit. Thus, by way of example, if the trustees were to lend £1 million to the Husband free of any interest. The Inland Revenue would assess the capital benefit by assuming a commercial rate of interest – say 5% - and then charging capital gains tax at highest marginal rate on that amount (i.e. in the given example tax at the rate of 64% on £50,000 being some £32,000). Thus, it can be seen that the effective tax charge on this basis is 3.2%. In reality, this is lowest tax charge for "importing" funds into the jurisdiction.
- ix) Of course, to avoid or lessen this charge the Trustees might adopt a policy of a reduced (as opposed to a nil) interest rate or they might index link the loan. They also have the ability to extend the term. Mr McCall QC – one of leading experts in the field – submitted that there were a number of options that the trustees could use to lessen or reduce an immediate charge to the 3.2% tax. Clearly, this is something about which the Trustees would need to take appropriate advice.
- x) The Husband's Fund was, per the 5th April 2003 Accounts, stated to be worth in the region of £6.4 million, made up of the following major resources:-
 - o the former matrimonial home, Haere Mai, is in the accounts at some £550,000 but has an agreed value of £750,000 (less costs of sale);
 - o quoted stocks shown in the accounts at some £3,000,000 (but with a current market value of some £2,650,000);
 - o a Mezzanine Loan of some £919,000 to what was the family company - called Bison Limited; and
 - o unquoted Bison stocks and shares shown at book values totalling some £1,660,000: these include 883,000 preference shares shown at par, 26,584 B ordinaries shown at a premium of over £20 per £1 share and what are called 6,720 Ordinary £1 stock F Share Options shown at some £24 each.
 - o Cash of some £419,000 net

In addition to these assets, the Trust benefits from 2 further sources of cash, as follows:-

- o The preference shares carry a dividend of some £90,537 per annum. This income is rolled up and is not payable until repayment of the loan facilities or the sale/listing of the company.
- o The Mezzanine loan, which carries interest at 3.5% over the Bank of Scotland Base rate compounding. This loan was originally repayable on the 31st December 2007, or earlier if there was a change of control of the company. The facility was (and is) secured by the same security as the senior debt provided by the Bank of Scotland but is postponed to that security. The providers of the mezzanine loan (i.e. the H family Trusts and the Bank of Scotland itself) have the option to subscribe at par for 120,000 F ordinary shares exercisable upon repayment of the loan, or earlier if control of the company changes.
- o Neither of these resources of income was directly revealed by the Husband (or more importantly by his trustees) in any disclosure placed before the Court. The omission was only discovered when Mr McCall QC undertook the necessary research into the Bison company accounts and raised a questionnaire seeking confirmation of monies that he considered ought to be due. Thus, the lack of this evidence from the Husband's initial disclosure was, without doubt, a very serious omission.
- o The best estimate which the Wife's advisers were able to give me (see the Report of Mr Tim Lawrence plus the additional information in his addendum letter of the 7th April 2004) was that the additional income from these sources as at December 2007 would be in the region of £1,900,00 gross or about **£1.14 million net**. As the income beneficiary, the Husband **was (and is) entitled to receive this sum**, provided that he is alive and subject only to the company's ability to pay.
- o Moreover, even when disclosure was eventually given on behalf of the Husband, it proved to be materially inaccurate. The initial evidence asserted that the above sums were due and

payable in December 2007. In fact, his case was that the rolled up dividend may not be able to be paid in full - or, as it was put in his evidence, "*the preference shares would be likely to be redeemed at par but that the accrued dividend would not be met in full*" and the company may be unable to pay the mezzanine loan interest. However, it seemed clear that these monies were a resource that was potentially available within the next 3 ½ years.

