NUPTIAL AGREEMENTS AUTHORITIES BUNDLE

GRANT LAZARUS WHITE PAPER MANCHESTER 2025

Michaelmas Term
[2010] UKSC 42
On appeal from: 2009 EWCA Civ 649

JUDGMENT

Radmacher (formerly Granatino) (Respondent) *v* Granatino (Appellant)

before

Lord Phillips, President
Lord Hope, Deputy President
Lord Rodger
Lord Walker
Lady Hale
Lord Brown
Lord Mance
Lord Collins
Lord Kerr

JUDGMENT GIVEN ON

20 October 2010

Heard on 22 and 23 March 2010

Appellant	*Respondent*
Nicholas Mostyn QC Deepak Nagpal (Instructed by Payne Hicks Beach)	Richard Todd QC Geoffrey Kingscote Jonathan Harris (Instructed by Vardags (formerly Ayesha Vardag Solicitors))

LORD PHILLIPS, LORD HOPE, LORD RODGER, LORD WALKER, LORD BROWN, LORD COLLINS AND LORD KERR

Introduction

1. When a court grants a decree of divorce, nullity of marriage or judicial separation it has the power to order ancillary relief. Ancillary relief governs the financial arrangements between the husband and the wife on the breakdown of their marriage. Sometimes the husband and wife have already made an agreement governing these matters. The agreement may have been made before the marriage ("an ante-nuptial agreement") or after the marriage ("a post-nuptial agreement"). Post-nuptial agreements may be made when the husband and wife are still together and intend to remain together, or when they are on the point of separating or have already separated. The latter type of post-nuptial agreement can be described as "a separation agreement". We shall use the generic description "nuptial agreements" to embrace both ante-nuptial and post-nuptial agreements.

2. A court when considering the grant of ancillary relief is not obliged to give effect to nuptial agreements – whether they are ante-nuptial or post-nuptial. The parties cannot, by agreement, oust the jurisdiction of the court. The court must, however, give appropriate weight to such an agreement. This appeal raises the question of the principles to be applied by the court when considering the weight that should be attached to an ante-nuptial agreement. The Privy Council recently considered this question in relation to a post-nuptial agreement in *MacLeod v MacLeod* [2008] UKPC 64, [2010] 1 AC 298 and it will be necessary to consider the implications of that decision.

3. The approach of English law to nuptial agreements differs significantly from the law of Scotland, and more significantly from the rest of Europe and most other jurisdictions. Most jurisdictions accord contractual status to such agreements and hold the parties to them, subject in some cases to specified safeguards or exceptions. Under English law it is the court that is the arbiter of the financial arrangements between the parties when it brings a marriage to an end. A prior agreement between husband and wife is only one of the matters to which the court will have regard. The uncertainty as to the weight that the court will attach to such agreements has led to calls for reform. The history of steps taken towards the reform of our law is set out in the judgment of Thorpe LJ at paras 16 to 23 of his judgment in this case in the Court of Appeal. For present purposes it suffices to note the following.

4. In 1998 the Home Office published a consultation document, "Supporting Families", which included the following statement in para 4.21:

> "The Government is considering whether there would be advantage in allowing couples, either before or during their marriage, to make written agreements dealing with their financial affairs which would be legally binding on divorce."

5. In para 4.23 the Government proposed that any such agreement should be subject to six safeguards. It would not be legally binding:

> "– where there is a child of the family, whether or not that child was alive or a child of the family at the time the agreement was made
>
> – where under the general law of contract the agreement is unenforceable, including if the contract attempted to lay an obligation on a third party who had not agreed in advance
>
> – where one or both of the couple did not receive independent legal advice before entering into the agreement
>
> – where the court considers that the enforcement of the agreement would cause significant injustice (to one or both of the couple or a child of the marriage)
>
> – where one or both of the couple have failed to give full disclosure of assets and property before the agreement was made
>
> – where the agreement is made fewer than 21 days prior to the marriage (this would prevent a nuptial agreement being forced on people shortly before their wedding day, when they may not feel able to resist)."

6. There are many, including some members of the Family Bar and Bench, who would favour a reform along the lines proposed, but the Government has not taken its proposals further. The Law Commission is, however, currently considering this area of the law and is expected to report in 2012.

