

Family Law Reports/2005/Volume 2 /X v X (CROWN PROSECUTION SERVICE INTERVENING) - [2005] 2 FLR 487

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X v X (CROWN PROSECUTION SERVICE INTERVENING)

[2005] EWHC 296 (Fam)

FAMILY DIVISION AND ADMINISTRATIVE COURT

MUNBY J

2 MARCH 2005

Financial relief - Divorce - Confiscation order - Impact on financial order - Relevance as financial obligation and as conduct - Nazi atrocity compensation funds

The husband and wife were married for over 30 years, and had three adult children. In the last few years of the marriage, the husband, without the wife's knowledge, had begun to use the successful family company for professional money laundering. He was eventually sentenced to 6 years' imprisonment, and, under the Criminal Justice Act 1988, a confiscation order was made against him in the sum of £1,427,316 (with a further 5 years' imprisonment in default of satisfaction). The wife petitioned for divorce. The net family assets were worth about £2,485,358, including not only the matrimonial home, valued at £873,000, but also a property in France, valued at £402,550, and significant pension funds. The French property had been acquired using compensation paid to the husband's family by the West German government in respect of Nazi atrocities, including the murder of the husband's Jewish grandparents, and the husband argued that this asset should be treated differently. In the ancillary relief proceedings the wife initially sought equal division of all but the assets tainted by the husband's criminal conduct, plus a fund for her income needs over 3 years and her costs, amounting to a total of £1,234,890, leaving the husband with £1,041,919 plus his pension fund. The Crown Prosecution Service (CPS) was also involved in the proceedings, pursuing enforcement of the confiscation order. The wife eventually reached a compromise with the CPS and both argued that the wife should receive £1,191,374 of the family assets, leaving the husband with £1,085,435 plus his pension. This was less than the husband needed to pay for the confiscation order, but the CPS indicated that it would not resist giving him a certificate of inadequacy to cover the eventual shortfall, and that it would not attempt to seize his pension income. The husband proposed either that (a) £300,000 be preserved to provide for his future accommodation needs, ideally held in a trust created to hold the West German compensation assets, the remainder being held for the children, alternatively to come from the wife's share of the family assets, to return to her on the husband's death; in both cases the remaining family assets were to be used first to satisfy the wife's claim, then to satisfy the compensation order or (b) to apply the family assets first to payment of the confiscation order, dividing them between husband and wife only afterwards, with a lump sum of £200,000, plus his pension for the husband and what was left (about £575,732) for the wife.

Held - granting decree absolute and making a clean break order of a lump sum of £262,500 to the wife, with a transfer to her of the matrimonial home -

(1) A confiscation order was a highly relevant factor when considering the application of s 25 of the Matrimonial Causes Act 1973, not merely when considering financial obligations, but also as conduct which it would be inequitable to disregard. It would be wrong to take into account during ancillary relief proceedings a spouse's obligations under a confiscation order in such a way as to insulate the offender from the

consequences of the order. It would be wrong for a husband against whom a confiscation order had been made to be in a better position if he divorced than if he stayed married, and wrong for a married offender to be in a better position than an unmarried offender (see paras [21], [22], [41]).

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(2) There was no general discretionary power in either the Administrative Court or the Family Division to exonerate the defendant from the consequences of a confiscation order, or to ameliorate those consequences merely because it might be fair or just to do so. In any case, Parliament had determined that a confiscation order should not be limited to the defendant's profit from his criminal activities, and the court had no jurisdiction to substitute its own view of justice for that laid down by Parliament (see paras [20], [33]).

(3) Had there been no confiscation order there would have been no question but that this was a case for equal division of the assets. Taking the confiscation order into account, the case remained an equal division case. It would be wrong as a matter of principle to allow the husband's understandable need for accommodation, which had been generated entirely by the confiscation order, to turn the wife's claim into a claim based merely on needs, or to charge her funds with his accommodation for his lifetime. Even had this been a needs case, the wife's needs would not have been satisfied by the husband's proposals, calculating needs by reference to, inter alia, previous standard of living (see paras [23], [31], [41], [43], [44]).

(4) The husband's suggestions in regard to the assets purchased with atrocity compensation money were attempts to immunise some of his assets from the confiscation order while at the same time allowing him to enjoy the benefits of them, which was the kind of artificial contrivance judges must be alert to prevent. Even allowing for the exceedingly sensitive and unusual provenance of the compensation money, it was inconceivable that anyone would have suggested that the funds be settled or resettled in an ordinary ancillary relief case (see paras [28], [30]).

(5) The confiscation order should be met out of the husband's share of the assets, notwithstanding that this would leave him with only his pension income to rely upon. Satisfying the confiscation order before ordering division of the assets would be to punish the wife for the husband's crimes. This solution was not only fair, just and reasonable as between the husband and wife, it was also in the public interest (see paras [43], [44], [46]).

Statutory provisions considered

Matrimonial Causes Act 1973, ss 24(1)(c), 25(2)

Criminal Justice Act 1988, ss 71, 74, 80, 82, 83(1), 102

Cases referred to in judgment

Beach v Beach [1995] 2 FLR 160, FD

Chamberlain v Chamberlain [1973] 1 WLR 1557, [1974] 1 All ER 33, CA

Customs and Excise Commissioners v A and Another; A v A [2002] EWCA Civ 1039, [2003] Fam 55, [2003] 2 All ER 736, CA

Draskovic v Draskovic (1981) 11 Fam Law 87

H v H (Financial Relief: Conduct) [1998] 1 FLR 971, FD

Harnett v Harnett [1973] Fam 156, [1973] 3 WLR 1, [1973] 2 All ER 593, FD

Herklots' Will Trusts, Re; Temple v Scorer and Another [1964] 1 WLR 583, [1964] 2 All ER 66, ChD

Lord Lilford v Glynn [1979] 1 WLR 78, [1979] 1 All ER 441, CA

MCA, Re; HM Customs and Excise Commissioners and Long v A and A; A v A (Long Intervening) [2002] EWHC 611 (Admin/Fam), [2002] 2 FLR 274, QBD

P v P (Inherited Property) [2004] EWHC 1364 (Fam), [2005] 1 FLR 576, FD

Parra v Parra [2002] EWCA Civ 1886, [2003] 1 FLR 942, CA

Peters, Re [1988] 1 QB 871, [1988] 3 WLR 182, [1988] 3 All ER 46, CA

Piacentini, Re; Dayman (Receiver of Piacentini) v Inland Revenue Commissioners [2003] EWHC 113 (Admin), [2003] QB 1497, [2003] BPIR 812, QBD

R v Benjafield [2002] UKHL 2, [2003] 1 AC 1099, [2002] 2 WLR 235, [2002] 1 All ER 815, HL

R v Rezvi [2002] UKHL 1, [2002] 2 WLR 235, [2002] 1 All ER 815, HL

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T v S (Financial Provision for Children) [1994] 2 FLR 883, FD

Tavoulareas v Tavoulareas [1998] 2 FLR 418, CA

White v White [2001] 1 AC 596, [2000] 3 WLR 1571, [2000] 2 FLR 981, [2001] 1 All ER 1, HL

X (Restraint Order), Re [2004] EWHC 861 (Admin), [2004] 3 WLR 906, [2004] 3 All ER 1077, QBD

Christopher Hames for the applicant

David Williams for the respondent

Kennedy Talbot for the intervener

Cur adv vult

MUNBY J

[1] I have been sitting simultaneously in the Family Division, hearing cross-applications by a wife and a husband for ancillary relief under the Matrimonial Causes Act 1973 (the 1973 Act) (FD03D02658), and in the Administrative Court hearing confiscation proceedings brought by the Crown Prosecution Service (CPS) against the husband under the Criminal Justice Act 1988 (CJA No 12 of 2003) (the 1988 Act). As a result of previous directions the wife is a party to the confiscation proceedings and the CPS has been joined as an intervenor in the ancillary relief proceedings.