- The Wife's accountant – Mr Tim Lawrence - considered that, despite Bison being highly geared, its recent, annual profits had been sufficient (for example, 2001 after tax profits being £4 million and 2002 profits on the same basis being £2 million) and its forecasts /directors reports were sufficiently bullish to mean that, on the balance of probabilities, the dividends and mezzanine loan would be paid in full.
- Until some 2 working days before the start of the trial, all the evidence which had been filed on behalf of the Husband (and, as I remind myself, that had had to be dragged out of him) stated that the relevant date was December 2007. Accordingly, it was a matter of great surprise, when a letter arrived from a Mr GN Wright – the Group Finance Director of Bison - indicating that the date had, for commercial reasons, been delayed by another 5 years to 31st December 2012.
- This news caused a good deal of suspicion, particularly as evidence which was said to support the assertion was omitted as an enclosure to the relevant letter. In the light of this, I called for disclosure of a number of trust and company documents. When they arrived, the documents revealed as follows:-
- As early as 2001 directors of Bison decided to build a new, "state of the art", concrete manufacturing plant at Swadlincote. In order to fund the project, they proposed (i) to sell their present site in Litchfield (for residential use) and (ii) raise further finance from the Bank of Scotland. It was considered that a further £17 million would be needed for this project. The Bank agreed to make the additional funds available as part of their "senior debt". There were discussions as to whether the mezzanine loan should be incorporated as part of the new senior debt. The Bank were not prepared to agree to this, but, as part of the overall deal, required the mezzanine loans to be delayed to 2012.
- In the light of this, Walbrook were asked to accept to the new date, consequential changes in a number of covenants relating to their loan and to sign documents ratifying the amendments on behalf (inter alia) of the Husband's Fund. In August 2003, Mr Cuttiford (in effect, the lead trustee) sought information from a Mrs Annette Pairman – the Bison company secretary and a long-standing friend of the H family. She sent up-dating documentation and recommended the deal. On the 22nd August 2003, Mr Cuttiford signed a Trustee Minute in effect accepting the terms of the new mezzanine loan and giving him authority to sign documents. In fact, he had already signed the relevant documentation on the 19th August 2003. All this took place about the same time that Mr Cuttiford was seeing Robert Ham QC (his expert) in relation to the preparation of his statement in these proceedings. Despite this, Mr Cuttiford, failed to make any of the relevant information available to his Counsel (who settled his statement) or the Court. Mr Cuttiford said this was just an oversight. I do not accept this evidence. All in all this lack of candour is most regrettable.
- Despite this, I am convinced that the repayment date is now 2012, or earlier if control of the company changes. Moreover, I am clear that the term of the loan has been extended for proper commercial reasons. In the circumstances, it is difficult to understand why there was the perceived need for secrecy.
- The "new" date was known as early as August 2003. Consequently, the evidence that was placed before the Court in January 2004 giving the 2007 date was wholly misleading and incorrect. These facts, will not affect the outcome of the case, but they do impinge on the legal costs which have been engendered in this very costly piece of litigation. I propose to take this point into account (to the extent that it may be appropriate) when I consider the proper order for costs and the basis of their assessment.

- The delay in payment until 2012 means that the funds will probably not be available for some 8 ½ years. In the meantime they will continue to grow exponentially and, so far as the mezzanine loan is concerned, at a very high rate of interest.
- The best estimate is that by December 2012, those monies will have risen to a sum in excess of £3.874 million gross – some £2.3 million net of income tax at 40%.
- Mr Blair QC submitted that applying a discount rate this sum could be valued in today's terms. The Duxbury model is usually worked on a real rate of return of 3.75% but, for the purposes of this exercise and in order to be cautious, I propose to take a 5% discount rate. In accordance with the At a Glance tables, this would give a current value of this sum (assuming a somewhat longer 9 year delay) of £2.3 million × .645 – thus, the current value is £1.483 million.
- The Husband still submits that there is uncertainty as to whether this sum will ever be obtained because the company may fail to pay out and he may not live that long. The latter point could be covered by a protective term assurance policy and so I do not consider that to be a great problem. Moreover, I do not find the former point persuasive. I prefer the evidence of Mr Lawrence and consider that, on the balance of probabilities, the monies will be paid. However, to cover that (very remote contingency) I propose to adjust the figure by a notional, further 10% - thus, I consider the real, current value of that future income is some **£1.33 million net as at today.**
- The Husband is entitled to this income fund and, when it is paid, he could use it to repay such indebtedness as he may have: for example, if he is given a loan to meet his liabilities in this case.