7. There can be no question of this Court altering the principle that it is the Court, and not any prior agreement between the parties, that will determine the appropriate ancillary relief when a marriage comes to an end, for that principle is embodied in the legislation. What the Court can do is to attempt to give some assistance in relation to the approach that a court considering ancillary relief should adopt towards an ante-nuptial agreement between the parties. Earlier this year Resolution, an organisation of over 5,700 family lawyers, published an updated paper on "Family Agreements", which proposes legislative reform to the law of ante-nuptial and post-nuptial agreements. This quotes statistics that show that about 45% of marriages are likely to end in divorce. It comments on the strain and expense that are involved in disputes about ancillary relief, which are increased by the uncertainty of the outcome.

8. In order to address the facts of this particular case it will be necessary, in due course, to set these out in a little detail. At this stage we propose to give a summary that will provide a context for the consideration of the relevant principles that will follow.

9. The appellant ("the husband") is a French national. The respondent ("the wife") is a German national. They signed the ante-nuptial agreement in Germany on 1 August 1998. The husband was then aged 27 and the wife 29. They were married in London on 28 November 1998. They had two children, Chiara, born on 4 September 1999 and Chloe, born on 25 May 2002. In October 2006, after 8 years of marriage, they separated.

10. The wife petitioned for divorce in the Principal Registry of the Family Division that same month. The husband cross-petitioned in November. They agreed to proceed undefended on cross decrees and were divorced in July 2007.

11. Meanwhile, the wife had applied for permission to take the girls to live in Germany. In September 2007, His Honour Judge Collins granted that application but made a shared residence order providing that the children should divide their time between their parents. Under his order, they were to spend just under one third of the time with their father and two thirds with their mother. The husband made an unsuccessful application for permission to appeal that order to the Court of Appeal. The wife took the children to live in Germany in February 2008. However, in November 2008 (after the judgment of Baron J in the ancillary relief proceedings), she applied to the German court for permission to take them to live in Monaco. The husband resisted this, but permission was granted in May 2009 and that is where they now live.

12. The ante-nuptial agreement was drawn up in Germany by a notary. It contained a choice of law clause that provided that the effects of their marriage, including the laws of matrimonial property and succession, were to be subject to the law of the Federal Republic of Germany. The main part of the agreement provided first for separation of property. In clause 3 it was declared that the statutory matrimonial regime was to be excluded, and that each party was to manage his or her assets entirely independently. By clause 4 the parties excluded the equalisation of pension rights. By clause 5 they waived claims for maintenance after the marriage was terminated. Clause 6 contained a waiver of the statutory right to a portion of the estate of the first one of them to die. The effect of the agreement was that neither party was to derive any interest in or benefit from the property of the other during the marriage or on its termination. It made no provision for what was to happen in the event of their having children.

13. The parties entered into this ante-nuptial agreement at the instigation of the wife. She came from an extremely rich family. Some of the family wealth had already been transferred to her, so that she enjoyed substantial unearned income. She expected to receive a further portion of the family wealth if, but only if, she entered into the ante-nuptial agreement to protect this. Her father insisted upon this. She herself was anxious that the husband should show, by entering into the agreement, that he was marrying her for love and not for her money.

14. The husband was working for JP Morgan & Co and, at the time of the ante-nuptial agreement, was earning about £120,000 a year and had excellent prospects. These were realised inasmuch as he earned about $475,000 dollars in 2001 and about $320,000 in 2002. He then became disenchanted with banking and embarked on research studies at Oxford with the object of obtaining a D Phil in biotechnology.

15. Despite the terms of the ante-nuptial agreement the husband brought a claim for ancillary relief, seeking an order against the wife both for periodical payments and for a lump sum. The hearing of his claim began before Baron J on 23 June 2008 and she handed down her judgment on 28 July 2008: [2008] EWHC 1532 (Fam) [2009] 1 FCR 35. The issue that lay at the heart of the proceedings was the weight that should be given to the ante-nuptial agreement. Baron J held that the circumstances surrounding the conclusion of the agreement fell foul of a number of the safeguards set out in para 4.23 of the Home Office consultation document (see para 5 above), and for that reason, the weight to be attached to it fell to be reduced. None the less, she held that his award should be circumscribed to a degree to reflect the fact that he had signed the agreement. Her award also had to make provision for the two children, whose arrival had not been anticipated in the agreement. In the event she awarded the husband a total of £5,560,000, on the basis that this would provide him with an annual income of £100,000 for life and enable him to buy a home in London, where the two children could visit him. She

awarded him periodical payments of £35,000 a year for each child until they ceased full time education. In addition she awarded a sum to enable him to buy a home in Germany (which would remain owned by the wife) where the two children could stay with him.