[2] The facts are fairly simple and not substantially in dispute. The husband was born in 1940 and the wife in 1943. They married in 1969 and have three children. One is now aged 30. The other two are in their twenties. None is in any way dependent upon their parents though, as it happens, the younger two are still living with their mother in the former matrimonial home. The husband joined the family business, XBL, in 1962. It is common ground that XBL is his alter ego and that its assets are to be treated as his. The husband spent almost the whole of his life as an honest and hard-working businessman, running an entirely legitimate and successful business through XBL. Then in about 1998 - according to the indictment on 1 October 1998 - everything went wrong. He embarked upon a course of criminal conduct, allowing XBL to be used as a business for professional money laundering. He was arrested by the police on 27 January 2001. A quantity of cash was seized. This came as an appalling revelation to the wife. It is common ground that she is entirely innocent of any wrongdoing and that up until the moment of his arrest she had not the faintest suspicion of her husband's criminal activities. On 24 January 2003 he was convicted at the Crown Court on one count of conspiracy to assist another to retain the benefit of criminal conduct. He was sentenced to 6 years' imprisonment. On 7 February 2003 a restraint order was made by Moses J. On 16 April 2003 the wife petitioned for divorce. On 31 October 2003 the Crown Court judge made a confiscation order in the sum of £1,427,316, though he seems to have accepted that the personal profit secured by the husband from his criminal activities was no more than £500,000 at most. The husband was ordered to serve a further 5 years' imprisonment in default of satisfaction of the confiscation order. On 16 November 2003 a decree nisi was granted. On 3 November 2004 the husband's appeal against conviction was dismissed.

[3] The family assets are worth £2,559,119 and consist of the former matrimonial home in London valued (net of notional realisation costs of 3%)

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at £873,000, a house in France valued on the same basis at £402,550, XBL's half-share in a commercial property valued on the same basis at £318,645, a number of bank accounts, some in the husband's name amounting to £124,876, some in the wife's name amounting to £32,994 and some in the name of XBL amounting to £177,248, certain sums in cash totalling £127,149, a portfolio of shares in the husband's name worth £103,363, and pension funds held by the husband and the wife worth a total (cash equivalent transfer value (CETV)) of £399,294. Although the former matrimonial home in London is registered in the husband's name alone, and the house in France in the wife's name, it is in effect common ground - and not challenged by the CPS - that both properties are owned jointly by the husband and the wife and that the wife accordingly has a beneficial 50% interest in each of the two properties. Thus, ignoring certain alleged liabilities of XBL, but taking into account the husband's estimated capital gains tax liabilities of £73,761, the position, as set out in the annexed table, is that the net family assets of {£2,559,119 - £73,761 =} £2,485,358 are held as to £1,791,709 - 72% - by the husband and as to the remaining £693,649 - 28% - by the wife.

[4] The CPS accepts that the only assets which are 'tainted' by the husband's criminal activities are the XBL bank accounts and the cash. The CPS asserts that the whole of these two categories of asset is tainted, in other words that the tainted assets amount in all to £304,397. The husband asserts, on the other hand, that only £50,309 of the XBL bank accounts and only £93,270 of the cash (that part of it which was seized by the police at the time he was arrested) is tainted, in other words that the tainted assets amount in all to only £143,579. On the Crown's case, therefore, the untainted family assets amount to £2,180,961 (ie, £2,485,358

- £304,397), whilst on the husband's case the untainted family assets amount to £2,341,779. The wife, of course, has no knowledge of any of these matters but on this issue aligns herself forensically with the husband.

[5] In relation to the assets there are three other matters I should mention at this stage. The first relates to the husband's pension fund. This is currently valued at £376,414, of which 25% - £94,104 - is the current value of the sum which the husband will be entitled to draw down as capital when the pension becomes payable later this year on his sixty-fifth birthday. The balance of £282,310 is the current capitalised value of the income which the husband will be entitled to draw down, month by month, starting on his sixty-fifth birthday. Strictly speaking both elements of the pension are part of his 'realisable property' within the meaning of s 74 of the 1988 Act (see below) but the CPS, adopting an appropriately pragmatic approach, realistically accepts that the cost of collecting each monthly pension payment as it is received makes the exercise hardly worthwhile. Accordingly, when calculating the amount of the husband's realisable property the Crown Court was invited, and agreed, to include only the value of the capital sum, the value of the income stream being left out of account. Likewise, the CPS has indicated that it will not take any steps to seize the income payments under the pension.

[6] The next matter relates to the husband's capital gains tax liability of £73,761. It is common ground that the payment of the confiscation order takes priority over any capital gains tax liability. That is the effect of s 82(6) of the 1988 Act: see *Re Peters* [1988] QB 871, *Re Piacentini; Dayman (Receiver of Piacentini) v Inland Revenue Commissioners* [2003] EWHC 113 (Admin), [2003] QB 1497, [2003] BPIR 812, and *Re X (Restraint Order:*

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Variation) [2004] EWHC 861 (Admin), [2004] 3 WLR 906. The obligation to pay the capital gains tax is a personal obligation of the husband and insofar as it will therefore survive intact despite the enforcement of the confiscation order it is, as Mr Talbot on behalf of the CPS pointed out, an obligation of the husband which I must have regard to under s 25(2) of the 1973 Act.

[7] The other matter relates to a part of the assets which came to the husband in the most tragic and distressing circumstances, reflecting the long shadow which, even 60 years after the liberation of Auschwitz, the legacy of Nazi atrocities still casts over us. The husband is Jewish. His grandparents were German Jews. The devoted service which his grandfather gave to his Fatherland as an officer in the Kaiser's army during the Great War was not enough to save him from Nazi persecution. His business was stolen from him by the Nazis and eventually he and his wife - the husband's grandmother - were deported to the east and murdered by the Nazis in Auschwitz. After the war the government of West Germany as it then was paid compensation for the loss of the family's business and the murder of the husband's grandparents. The money passed to the husband from his parents and in due course the remaining balance of about £300,000 was used by him to buy the house in France.

[8] There are five applications before me:

- (i) the wife's application for ancillary relief under the 1973 Act;
- (ii) the husband's cross-application for ancillary relief under the 1973 Act;
- (iii) an application by the wife for permission to apply for decree absolute notwithstanding that more than a year has elapsed since the grant of the decree nisi;

(iv) an application by the CPS for the appointment of a receiver under s 80(2) of the 1988 Act; and

(v) an application by the husband for a certificate of inadequacy under s 83(1) of the 1988 Act.