6. **The Husband's income.**

- i) The Trust Accounts which do not include income from the Mezzanine Loan or the Bison preference shares, show a net income in 2003 (after expenses) of £105,000, of which part was received without deduction of tax. Mr Blair considers that the trust income is about £100,000 net. The Husband told me that he had been told by Deloitte that his trust income was about **£67,000** per annum net and that is the figure which I propose to adopt. I am conscious that the income may be reduced as capital is required to fund this award and the costs – beyond the net value of the former matrimonial home some £728,000. I consider that a future income stream of some £67,000 is a fair reflection of this factor. In the recent past, the Husband's income account has been overdrawn, but the trustees have been fairly flexible about this situation. Indeed the amount "overdrawn" has fluctuated as figures have been shifted to the capital account. I consider that the Trustees will continue to adopt an adaptable approach, should income needs be greater in the short term.
- ii) In addition, to this the Husband has an earning capacity. For the reasons set out above, I do not consider that the Husband has exercised his earning capacity in the recent past. Rather he has been content to rely upon his parents to support his needs, whilst paying the interim maintenance ordered by DJ Bradley - £36,000 per annum (plus tuition and a nanny for Lewis) from his trust income. In addition, he has paid Dominic's school fees of some £10,000.
- iii) Despite his lack of effort in the recent past, I consider that the Husband does have a current earning capacity of some £25,000 per annum gross or £20,750 net (assuming that the Husband uses all his tax allowances against this income).
- iv) I consider that he could earn this sum whilst undertaking the necessary flying on a part time basis. On the other hand, I have little doubt, given their past assistance that Mr and Mrs H senior will "lend" this sum to enable the Husband to undertake and complete the necessary training within the next 2 years. Thereafter his earnings will rise to £30,000 per annum gross (approaching £25,000 net) for the next 2 years and thereafter will be at the level of £70,000 gross.
- v) Accordingly, for the next 2 years I put the Husband's total income in the region of £87,750 net per annum. Thereafter for the next 2 years it will rise by £5,000 per annum net. For the reasons which I set out below, I consider that this money should be used to fund his and the Wife's needs – whilst the bulk of his children's maintenance needs are funded by the Grandchildren's trust.

7. **The Grandchildren's trust**

- i) This offshore trust was made by appointment of new trusts dated the 8th March 1999 under a settlement known as the Liferent Trust, itself made the 2nd April 1987.
- ii) Lewis is in the class of beneficiaries, as is Dominic. There are 5 other grandchildren who can benefit – being the children of Shaun and Duncan.
- iii) The fund (which has apparently lost more than a third of its capital value since 1999 disregarding accumulated income) had a total value of some £2.6 million, as at the 5th April 2003, (of which £2,460,615 was on the capital account and accumulated income totalled £133,000). As there are substantial capital losses, it is obvious that capital could be remitted to England without tax.
- iv) The appointors were Walbrook and Mr Anfossi, (who were and are the continuing trustees). The trusts appointed are in favour of the grandchildren in variable shares. The grandchildren have prospective income entitlements at 25, but the trustees have power to apply funds for their maintenance and benefit meanwhile. To date, the trustees have indicated that they intend to accumulate the income until the beneficiaries are 25 years old. It does seem to me that in taking this stance, the trustees appear to have forgotten that this trust also enables them to maintain their beneficiaries.
- v) Although Dominic and Lewis are beneficiaries, to date they have received only limited benefits, consisting of payments of £4,535 each added on 5th April 2001 (which sums were paid into the Godchildren's Trust referred to below). I am unclear why such limited payments can be said to be for their benefit.
- vi) The 2003 accounts show income of £18,000, that is less than a 1% yield. In 2003 even this modest income was rolled up after a charge of additional rate tax. No income distributions are shown, even though it would have been fiscally advantageous to make such distributions. In particular, use could (and should) have been made of the beneficiaries' tax allowances in order to save tax.
- vii) The evidence shows that this trust has not been effectively managed. It has lost capital value, the income return is low in comparison with industry norms and tax is being paid unnecessarily.
- viii) More importantly, whilst Lewis has clearly identified needs, they are not being met from the resources which are available. In the circumstances of this case, that seems to be most unfortunate.
- ix) The trustees have a number of beneficiaries but they have one who requires funds spent on him now. Lewis may not need a flat or fast car when he is 25 years old but he does need therapeutic help now. He also needs his mother and father to be able to function as parents – even though they are separated and still angry with each other. Lewis also needs a nanny and additional tuition. All these payments are, to my mind, sums that should properly come from this trust. It is also proper for Trustees to pay reasonable sums towards his general maintenance – even if by so doing that relieves the Husband from his obligation: see **Fuller v Evans 2000 1AER 636**.
- x) I am confident that Walbrook will give proper consideration to the needs as I find them in this judgment. I urge them to make all the necessary funds available. If they choose not to, then I suspect that their actions might, in the long-term be considered as perverse.
- xi) Likewise, Dominic (although not part of my direct consideration) has been privately educated to date at a cost of £10,000 per annum. This expense has been deducted from his father's income account. I am of the clear view that this expenditure could be properly made from Dominic's "notional share" of the grandchildren's settlement.