I propose to deal in this judgment with only the first three of these. Counsel are agreed that applications (iv) and (v) are better dealt with after they have all had an opportunity to consider my decision on the ancillary relief matters.

[9] Before the hearing commenced, each party had put forward open proposals as to how the various claims should be satisfied. During the course of the hearing these proposals were modified in important respects. The wife and the CPS reached agreement as to how her claims should be met, but that agreement did not commend itself to the husband, who put forward counter-proposals. I shall focus on these, rather than examining the earlier proposals, for they are now of merely historical interest.

[10] The wife's basic position is very simple and straightforward. She wants no part of the 'tainted' assets, but asserts that, subject to that, this is in principle a clear-cut case for an equal division of the family assets in accordance with *White v White* [2001] 1 AC 596, [2000] 2 FLR 981. This is not, she says, a 'needs' or 'reasonable requirements' case; it is a *White v White* case. This was a long marriage, with each spouse making full contributions in his or her own way, and there are no minor children whose needs have to be met. Adopting the husband's view as to the value of the 'tainted' assets, her claim on this basis would be for one half of £2,341,779,

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in other words £1,170,890. In addition she seeks a further £27,000, to reflect what are said to be her income needs for the next 3 years at the rate of £750 per month, and payment of her costs in the sum of £37,000. In total that comes to £1,234,890. This would leave the husband, apart from the income of his pension fund, with assets of only £1,041,919 (ie, £2,559,119 - £1,234,890 - £282,310) out of which to meet the confiscation order of £1,427,316 and, subject to that, the capital gains tax liability of £73,761.

[11] Initially, the preferred view of the CPS had been that the confiscation order should be paid in full, only the balance of the assets being divided thereafter between the husband and the wife. Its alternative position was, broadly speaking, very much the same as the wife's preferred solution, albeit treating the 'tainted' assets as amounting to £304,397 rather than £143,579 and not allowing her anything over and above a simple half-share. On this basis the wife would have received one half of £2,180,961, ie £1,090,480.

[12] The outcome of discussions between the wife and the CPS during the first day of the hearing was agreement between them that the wife should retain the London property, her bank accounts and her pension fund (worth £928,874 in total) and in addition receive a lump sum of £262,500 - in all, an award worth £1,191,374. Wrapped up in this compromise there was, in effect, a compromise of the issue between the wife and the CPS as to the true value of the 'tainted' assets. The practical effect of this, assuming that the wife were to reinvest in a property costing £700,000 and keep her pension fund intact, would be to leave her, after payment of her costs, with an income fund of {£1,191,374 - (£700,000 + £22,880 + £37,000) =} £431,494, giving her, on a *Duxbury* basis, an income of approximately £30,000 pa.

[13] On this basis the husband would be left, apart from the income of his pension fund, with assets of only £1,085,435 (ie, £2,559,119 - £1,191,374 - £282,310) out of which to meet the confiscation order of £1,427,316 and the capital gains tax of £73,761. But, as I understand the position of the CPS, it would not resist my giving the husband a certificate of inadequacy to cover the shortfall of £341,881 in relation to the

confiscation order. (To be more precise, the CPS will not resist my giving the husband a certificate of inadequacy to cover the eventual shortfall whatever it may be once all the assets have been realised. The assets may ultimately realise more or less than now assessed, and as Mr Talbot points out it is even possible - if unlikely - that the husband may come into other assets.) Nor, as I have said, would the CPS seek to seize the income payments under the husband's pension. So the overall effect of what is proposed by the wife and the CPS would be to divide the family assets of £2,559,119 as to £1,191,374 (47%) to the wife, £282,310 (11%) to the husband and £1,085,435 (42%) to the Crown. The Crown, on this basis, would be receiving 76% of the amount of the confiscation order.

[14] Faced with this the husband puts forward two alternative proposals. His preferred solution is that I exercise my powers under s 24(1)(c) of the 1973 Act to vary what Mr Williams on his behalf submits was the post-nuptial settlement created when the husband acquired the house in France and put it into the wife's name. He invites me to settle the sum of £300,000 - the original purchase price of the house in France - on trust to enable suitable accommodation to be provided for the husband during his life. Subject to that the trust fund would be held beneficially either for the children - thereby ensuring that the Holocaust compensation moneys remain in the husband's family - or alternatively for the wife. The husband would prefer the £300,000

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to be found out of the proceeds of sale of the house in France, in which case, he says, the trust fund should be for the children, the wife receiving the fund of £1,194,374 as agreed with the CPS. Alternatively, the £300,000 could be funded by the wife out of the £1,191,374 agreed with the CPS, in which case the trust fund would revert to her after his death. In the one case the husband's housing fund would in effect be provided at the expense of the Crown: the wife would still receive assets worth £1,191,374 but the amount available to meet the confiscation order would be reduced from £1,085,435 to £785,435. In the other case the Crown would not be prejudiced: there would still be £1,085,435 available to meet the confiscation order but the wife's fund would be reduced during the husband's lifetime from £1,191,374 to £891,374.

[15] Mr Williams was not very precise as to how exactly such a trust might be set up, but I imagine that what he has in mind is that the husband should be given a licence or some other purely personal right to occupy the trust property, in other words the kind of personal and non-transmissible interest seen, for example, in *Re Herklots' Will Trusts; Temple v Scorer and Another* [1964] 1 WLR 583. In addition, of course, the husband would enjoy the income of his pension fund.

[16] The husband's alternative proposal is that the family assets should first be applied in payment of the confiscation order, that he should receive a lump sum of £200,000 and the income of his pension fund, and that whatever remains after payment of the capital gains tax should go to the wife. On this basis the wife would be left with {£2,559,119 - (£1,427,316 + £200,000 + £282,310 + £73,761) =} £575,732. The husband would have a fund worth {£282,310 + £200,000 =} £482,310 in total.

[17] There is no need for me to examine in any detail the jurisdictions I am exercising. The principles are well-known: see *White v White* [2001] 1 AC 596, [2000] 2 FLR 981 and *Re MCA; HM Customs and Excise Commissioners and Long v A and A; A v A (Long Intervening)* [2002] EWHC 611 (Admin/Fam), [2002] 2 FLR 274, affirmed [2002] EWCA Civ 1039, [2003] Fam 55. For present purposes it suffices if I draw attention to a few points only.

[18] The 1988 Act is, and was intended by Parliament to be, harsh, indeed Draconian. Three features, in particular, bring out the stringency of the statutory scheme:

- (i) Confiscation is not limited to the profits of crime. The 'benefit' from an offence, as that phrase is used in s 71, extends to all the money which passes through the defendant's hands in

the course of his criminal behaviour. It is not confined to what sticks to his fingers or is left in his hands at the end of the day. It extends, as it were, to the turnover and not just the profits of his criminal activities.

(ii) The property which is liable to be seized, what in the 1988 Act is referred to as 'realisable property', extends, by virtue of ss 74 and 102, to every species of property, of whatever nature, in or in relation to which the defendant has either an 'interest' or a 'right'.

(iii) So far as is material for present purposes, absolutely nothing is excluded from the defendant's realisable property, neither his home nor his personal belongings nor even the tools of his trade.

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The effect of the 1988 Act, therefore, is that the defendant may be completely stripped of all his property and possessions and left quite literally homeless, penniless and destitute.

The only amelioration of the statutory scheme is that the amount of the confiscation order made by the Crown Court cannot exceed the amount of the defendant's 'realisable property'.

[19] Whilst the primary purpose of the statutory scheme is to strip criminals of the proceeds of their crimes, Mr Talbot rightly reminded me that the public interest in enforcing confiscation orders extends further. As Lord Steyn said in *R v Rezvi* [2002] UKHL 1, [2002] 2 WLR 235, at [14]:

'The provisions of the 1988 Act are aimed at depriving such offenders of the proceeds of their criminal conduct. Its purposes are to punish convicted offenders, to deter the commission of further offences and to reduce the profits available to fund further criminal enterprises. These objectives reflect not only national but also international policy.'

[20] Although the use of the word 'may' in s 80, shows that I have a discretion, for example in relation to the appointment of a receiver, to exercise, or to decline to exercise, the powers conferred on me by the 1988 Act, that discretion is subject to the 'legislative steer' in s 82(2), which provides that these powers 'shall be exercised with a view to making available for satisfying the confiscation order ... the value for the time being of realisable property ... by the realisation of such property': see *Customs and Excise Commissioners v A and Another; A v A* [2002] EWCA Civ 1039, [2003] Fam 55, at [21] and [94]. Whatever the ambit of the discretion, I do not have any general discretionary power to exonerate the defendant from the consequences of a confiscation order, or to ameliorate those consequences, merely because I think it might be fair or just to do so. That is to confuse the role of the Administrative Court, and indeed the Family Division, with the role of the Crown Court:

(i) It is part of the function of the Crown Court when making a confiscation order to decide whether to do so will cause injustice. As the Criminal Division of the Court of Appeal said in *R v Benjafield* [2002] UKHL 2, [2003] 1 AC 1099 at [86], speaking of the Crown Court:

'The prosecution has the responsibility for initiating the confiscation proceedings unless the court regards them as inappropriate ... There is also the responsibility placed upon the court not to make a confiscation order when there is a serious risk of injustice. As already indicated, this will involve the court, before it makes a confiscation order standing back and deciding whether there is a risk of injustice. If the court decides there is, then the confiscation order will not be made ... There is the role of this court on appeal to ensure there is no unfairness.'

In *R v Rezvi* [2002] UKHL 1, [2002] 2 WLR 235 at [15] Lord Steyn agreed:

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'For my part I think that this reasoning is correct, notably in explaining the role of the court in standing back and deciding whether there is or might be a risk of serious or real injustice and, if there is, or might be, in emphasising that a confiscation order ought not be made. The Crown accepted that this is how the court, seized with a question of confiscation, should approach its task. In my view this concession was rightly made.'

(ii) The function of the Administrative Court is quite different. I do not sit on appeal from or to review the decision of the Crown Court. That is the function of the Criminal Division of the Court of Appeal. As between the defendant and the Crown (matters are of course different as between the Crown and the defendant's wife) I take the order of the Crown Court as a given. As between the defendant and the Crown it is not for the Administrative Court to seek to go behind the confiscation order. The function of the Administrative Court is, essentially, to decide how to enforce the confiscation order made by the Crown Court. It is not for me to inquire whether the Crown Court has properly gone about its task and properly exercised its powers: see *Re MCA; HM Customs and Excise Commissioners and Long v A and A; A v A (Long Intervening)* [2002] EWHC 611 (Admin/Fam), [2002] 2 FLR 274, at [132]-[133], *Customs and Excise Commissioners v A and Another; A v A* [2002] EWCA Civ 1039, [2003] Fam 55, at [93]. My task, as Judge LJ expressed it, is limited to the enforcement process relating to an unsatisfied confiscation order.

(iii) The same goes for the Family Division. The proper exercise of the court's jurisdiction under the 1973 Act may have the effect of immunising an innocent wife from what would otherwise be the effect of a confiscation order made against her husband under the 1988 Act. But that is very different from saying that the jurisdiction under the 1973 Act can properly be exercised in such a way as to exonerate the defendant husband from the consequences of a confiscation order, or to ameliorate those consequences, merely because the family judge thinks it might be fair or just to do so. As Wall J (as he then was) said in *Customs and Excise Commissioners v A and Another; A v A* [2002] EWCA Civ 1039, [2003] Fam 55, at [101]:

'the judges of the Family Division in dealing with future applications of the type exemplified by this case will be astute to balance the public interest represented by the [CJA 1988] with the public interest in the protection of the rights of spouses under Part II of the MCA 1973. There can be no question of MCA 1973 being used as a means to circumvent the provisions of [CJA 1988], and I am confident that the judges will be acutely alert to ensure this is not the case.'

I respectfully agree.

[21] Mr Talbot, if I may say so, put the point very neatly when he submitted - and I agree - that in this kind of case the legislation can properly be used as

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a shield to protect an innocent wife but not as a device to improve the guilty husband's position or to insulate him from the consequences of a confiscation order. The fact is, as Mr Talbot correctly complained, that some of Mr Williams's submissions on behalf of the husband came perilously close to asserting that the duty imposed on me by the 1973 Act to take into account the husband's position, including his needs, contributions and the like, together with the limited extent of his 'profit' from his criminal activities, mean that I can deploy my jurisdiction under the 1973 Act to insulate him from the consequences of the confiscation order. As Mr Talbot correctly says, that cannot be right. The protection afforded by the 1973 Act in a case such as this is for the benefit of an innocent wife, not a guilty husband. To use the 1973 Act to protect a guilty husband would, as Mr Talbot submits, subvert the intention of Parliament. It would, as he says, be wrong for a husband against whom a confiscation order is made to be in a better position if he is divorced, or divorces,

than if he stays married. I agree.

[22] The point in fact goes further than that. Why should a criminal who is married, and who as such may be able to invoke the 1973 Act, be for this purpose in a better position than a criminal who being unmarried is by definition unable to do so? To this point, try as he might, Mr Williams really had no answer. Marriage, of course, is a very important relationship. It confers a status. It also confers on the parties to the marriage, and their children, many important and valuable privileges and benefits, many of which, as Mr Williams pointed out, are rooted in public policy and the public interest in maintaining not merely individual marriages but also marriages in general and marriage as an institution. But the privileges conferred on the married man (or woman) do not, in my judgment, include the privilege of being insulated from the consequences of the 1988 Act, nor does the public policy in favour of marriage require any such privilege. On the contrary, the public policy identified by Lord Steyn in *R v Rezvi* points, as it seems to me, in quite the opposite direction.