8. **The Godchildren's settlement.**

- i) This settlement is not of direct relevance to these proceedings. It is a Scottish trust dated 14th March 1994, and is in favour of a godchild called Jeremy H "*and such other godchildren or other persons (other than myself or my spouse) as I may by any informal writing making reference thereto nominate as beneficiaries*". It is a fully discretionary trust.
- ii) The trustees are a Deloitte London partner, Mr Clive Stanford and Island Trustees Ltd of which Mr Stanford is a director.
- iii) Dominic has been named as a beneficiary. Lewis is not a beneficiary (though, if that is proper, he could be made a beneficiary by the settlor exercising his power to nominate him as such). Despite

this, payments have been made for the benefit of both Dominic and Lewis which have been reimbursed variously from the Grandchildren's Trust and the Husband's fund.

- iv) The assets of the trust are "interest free loans made for and on behalf of [the three persons he names as beneficiaries apart from Dominic] which total £139,541".
- v) The surprising use of the monies in this fund for the benefit of Lewis simply goes to illustrate the flexible manner in which monies can be made available within the H family.

9. **The Chronology.**

This was set out in a detailed document prepared by Mr Blair QC. It is uncontroversial and I adopt it as part of this Judgement.

10. **The Witnesses.**

i) **The Wife.**

- a) I found the Wife to be generally a truthful witness, although I do not accept everything she told me in the witness box. I accept her evidence that the parties lived a nice lifestyle but I conclude the parties were not extravagant by nature. So far as housing is concerned, they had what they wanted and the Trustees were compliant. But apart from that, the family lived on the Husband's fairly modest wages and regular payments of £36,000 per annum from the trust, plus additional ad hoc payments as required. The Husband gave the Wife about £2,000 per annum in cash for her clothing. The family were able to enjoy the benefits of occasional nice holidays. Of course, having wealthy parents meant that their generosity enabled the family to enjoy additional treats.
- b) I also accept the Wife's evidence that she needs a new home with a large garden for Lewis. She said to me that she would rather have a two bedroomed bungalow with a large garden than a large house on a small plot. In the final analysis that will be a matter for her. She produced housing particulars which showed properties costing some £600,000 to £650,000. The Wife said that she needed this amount and had found a house costing £650,000 which would have been "perfect" but had been sold. As the Husband was in person, I did not have the usual raft of particulars showing alternative houses. His case was simple – that the Wife only needed 60% of the net value of the former matrimonial home - that is £436,500. Accordingly, I will have to use my overall knowledge as to the proper sum for housing.
- c) I accept the Wife's evidence about Lewis and the difficulties that she encounters with him on a daily basis. Accordingly, although this was a relatively short relationship/marriage, I am in no doubt that the Wife will have to make a continuing and demanding contribution as a mother. This of itself entitles her to a good home for the rest of her life and a reasonable lifestyle.
- d) She has conceded that the house should be placed in trust for her life with remainder to Lewis. That concession is absolutely appropriate in this case because:-
 - o The monies emanated from Mr Derek H
 - o The parties have always lived in a trust house
 - o The marriage/relationship was not of the longest duration
 - o The Trust structure will protect the funds and ensure that they pass down to the H family – as was originally intended.

ii) **The Husband.**

- a) I found the Husband to be an intelligent and articulate man. I also consider (save where I have found otherwise) he was telling me the truth for the main part. From watching him in Court I suspect that he is capable of losing his temper if provoked. I am clear that he has been hurt by this relationship and I believe that his family have accepted his view of the marriage and his current view of the Wife.
- b) With hindsight, I suspect that the H family view of the Wife may prove rather harsh. I do not suppose that she has always behaved well and certainly involving the police on a regular basis cannot have assisted, but I suspect that she may well have been genuinely afraid of the Husband. Whatever her faults (from the H perspective) she does face a difficult future with Lewis. Accordingly, she needs help and security.
- c) I do not think that the Husband has fully understood the real problems that his son has and the need to ameliorate them as soon as possible. I do not say this as a matter of criticism because it is often difficult

to see bad behaviour as anything else. I do believe that the Husband is fully committed to his son – to my mind, this means that he must play an active part in his development and must learn to manage him.

- d) The Husband told me that he was in real financial trouble. He said that he owed his father £220,000 and still owed Manches £16,000. He said that he had a bank loan of £16,000 and an overdraft of £3,500. In addition, he expects that he will have to pay his Wife's costs of some £241,000. I consider that his father will wait to be repaid – for as long as it takes (if ever) and so I do not regard this as a pressing need. I accept that he will have to pay the other debts – although his father may cover the remaining Manches bill.
- e) The Husband said that he needed a decent home for himself. In an earlier statement he put this need at £450,000. I accept that this would buy him a nice home – and I feel sure that the trustees have sufficient assets to enable him to buy such a home. He said that his trust income would be £67,000 and that his income account was some £92,600 in deficit. The income deficit has been a moveable feast and I am confident that the trustees will not allow it to cause difficulties in the Husband's cash flow. He said that his earned income was only going to be £23,800 gross. I consider that the Husband will be able to earn more than the figure he gives.
- f) He said that he thought that his wife should continue to live at the rate of £36,000 and that he would continue to provide for the nanny and additional education as heretofore.

iii) **Mr Lawrence.**

- a) Mr Lawrence is a respected professional with many years of experience in this field. His evidence was measured and, as I find, accurate. The Husband was concerned about Mr Lawrence's involvement in this case because he perceived that there was a personal element. Mr Lawrence lives in the locality and his daughter had gone to school with the Wife. Accordingly, he was acquainted with her as his daughter's one time friend. Apparently, Mr Lawrence's wife had met the Wife in the hairdressers – whereupon she had heard of the difficult divorce. The result of the conversation was that Mr Lawrence recommended a new solicitor with more experience in this type of work (Miss Wait – then of Messrs Charles Russell) and offered his services on a pro bono basis. I do not consider that this connection has tainted his evidence. The contents of his reports and letters were not challenged in any material way and I accept their contents. With my permission, he was asked questions by Mr Buckley who was concerned that Mr Lawrence did not know the industry p/e ratios and comparables. He was challenged as to the possible value of Bison. I did not find Mr Lawrence's lack of knowledge surprising – given that he was not valuing Bison. Mr Buckley suggested that the current value of Bison (and he said he was trying to sell company for a group of investors) was such that the income from the preference share dividends and the mezzanine loan interest would not be repaid. Although the above assertions were made by Mr Buckley, they were not supported by any written material and I do not accept them. Consequently, I accept the evidence of Mr Lawrence. As set out above, I find that on the balance of probabilities the Husband will receive the additional income from these sources – probably in 2012, but possibly before. Consequently, I accept Mr Lawrence's amended calculations on the monies which will become due.

iv) **Mr Cuttiford.**

- a) I found Mr Cuttiford to be a pleasant man. He had been a professional trustee operating from Jersey for in excess of 20 years. As such, he was steeped in the culture of his job – this means that he was protective of his trust assets and of his beneficiaries' apparent requirements. The lapses in his evidence, his failure to give details of the future income payments and the subsequent delay in payment date to 2012 is, quite frankly, inexplicable. He met with the Husband and Mr Derek H, when these proceedings began. I suspect that his actions were a combination of lack of precision and his perception that the family wanted the trust cards played very close to their chest. I am clear in the past that he has essentially complied with the family's wishes in relation to the Husband's Fund. I expect that this attitude will continue.

- b) I consider that Mr Cuttford will co-operate to ensure that (i) homes are provided for the Wife and the Husband; (ii) monies are paid for the parties' reasonable maintenance and (iii) funds are made available for Lewis (and Dominic) from the Grandchildren's settlement.