[23] Against this background of general principle I turn to consider the husband's proposals. First, however, I think it may be convenient to consider how I should have exercised my jurisdiction under the 1973 Act had there been no confiscation order. In those circumstances this would have been a fairly simple case calling in principle, as it seems to me, for an equal *White v White* division of the assets between the wife and the husband. As Mr Hames on the wife's behalf correctly submitted, this would not have been a 'needs' or 'reasonable requirements' case; it would have been a *White v White* case. This was a long marriage, with each spouse making full contributions in his or her own way, and there are no minor children whose needs have to be met. The husband might have been able to contend for an adjustment reflecting his particular claim to the Holocaust compensation moneys, not merely as being part of his inherited wealth but, moreover, as moneys which are so intimately related to the tragic history of his family that they truly 'belong' to and should remain with his family rather than going to the wife. Such a contention might or might not have succeeded. The wife, for instance, could have made some play of the fact that despite their provenance the husband chose to invest the moneys in a property acquired for the joint benefit of the two of them and a property, moreover, which he was content to put in her name: see *Parra v Parra* [2002] EWCA Civ 1886, [2003] 1 FLR 942 at [27] and *P v P (Inherited Property)* [2004] EWHC 1364 (Fam), [2005] 1 FLR 576. Be that [2005] 2 FLR 487 at 497

as it may, this would, as it seems to me, plainly have been a case calling in principle for an equal, or at least a broadly equal, division of the assets between the husband and the wife.

[24] I return to the husband's proposals, going first to his proposal that the sum of £300,000 be settled on the children. Two separate arguments underlie this proposal: one is the need of the husband for accommodation, the other his very understandable desire that the Holocaust moneys, with all their obvious significance and importance for him, should be preserved for his children. In support of the latter argument Mr Williams suggests that there is something unattractive, even wrong, in the Crown - the State - seeking to claw back from the husband moneys which accrued to him in such very special and poignant circumstances. Moneys awarded to the family by one state in recognition of the grievous wrong it did to two members of the family should not, it is suggested, be seized by another state as the price for a wrong committed against it by another member of the family. In this context Mr Williams points out that the UK affords favourable tax treatment to payments received by Holocaust survivors and victims of Nazism (albeit, as Mr Talbot points out, not to payments in compensation for assets stolen or confiscated by the Nazis) and leaves such sums out of account when calculating housing and various other benefits. That may be, but the point remains that Parliament has not seen fit to extend any similar exemption or concession in relation to confiscation orders under the 1988 Act and that a defendant's 'realisable property' is in principle all-embracing and subject to no relevant exceptions.

[25] I am content to assume, though without deciding, that the acquisition of the house in France in the wife's name constituted a post-nuptial settlement which I have jurisdiction to vary under s 24(1)(c) of the 1973 Act in the manner suggested by Mr Williams. I am also prepared to assume, though again without

deciding, that such an order would 'work', in the sense that it would achieve the desired objective of immunising the £300,000 fund from the Crown's demands. Mr Talbot submitted otherwise, pointing out correctly that the husband's interest - even if only a 'right' in relation to the fund rather than an 'interest' in the true sense of the word - would remain part of his realisable property within the meaning of s 74 of the 1988 Act. That may be, but if all the husband were to be given was, as I have suggested, a licence or some other personal right to occupy the trust property - in other words some purely personal and non-transmissible interest or, to adopt a phrase from another branch of the law, a personal status of irremovability - then it is hard to see how it could sensibly be realised by the Crown. The very attempt to do so would merely bring the interest to an end.

[26] I need not go further into these matters because there are, in my judgment, two fundamental and insuperable objections to the husband's proposals. The first reflects the well-established practice of the court when it comes to making settlements in favour of children. The court's undoubted powers to make capital awards for children by way of property adjustment orders are rarely exercised, and then usually only if needed to meet the children's needs during minority or dependency. The authorities are well-known. In *Chamberlain v Chamberlain* [1973] 1 WLR 1557 the Court of Appeal reversed a decision of Latey J ordering the former matrimonial home to be settled on the wife for life with remainder to the children, Scarman LJ observing at 1565 that:

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'provided that the parents meet their responsibilities to their children as long as the children are dependent on them, this seems to me an asset which should then revert to the parents. Accordingly, I think the judge was wrong to order a settlement.'

In *Lord Lilford v Glynn* [1979] 1 WLR 78 the Court of Appeal reversed a decision of Payne J ordering the husband to settle a sum of £25,000 on trust for each daughter for life and thereafter for the benefit of her children. Referring to what Scarman LJ had said in *Chamberlain v Chamberlain* [1973] 1 WLR 1557 and to certain observations of Bagnall J in *Harnett v Harnett* [1973] Fam 156 at 161, Orr LJ said at 85 that:

'a father - even the richest father - ought not to be regarded as having 'financial obligations [or] responsibilities' to provide funds for the purposes of such settlements as are envisaged in this case on children who are under no disability and whose maintenance and education is secure.'

[27] In *Tavoulaareas v Tavoulaareas* [1998] 2 FLR 418, where the Court of Appeal, reversing an order made by Singer J, directed the settlement of £250,000 on trust for the benefit of the wife during the child's dependency, and for the purpose of providing accommodation for the wife and child during that period, with the reversion thereafter to the child, Thorpe LJ, at 429, said this:

'*Lilford (Lord) v Glynn* [1979] 1 WLR 78 ... is manifestly distinguishable. There Payne J had plainly stepped outside the boundaries of the Matrimonial Causes Act by ordering a father to make money settlements on his daughters which had no relation to accommodation or their need during minority. In an infinite number of cases since, settlements have been ordered during the dependency of a child or children and the court invariably chooses, at the conclusion of the dependency, whether the reversion should be for the settlor, for the parties in some shares, or to the child.

This is an exceptional case where reversion to the child is, in my judgment, fully justified. Neither party has made any contribution to the sum which will go into this settlement. Each of them are, for their present financial security, beholden to their respective families. Neither has any need for additional capital that could be said to be foreseeable in 15 or 20 years' time ...'

In that case the child was aged 5 at the time the order was made. Singer J himself subsequently made a similar order in *H v H (Financial Relief: Conduct)* [1998] 1 FLR 971, recognising at 984 that 'such a solution is exceptional'. In that case the children were aged between 16 and 8 at the date of the order. One sees the

same approach being adopted in the line of cases involving lump sum orders considered by Johnson J in *T v S (Financial Provision for Children)* [1994] 2 FLR 883.

[28] The simple fact is that, even allowing for the exceedingly sensitive and most unusual provenance of the relevant funds, and recognising that they are intimately related to the tragic history of the husband's family, and in that

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sense 'belong' to his family and not to the wife's family, it is really quite inconceivable that anyone would even have suggested that these moneys should be settled, or resettled, had this merely been an ordinary ancillary relief case. Any particular claim that the husband might have been considered to have to the Holocaust moneys would have been recognised either by excluding the fund, in whole or in part, from the *White v White* calculation as representing the husband's inherited wealth and/or by ensuring that in any division of the assets this particular fund was transferred to the husband.

[29] The other objection is one of public policy. Whatever the husband's motives in putting this proposal forward may be, what he is suggesting is in truth, as Mr Talbot submits, a mere device to circumvent the operation of the 1988 Act. And that, in my judgment, is not something that the court should countenance, either when exercising its jurisdiction under the 1988 Act or when exercising its jurisdiction under the 1973 Act. Balcombe J was faced with a not dissimilar problem in *Draskovic v Draskovic* (1981) 11 Fam Law 87, where a husband proposed that his interest in the former matrimonial home should be given to the children. Such an order would defeat The Law Society's charge. Having said that he was concerned as to the extent of his duty to protect public funds, and having referred to Scarman LJ's observations in *Chamberlain v Chamberlain* [1973] 1 WLR 1557, Balcombe J continued:

'In the absence of special circumstances, one did not require provisions for the children, which in this case would also be against public policy. If the court acceded to the husband's proposal, he would no longer have an interest and the charges of The Law Society would be affected. On balance, the scale must come down on public interest, and his Lordship was not prepared to accede to the husband's proposal.'

The report is brief, but the basis of the decision is clear. Quite apart from the fact that the order sought could not be justified in the light of *Chamberlain v Chamberlain*, it was in any event - 'also' - bad on grounds of public policy. The balance came down in favour of the public interest.

[30] I can see no difference of substance between that case and this. What the husband is proposing is, in my judgment, the very kind of artificial contrivance which in *Customs and Excise Commissioners v A and Another; A v A* [2002] EWCA Civ 1039, [2003] Fam 55, both Judge LJ at [88] and Wall J at [101] said the judges must be alert to prevent. The effect, if not the intention, of what he is proposing would be to immunise some of his assets from the confiscation order whilst at the same time allowing him to go on enjoying the benefit of them. That must be so. Otherwise there is simply no purpose in the husband putting the proposal forward.

[31] The husband's alternative proposal, that the fund should be vested in the wife rather than the children is, in my judgment, equally unacceptable. True that it would not fall foul of the *Chamberlain v Chamberlain* principle, but it would in my judgment be equally offensive on grounds of public policy. But for the existence of the confiscation order nobody would be suggesting that it could possibly be appropriate to make such an order under the 1973 Act. This is in principle not merely a *White v White* case; it is also, in principle, the clearest possible case for a clean break. But for the confiscation

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order it is little short of inconceivable that anyone could sensibly suggest the contrary. This merely goes to demonstrate how artificial and contrived the husband's proposal really is. And it has the added disadvantage,

from his point of view, that it would not even preserve the Holocaust moneys for his children and, from the wife's point of view, that the husband's housing fund would be provided at her expense. As Mr Talbot pointedly but appropriately put it, is it in the public interest - is it even fair as between the husband and the wife - that the husband should be left with something which the Crown Court has said that he should not have, particularly if that can only be achieved at the prejudice of the wife? Again, this variant is, in my judgment, precisely the kind of artificial contrivance that Judge LJ and Wall J had in mind.

[32] Judge LJ's comments in *Customs and Excise Commissioners v A and Another; A v A* [2002] EWCA Civ 1039, [2003] Fam 55, at [88] are particularly in point. Explaining why the order made in that case in favour of the wife was appropriate he observed:

'... in her proceedings under the Matrimonial Causes Act 1973, she was not seeking collusively to protect his interests in the matrimonial home. To the contrary, she was looking for a "clean break" from him, so that as part of the arrangements on the ending of their marriage, her financial links to him would be severed, and he excluded from enjoying any benefit from his original interest in the property.'

The wife in the present case is not, of course, seeking in any way to act collusively with the husband. But my point is, I hope, clear. The husband here is in effect seeking to thrust on an unwilling wife what if done with her consent would be collusive and unacceptable. What he is in fact proposing is equally unacceptable.

[33] I should mention at this point, if only to reject it, one strand in Mr Williams's argument on behalf of the husband. Pointing to the Crown Court judge's seeming acceptance that the husband's profit from his criminal activities was no more than £500,000 at most, Mr Williams submits that I should in some way exercise my jurisdiction under either the 1973 Act and/or the 1988 Act so as to deprive the husband of no more than that amount, rather than the £1,427,316 referred to in the confiscation order. That, he submits, would enable the court to do overall justice to the husband, the wife and the Crown. I emphatically disagree. The 1988 Act is clear. Public policy and the public interest as determined by Parliament require that a confiscation order not be limited to the defendant's profit from his criminal activities. Were I to accede to Mr Williams's argument I should simply be re-writing the statute and substituting my own view of justice for that laid down by Parliament. That I cannot do. To accede to Mr Williams's submission would not achieve justice. It would merely give the husband a private benefit which he does not deserve and which Parliament has made clear he is not to have.

[34] I turn, therefore, to the husband's alternative proposal, that the family assets should first be applied in payment of the confiscation order, that he should receive a lump sum of £200,000 and the income of his pension fund, and that whatever remains should go to the wife. On this basis, as I have already pointed out, the wife would be left with only £575,732 rather than the £1,191,374 which she would get under her agreement with the CPS - a 'loss'

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to the wife of no less than £615,642. The husband, as I have said, would be left with £482,310.

[35] One striking feature of this proposal is immediately apparent. The price which the wife has to pay to give the husband £200,000 is the vastly greater figure of £615,642. The reason for this is obvious: she loses the benefit of her agreement with the CPS under which, in effect, the Crown agrees to write off (see para [13] above) the sum of £341,881 and has in effect also to pay the husband's capital gains tax liability of £73,761.

[36] Mr Hames recognises that on his approach the husband will be left with nothing apart from the income from his pension fund. But he does not shrink from that outcome. He takes as his starting point the assertion that, but for the confiscation order, this would be a simple case calling for an equal *White v White* division of the assets. He emphasises that the wife did not participate in any way in the husband's criminality;

that she is wholly innocent; that she was shocked by his arrest; that she does not seek to lay claim to any share in the 'tainted assets'; and that there is nothing to suggest that the parties' standard of living was in any way affected by the husband's criminality, which after all is not suggested to have started until 1998 when they had already been married for some 29 years. He submits, in short, that there are no disqualifying reasons why the wife should not have her full share of the untainted assets. On the contrary, to satisfy the confiscation order ahead of her claims, as the husband is proposing, would effectively be to punish this innocent wife for the crimes of her husband. The case remains, at the end of the day, he says, a *White v White* case.

[37] Mr Williams, grasping the nettle, parts company with Mr Hames on that fundamental premise. He submits that, like it or not, one has to have regard to the confiscation order and that its impact is such that it wholly alters the situation. The case, he says, is now primarily a 'needs' case, and prominent amongst the parties' needs is the husband's need for accommodation, however basic (his need for income being met by his ability to utilise the income of his pension fund). He seeks to sugar the pill by pointing to the wife's own acceptance that the husband's criminality was the result of foolishness rather than naked villainy. He submits that the wife's 'needs' can be met even if she is left with only £575,732. She does not, he says, need to live in a house anything like as large as the former matrimonial home, and I should not be deflected from requiring her to 'downsize' by any concern that this may render two of the adult children homeless. If need be, the husband could be awarded a smaller lump sum - perhaps only £150,000 or even £100,000 - which would still give him some chance of finding some kind of accommodation somewhere whilst giving the wife £625,732 or even £675,732.

[38] Mr Williams pointed by way of analogy to the decision of Thorpe J (as he then was) in *Beach v Beach* [1995] 2 FLR 160. In that case the central question was whether a husband should be permitted to escape from the terms of a separation agreement he had freely negotiated with his wife in circumstances where the financial situation had subsequently turned disastrously for the worse as a result of the husband's lack of business skills. As a consequence there was not even enough money to pay the wife her agreed lump sum of £450,000 - she received only £412,000. Thorpe J's approach can be seen in the following passages from his judgment at 168-170:

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'My essential duty is to determine this application upon the criteria contained in s 25, as amended. I accept Mr Moor's submission that applicants are to be treated equally, whether they be male or female. I do not accept his submission that the wife must take the husband as she finds him, bound to share equally in misfortune as she would have shared in success. If that submission were truly accepted, it would preclude the development of a financial misconduct case.