11. **The Financial Resources.**

- i) The **Schedule of Assets and Liabilities** prepared by Mr Blair QC on behalf of the Wife has not been challenged in any material way. It traces the history of H's disclosure (and lack of it) from and including the presentation made in his Form E.
- ii) There is no *immediate* capital of any substance. The real wealth in the case is under the umbrella of H's family's trust resources, and in particular is held by the Husband's Fund.
- iii) I find that, in the round, that fund is worth at least £6.4 million gross. If it were to be remitted to England as capital then it would suffer a large amount of tax. However, it is highly unlikely (if not to say unrealistic) to envisage any capital remission in this manner. The Husband is entitled to the annual income of in excess of £100,000 gross (apart from the rolled up Bison income). This general income may reduce for a period because some monies will be needed to fund the award in this case but, it may not, because it should be possible to increase the income return.
- iv) At the latest by 2012 the Husband will, as I find, receive rolled up income deriving from his preference shares and Mezzanine Loan. For the reasons set out above I consider that those funds will be paid and will total about £3.874 million gross – some £2.3 million net of income tax at 40% - or about £1.33m million in today's terms. The Husband is entitled to this sum.
- v) When the rolled up income is paid, he can use it to repay such indebtedness as he may have. Of course, if he has an interest free loan from the trust, he will benefit in the sense that the value of the loan will be static – whereas the monies that he receives will have grown over time. However, it may be that the trustees will ensure that he pays rolled-up interest in order to avoid a tax charge. If they take this route, then the additional funds will cover the interest due.
- vi) The Wife has no capital resources.
- vii) **Liabilities**
Both parties have indebtedness in the area of legal costs. I find that the Husband has other debts in the order of £20,000. As already stated I do not regard the deficit on his income account as a real debt which requires repayment – other than by some accounting exercise when it can be managed.
- viii) **Income.**
The Wife has never worked since Lewis' birth / during the marriage. She receives child benefits. In addition, investigation is being made as to her entitlement to a disability living allowance in respect of Lewis: this should apparently amount to between £35 and £79 per week.

The Husband has total income from the sources identified above totalling some £87,750 per annum net for the next 2 years. In addition the Grandchildren's trust can and should provide monies to fund the necessary costs (outlined above) relating to Lewis and Dominic's school fees.

12. **The Law and its application in this case.**

- i) In this case my dispositive powers are governed by the provisions Sections 23 and 24 of the Matrimonial Causes Act 1973. In essence, it is my duty to take into account all the factors set out in Section 25 of the Act so as to produce an outcome that is "fair" in all the circumstances of the case. In seeking to achieve a fair outcome there is no place for discrimination between the spouses and their respective roles. There should be no bias in favour of the money-earner and against the home-maker and child-carer.
- ii) However in this case, the compelling factor is that the real worth of the family results from the monies put into trust by Mr Derek H. Accordingly, this is not a case where the assets fall to be divided equally as a result of equal but different efforts made by the parties during their relationship.

- iii) In this case fairness dictates that the Wife's award should be confined by an application of the statute to her perceived needs and the Husband's ability to pay – given that the assets are held on his behalf by Trustees.
- iv) The latter factor brings into play the case of Thomas – v **Thomas** which I shall consider in greater detail at the end of this Judgment. First I shall consider the relevant Section 25 factors as they apply to this case.

13. **Standard of Living.**

The Wife says that it was high, and was not informed by any apparent shortage of funds. I find that it was comfortable with occasional treats.

14. **Needs**

i) Income needs

By the end of the trial the Wife put her income needs at £50,000 exclusive of the costs of the nanny but inclusive of Lewis's general maintenance requirements. The Husband accepted that he or the grandchildren's trust would continue to provide for the cost of the nanny and additional tuition. He placed her other needs at £36,000 per annum. He did not cross examine the Wife about specific expenditure, but at my request pointed to a number of items which he regarded as inflated. I have come to the conclusion that the Wife and Lewis should (in addition to child benefit) have a total of £40,000 net spendable for their general expenditure. I will listen to submissions as to how this should be divided between mother and son. If the Wife is successful in her application for disability allowance, then this will provide her with extra monies and I do not consider that payment of this allowance should reduce the maintenance which she will receive under my order. By my calculation, this will leave the Husband with some £47,750 (perhaps more if the Grandchildren's trust meet part of the general maintenance due to Lewis – hence my suggestion that further submissions are made on that aspect). Accordingly the Husband will have a degree of flexibility if some tax has to be paid in respect of any loan from the Trust. Obviously, to escape a large tax bill it will be necessary to avoid a substantial benefit. I have no doubt that the trustees will need specific advice on this aspect.