... So the crux of the case is really the responsibility for the present near-destitution of the husband. How has this come about? Who is responsible for this state of affairs? Is it the product of the husband's misconduct?

I have already recorded the developments and find the history as the wife presents it. I utterly reject Mr Moor's submission that this history is irrelevant to the outcome of this case. I think Miss Ralphs is fully entitled to suggest that the husband's conduct amounted to conduct which it would be inequitable to disregard.

He obstinately, unrealistically and selfishly trailed on to eventual disaster, dissipating in the process not only his money but his family's money, his friends' money, the money of commercial creditors unsecured and eventually his wife's money, insofar as the disaster that eventually developed did not even pay for her specified agreed sum.

... The responsibility is, in my judgment, not shared, not hers, but his.

So, on one view, why should he have anything when she has not even had what should have been her due under the freely negotiated contract? My first impression was to dismiss this claim as Miss Ralphs invited me to do. However, on further reflection I have concluded that the disparity between the present position of the husband and the wife is so great that that would not be a fair application of the s 25 criteria.'

In the event, and in the particular circumstances of the case, Thorpe J awarded the husband a lump sum of £60,000, to enable him to obtain what the judge called 'some basic accommodation'.

[39] I do not doubt for a moment the complete propriety of the particular outcome in that case. I confine myself to two comments. In the first place, every case must in the final analysis turn on its own particular facts. In that case Thorpe J felt it was fair to require the wife to forego the sum of £60,000 - some 15% of the £412,000 she had received - so that the husband could be paid the same amount of £60,000. Here, what is being suggested is that the wife should forego no less than £615,642 - some 52% of what she would receive under what the CPS is proposing - so that the husband can be paid £200,000. The two cases are on any basis very different. Secondly, that was a case of financial recklessness and folly, whilst the present case is one of serious criminality - just how serious can be judged by the fact that the husband, a man of previously blameless character, was sentenced to a term of 6 years' imprisonment. In any event, the case does not really help Mr Williams for, as can be seen, Thorpe J unhesitatingly rejected the submission that the wife had to take the husband as she found him and held that the husband's conduct amounted to conduct which it would be inequitable to disregard.

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[40] Mr Williams accepts that, at the end of the day, I have to strike a proper balance between the competing interests of the Crown, the husband and the wife: see *Customs and Excise Commissioners v A and Another; A v A* [2002] EWCA Civ 1039, [2003] Fam 55, at [41]. The principles are clearly set out in that case and there is no need for me to repeat here what I said on that occasion about the proper approach to the exercise of discretion. That is the approach which I propose to apply here.

[41] As I have said, but for the confiscation order this would have been a fairly simple case, calling as it seems to me for an equal *White v White* division of the assets between the wife and the husband. But I cannot of course ignore the confiscation order. I am required by s 25(2) of the 1973 Act to have regard to it. It is plainly a highly relevant factor. But it cuts both ways. Whilst on the one hand the husband can pray it in aid under s 25(2)(b) as one of his financial obligations, the wife can equally pray it in aid under s 25(2)(g) as conduct of the husband which it would be inequitable for the court to disregard.

[42] At the end of the day I am faced in this case with a very stark dilemma. I can either, as the wife and the CPS urge on me, award her £1,191,374 or, as the husband urges on me, award her £575,732 in order that he be given a housing fund of £200,000 (or alternatively £675,732 in order that he have a housing fund of £100,000).

[43] There is, in my judgment, only one appropriate outcome - that for which the wife and the CPS contend. In substance I accept the arguments put forward by Mr Hames. This is, and in my judgment remains at the end of the day despite everything pressed on me by Mr Williams, a *White v White* case and not a 'needs' case. To deprive *this* wife, in the circumstances of *this* case, of what she would otherwise be entitled to in order to enable the confiscation order to be satisfied ahead of her claims would, as Mr Hames submits, be effectively to punish this innocent wife for her husband's crimes. In the circumstances of this case, and bearing in mind in particular the gross disparity between the £615,642 which the wife would have to forego and the £200,000 which the husband would receive, the husband is simply asking too much of the wife. There is a limit to how far one can press 'for better for worse' - and what this husband in this case is demanding of this wife goes far beyond that limit. The wife's argument under s 25(2)(g) heavily outweighs any argument of the husband under s 25(2)(b). In all the circumstances it would in this case be wrong as a matter of principle to allow the husband's understandable need for accommodation - a need which in financial terms has been generated entirely because of the confiscation order - to turn the wife's *White v White* claim into a claim based merely on her 'needs'.

[44] Quite apart from this I do not accept that the wife's needs can in fact be adequately met if she receives only £575,732, or even if she receives £675,732. Of course, if that was all the money there was she

would have to get by on it. And there are many 'small money' cases where the court concludes that a wife's needs can be met out of a smaller, sometimes a much smaller, fund. But a wife's 'needs', her 'reasonable requirements', are not to be calculated by reference to the living standards of the poorest or even the living standards of the average. They have to be assessed having regard to all the s 25(2) factors, including importantly, under s 25(2)(c), the parties' previous standard of living. No doubt the wife could get by on a fund of £575,732, and no doubt with such a fund she could find accommodation for

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herself whilst still having just enough to live on. But taking any realistic view, the accommodation she would be able to acquire if her overall resources were no more than £575,732 or even £675,732, would be very different indeed from what she has hitherto been accustomed to. Let it be assumed, as I do, that she does not 'need' to live in a house as large as the former matrimonial home. Let it also be assumed, as I do, that she does not 'need' to live in an area of London quite as attractive as that to which she has become accustomed. And let it be accepted, as I do, that the adult children's needs have in the circumstances to be left entirely out of account. Allowing for all of that, there is nonetheless a limit to how far down in the world a wife in this wife's situation can be required to move before one gets to the point at which it has to be acknowledged that her 'needs' and 'reasonable requirements' are no longer being met. In my judgment the husband's proposals would push this wife down beyond - in fact well beyond - that point. I also take into account as a not unimportant factor that the husband will not be left absolutely destitute. He will have the income generated by his pension fund.

[45] As between the husband and the wife a proper application of the principles expounded in *White v White* [2001] 1 AC 596, [2000] 2 FLR 981 and in *Re MCA; HM Customs and Excise Commissioners and Long v A and A; A v A (Long Intervening)* [2002] EWHC 611 (Admin/Fam), [2002] 2 FLR 274, *Customs and Excise Commissioners v A and Another; A v A* [2002] EWCA Civ 1039, [2003] Fam 55 leads me unhesitatingly to prefer the solution for which the wife and the CPS contend to that for which the husband contends. The wife's solution is fair just and reasonable. The husband's solution is none of those things.