The maintenance payments will be index linked and will be paid monthly by way of standing order. I consider that £40,000 per annum is a minimum amount. If, in the future, the Husband's income position improves significantly, then it may well be appropriate for the Wife to receive an increase.

ii) The Wife's Capital needs

Initially the Wife felt she must, if at all possible, stay at Haere Mai, for the sake of Lewis. However, she decided – wisely - that a move was appropriate. The competing positions for the Wife's housing needs are (in the round) per the Husband £440,000 and per the Wife some £650,000. I have decided that the appropriate sum is £525,000 – inclusive of the costs of cosmetic and initial structural works (if any). In addition, there will be the costs of purchase which I consider will be no more than £25,000 (inclusive of stamp duty). As the house is to be held in trust, all these monies will be placed in a new life interest settlement. In addition, the trust will need an administration / emergency fund – so that, inter alia, the costs of running the trust can be covered. I consider that £25,000 is necessary for that purpose (to which will be added any funds not used for the costs of purchase). Thus, the trust will be funded with a total of £575,000.

iii) The terms of the trust will include the following

- a) The Wife will be the life tenant.
- b) She will be entitled to the fund for the rest of her life – regardless of remarriage or cohabitation.
- c) On her death the funds will pass to Lewis. It may be necessary for his remainder to be held on Protective Trusts
- d) In the event that Lewis predeceases the Wife or dies without issue, the funds will on the Wife's death revert to the Husband or as he shall nominate.
- e) The Wife shall be entitled to purchase alternative properties with the funds provided that they are within the United Kingdom so long as Lewis is dependent upon his mother. Thereafter, provided it is reasonable she may purchase a property for herself anywhere in the world.

- f) Insofar as the assets of the trust are not required for housing, then they can be invested to produce an income which will be payable to the life tenant.
 - g) The Wife shall be entitled to choose the original 2 trustees – who will be professional people – for example, an accountant and a lawyer. Thereafter the retiring Trustee shall choose his/her replacement.
 - h) I will hear further submissions on such other terms as may be appropriate.
- iv) In addition to the housing fund, I consider that the Wife will need a modest lump sum to enable her to purchase the inevitable pieces of furniture and curtains that she will need on her move. I put this sum at £10,000. This will be necessary because I expect that the curtains will remain in situ at Haere Mai. She also needs a new car and I consider that £20,000 will buy her a good family vehicle. As her main asset will be held in Trust, I consider that it is essential and fair that she has some free capital to enable her to have a degree of flexibility and I consider that £25,000 is fair. Thus, I consider that she needs a total lump sum of £55,000.
- v) Thus, the total sum that will have to be found from the Husband's Fund, probably by the borrowing route as this is tax efficient, is £575,000 + £55,000 (£630,000). The net proceeds of sale of the former matrimonial home will meet the £630,000 and will leave about £100,000 which can be put towards the Husband's liabilities and needs.
- vi) The Husband's capital needs
The Husband needs a home. This will probably cost about £450,000, inclusive of purchase costs. He will almost certainly need to be able to pay his debts (some £20,000) and the Wife's costs (£240,000). The total sums appear to be in the order £1.34 million. This amount is, co-incidentally, just about the value of the future income fund in today's terms. Thus, if he has to borrow monies from the Trust, I am confident that he will have sufficient monies with which to repay them within the next 8 ½ years.
15. **Ages, duration of marriage.**
i) Both parties are aged 37 years old
ii) The marriage including pre-marital cohabitation (during which Lewis was born) lasted 6 ¼ years.
16. **Contributions.**
Financially all the contribution is from the Husband and his family. The Wife's contributions are in relation to caring for the family for some 6 years and henceforth as Lewis's mother responsible for his everyday upbringing. Given his special needs this will be a special long-term contribution.
17. **Conduct.**
The parties agreed that conduct (about which there was a great deal in the written evidence) was not relevant – at least up until December 2003. There was an incident in relation to a car (in early 2004) which the Wife alleges that the Husband damaged at a cost of £2,500. He denies the allegation. The police have investigated and pressed charges. I make no findings about the situation. The Wife had to pay for the damage, but I regard this sum as having been subsumed by the lump sum that I have ordered. I hope that criminal proceedings will lapse but I do not know if that is possible. It does not seem to me that there is much to be gained from the prosecution and I think that these parties should build bridges rather than seeking to make matters worse – particularly if a conviction would affect the Husband's career prospects. The case may be out of the Wife's control but, if she can assist, then I think she should.
18. **Health.**
i) The parties are young and healthy
ii) Lewis has the difficulties which I have already outlined. By statute he is my first consideration and his health needs have been taken fully into account by the orders which I have outlined above
19. **Conclusion**
i) The lump sum and trust, which I consider the fair outcome of this case, can only be put in place if the Trustees of the two relevant settlements assist with the provision of funds.
ii) Having seen Mr Cuttiford, the lead Trustee, and heard his evidence, I am confident that he will assist the Husband to provide the funds – after all, the bulk of the monies will be safely held in another trust and will return to the H blood line.

- iii) Moreover, I am content that the sums which I consider are fair can be raised from the Husband's own longer term income resources and so the trust fund will only be lending monies to enable the principal beneficiary to meet his legal obligations.
- iv) I consider that I am only seeking to give judicious encouragement to the Trustees in line with the case of **Thomas**. I remind myself of the passages in the speeches of Lord Justices Waite and Glidewell

a) Per **Waite LJ**

..... "the court is not obliged to limit its orders exclusively to resources of capital or income which are shown actually to exist. The availability of unidentified resources may, for example, be inferred from a spouse's expenditure or style of living, or from his inability or unwillingness to allow the complexity of his affairs to be penetrated with the precision necessary to ascertain his actual wealth or the degree of liquidity of his assets. Another is that where a spouse enjoys access to wealth but no absolute entitlement to it (as in the case, for example, of a beneficiary under a discretionary trust or someone who is dependent on the generosity of a relative), the court will not act in direct invasion of the rights of, or usurp the discretion exercisable by, a third party. Nor will it put upon a third party undue pressure to act in a way which will enhance the means of the maintaining spouse. This does not, however, mean that the court acts in total disregard of the potential availability of wealth from sources owned or administered by others. There will be occasions when it becomes permissible for a judge deliberately to frame his orders in a form which affords judicious encouragement to third parties to provide the maintaining spouse with the means to comply with the court's view of the justice of the case. There are bound to be instances where the boundary between improper pressure and judicious encouragement proves to be a fine one, and it will require attention to the particular circumstances of each case to see whether it has been crossed."

b) Per **Glidewell LJ**

"The judge also had, as we have, the guidance to be derived from the various authorities to which Waite LJ has referred. Those which are the most helpful in this case are, in my view, the decisions of this court in **O'D v O'D** [1976] Fam 83, **B v B** (1982) 3 FLR 298 and **Browne v Browne** [1989] 1 FLR 291. From these authorities I derive the following principles:

- (a) Where a husband can only raise further capital, or additional income, as the result of a decision made at the discretion of trustees, the court should not put improper pressure on the trustees to exercise that discretion for the benefit of the wife.
- (b) The court should not, however, be 'misled by appearances'; it should 'look at the reality of the situation'.
- (c) If on the balance of probability the evidence shows that, if trustees exercised their discretion to release more capital or income to a husband, the interests of the trust or of other beneficiaries would not be appreciably damaged, the court can assume that a genuine request for the exercise of such discretion would probably be met by a favourable response. In that situation if the court decides that it would be reasonable for a husband to seek to persuade trustees to release more capital or income to him to enable him to make proper financial provision for his children and his former wife, the court would not in so deciding be putting improper pressure on the trustees".

- 20. I am clear that the interests of all other beneficiaries will be not appreciably damaged by the order which I propose and, moreover, I am of the view that it would be reasonable for the Husband to persuade the trustees to help him. I consider that I am entitled to draw the inference from the trustees' past behaviour and the oral evidence of Mr Cuttiford that the trustees will assist this Husband to make the provision that I have ordered, particularly as the bulk of the capital ordered will be placed safely within another trust structure and will be used by one of the trust's ultimate (and, in fact, most needy) beneficiaries.

Bruce Blair Q.C. and Nicholas Cusworth (instructed by Payne Hicks Beach) for the Petitioner

The Respondent being in person with the assistance of his Mackenzie friend Mr Buckley