[46] I have of course also to consider whether this solution properly strikes the appropriate balance between the conflicting interests of the wife and the CPS and the appropriate balance between the conflicting interests of the husband and the CPS. In reality those conflicts have evaporated as a result of the stance adopted by the CPS. The CPS has reached agreement with the wife and is in effect content, as I have said, to write off the resulting shortfall. I am not bound by the view of the CPS as to what the public interest requires, even when the CPS is making a handsome concession. But it would be a strong thing for a judge in a situation such as this to say that the public interest requires more than the CPS is demanding. And there is nothing at all in the circumstances of this case to justify my taking a more rigorous view than that which, on careful reflection, commends itself to the CPS. I am entirely content to accept that the order I propose to make adequately safeguards the public interest. I am in fact satisfied that it holds the balance properly and fairly between the wife and the CPS and between the husband and the CPS in just the same way as I am satisfied that it holds the balance properly and fairly between the husband and the wife.

[47] For all these reasons, therefore, I agree that the cross-applications for ancillary relief should be determined in accordance with the proposals put forward jointly by the wife and the CPS. There will be a 'clean break' order providing for the wife to retain or have transferred to her, as the case may be, the London property, the bank accounts in her name and her pension fund. In addition she will receive a lump sum of £262,500. In return she will transfer the house in France to the husband. (Any taxes or other liabilities arising out of the acquisition or realisation of the property will of course be found from the proceeds of its sale: I do not intend the 'clean break' to leave the wife

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exposed to any personal liabilities in this respect.) As will be apparent there are very substantial liquid assets available to meet the lump sum: the cash together with the bank accounts in the name of either the husband or XBL amount in total to £429,273, and there are in addition easily realisable shares worth a further

£103,363. There is therefore no reason why the lump sum cannot be paid in full within 21 days, and I shall so order. There is, in those circumstances, no justification for continuing the maintenance payments of £750 per month which the wife has hitherto been receiving. They will accordingly cease on the making of the order. I will make an order in the confiscation proceedings varying the restraint order so as to enable the terms of the order I am making in the ancillary relief proceedings to be implemented.

[48] I will give the wife permission to apply for decree absolute.

[49] As agreed between them there will be no order for costs as between the wife and the CPS.

Postscript (14 March 2005)

[50] At a further hearing on 4 March 2005 a number of consequential matters were raised by counsel on which I was asked to rule:

(i) It was common ground between the parties, and I agree, that the insurance premium on the London house should, as hitherto, be paid out of moneys subject to the restraint order but on terms that the wife is to reimburse the husband for that part of the premium attributable to the period after the property is transferred to her pursuant to my order.

(ii) The husband is concerned that the transfer to him of the house in France in circumstances where it will immediately have to be sold to enable him to meet the confiscation order may expose him to some liability to French property tax. As I have already said, any taxes or other liabilities arising out of the acquisition or realisation of the property will of course be found from the proceeds of its sale, for I do not intend the 'clean break' to leave the wife exposed to any personal liabilities in this respect. Nor, however, should the order I make have the unintended effect of saddling the husband with additional liabilities. In practical terms it is the net proceeds of sale of the property (net, that is, both of the costs of realisation and of any French property or other taxes) that will be transferred to the husband and be available to meet the confiscation order. If there is any shortfall due to the incidence of French taxation then that is something that this court can take into account in addressing the husband's application for a certificate of inadequacy - indeed I do not anticipate that the CPS would in the circumstances resist the husband having appropriate relief in this respect.

(iii) The husband seeks the deferral of the appointment of a receiver for (say) 4 months to enable him to realise the remaining assets, in particular the house in France and the property partly owned by XBL. This is on the basis that he is best placed to maximise the sums that might be realised and that it is his liberty which is potentially at stake in the event of the shortfall in meeting the

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confiscation order not being reduced to the greatest extent possible. Mr Williams says that at this stage it is both unnecessary and disproportionate to appoint a receiver. Mr Talbot does not accept Mr Williams's analysis and points out that one of the recognised effects of the 1988 Act is that the costs of a receiver will neither fall on the husband nor go to reduce the amount of the assets available to meet the confiscation order. However, I do not think, in all the circumstances, that the Crown will be prejudiced if the husband is given a *short* period in which to take active steps to realise the various assets before a receiver is appointed. I will, therefore, adjourn the application for the appointment of a receiver. I emphasise, however, that all I am giving the husband is a *short* period of grace; that he must now, and without delay, take *active* steps to realise the assets and keep the CPS informed at all times of what he is doing - if he

does not the CPS can restore its application; and that arrangements must be put in place to ensure that the husband cannot under any circumstances obtain possession of any of the assets, of any title deeds, or of any of the proceeds of sale. This will in practice mean that the kind of order the husband is inviting me to make will only be feasible if his solicitors are prepared to give appropriate undertakings to the CPS and/or the court.

(iv) The husband seeks a variation of the restraint order to permit the payment of certain further legal and other expenses which he said had been incurred on behalf of either himself or XBL. This claim was forwarded to the CPS only at a very late stage and, even then, was in many respects woefully unparticularised. I am not prepared even to consider these matters until the husband has provided proper particulars and the CPS has had a proper opportunity to consider what is being sought. This application will be adjourned with liberty to restore.

(v) The husband also seeks a variation of the restraint order to permit the payment of legal fees - the sum of £3,000 was suggested - to obtain advice on appealing the confiscation order out of time and, if so advised, to make the appropriate application to the Court of Appeal. I dismiss this application. Such an application would be hopelessly out of time, the husband has not been able to identify for me the basis upon which such an application might be made, let alone to point to anything suggesting that it would have the slightest prospect of success, and, as Mr Talbot helpfully reminded me, the obtaining of such advice would, in any event, have been included in the brief fee of counsel who represented the husband in the Crown Court.

Appendix

	Value	Husband	Wife
London house	(1) 873,000	436,500	436,500
French house	(1) 402,550	201,275	201,275

[2005] 2 FLR 487 at 507

XBL property	(1) 318,645	318,645	
Bank accounts (H)	124,876	124,876	
Bank accounts (W)	32,994		32,994
Bank accounts (XBL)	177,248	177,248	
Cash	127,149	127,149	
Shares	(2) 103,363	103,363	
Pension fund (lump sum)	99,824	94,104	5,720
Pension fund (value of income)	299,470	282,310	17,160
Gross	2,559,119	1,865,470	693,649
Less: confiscation	1,427,316	(3) 1,427,316	
Net after confiscation	(4) 1,131,803	(4) 438,154	
Less: CGT	73,761	73,761	
Net after CGT	1,058,042	364,393	693,649

Notes

(1) Net after deduction of 3% notional costs of realisation (gross values £900,000, £415,000 and £328,500 respectively).

(2) I exclude the husband's loan account with XBL in the sum of £48,838, for this represents debtors who it would seem are unlikely to pay.

(3) The reasons why the confiscation order was in a lesser amount than the aggregate net value of the husband's assets are because (i) the capital value of the income element of the husband's pension fund was left out of account and (ii) the values of some of the assets have changed since the confiscation order was made.

(4) According to the husband there are other liabilities of XBL amounting to some £38,250. The details provided are sketchy and I have not taken them further into account.

Order accordingly.

Solicitors: Osbornes for the applicant

Fisher Meredith for the respondent

Central Confiscation Branch for the intervener

PHILIPPA JOHNSON

Law Reporter