16. The wife appealed successfully to the Court of Appeal against Baron J's order. The Court held that Baron J had been wrong to find that the circumstances in which the ante-nuptial agreement had been reached reduced the weight to be attached to the agreement. It was not evident that the fact of the agreement had had any significant impact on her award. In the circumstances of the case she should have given the agreement decisive weight. The award should make provision for the husband's role as the father of the two children, but should not otherwise make provision for his own long term needs. The case was remitted to Baron J.

Ancillary relief

17. The power to grant a decree of divorce was conferred on a new Court for Divorce and Matrimonial Causes by the Matrimonial Causes Act 1857. Section 32 of that Act gave the court power to order the husband to secure maintenance for the wife's life. The Matrimonial Causes Act 1866 gave the court power to order the husband to pay unsecured maintenance to the wife. Having identified this starting point of the power to award ancillary relief we can jump to 1969.

18. The Divorce Reform Act 1969 revolutionised the English law of divorce by replacing the old grounds of divorce which were based on fault with the single ground that the marriage had irretrievably broken down. This change was accompanied by a fresh approach to the financial consequences of divorce, which was supplied initially by the Matrimonial Proceedings and Property Act 1970, the provisions of which were largely re-enacted as Part II of the Matrimonial Causes Act 1973 ("the 1973 Act"). Significant changes were made to these provisions by the Matrimonial and Family Proceedings Act 1984 and the Family Law Act 1996. The following provisions of the 1973 Act, as amended, are particularly material.

19. Section 23 gives the court the power, on granting a decree of divorce, of nullity of marriage or of judicial separation to make a wide variety of orders. These include an order that either party pay to the other, or pay for the benefit of any child of the family, periodical payments, and that either party pay to the other, or for the benefit of any child of the marriage, a lump sum. Section 24 gives the court power to direct a party to transfer specified property to the other party or to or for the benefit of a child. No power is given to vary a property adjustment order. Section 24B gives the court power to make a pension sharing order. Section

31 gives the court power to vary a periodical payments order but not an order to pay a lump sum.

20. Section 25 provides that "it shall be the duty of the court" when deciding whether, and in what manner to exercise powers including those referred to above to have regard to:

> "all the circumstances of the case, first consideration being given to the welfare while a minor of any child of the family who has not attained the age of eighteen"

21. The section goes on to provide that as regards the exercise of its powers in relation to a party to the marriage the court shall in particular have regard to the following matters:

> "(a) the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future, including in the case of earning capacity any increase in that capacity which it would in the opinion of the court be reasonable to expect a party to the marriage to take steps to acquire;
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> (b) the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future;
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> (c) the standard of living enjoyed by the family before the breakdown of the marriage;
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> (d) the age of each party to the marriage and the duration of the marriage;
>
> (e) any physical or mental disability of either of the parties to the marriage;
>
> (f) the contributions which each of the parties has made or is likely in the foreseeable future to make to the welfare of the family, including any contribution by looking after the home or caring for the family;

(g) the conduct of each of the parties, if that conduct is such that it would in the opinion of the court be inequitable to disregard it;

(h) in the case of proceedings for divorce or nullity of marriage, the value to each of the parties to the marriage of any benefit … which, by reason of the dissolution or annulment of the marriage, that party will lose the chance of acquiring."

22. The principles to be applied to the grant of ancillary relief have twice been considered by the House of Lords, in cases involving substantial assets. In *White v White* [2001] 1 AC 596 the parties had been married for 33 years, during which time they had together carried on the business of farming. Their net assets were some £4.6 million. The judge awarded the wife a lump sum of a little less than £1 million, on the basis that this would meet her reasonable needs. The Court of Appeal allowed her appeal and held that she was entitled to a lump sum of £1.5 million, reflecting her contribution both to the business and to the family. In the House of Lords, where the decision of the Court of Appeal was upheld, Lord Nicholls of Birkenhead gave the leading speech. He identified the following principles. Fairness, and indeed the 1973 Act itself, required the court to have regard to all the circumstances of the case, and there was one principle of universal application. No distinction should be drawn between the different ways in which husband and wife contributed to the welfare of the family. There should be no bias in favour of the money-earner against the home-maker and the child-carer. As a general guide equality in the division of assets should only be departed from for good reason (p 605).

23. Lord Nicholls went on to draw a distinction between property that one party brought to the marriage, or inherited during the marriage ("inherited property") and property acquired by the labours of one or both parties during the marriage ("matrimonial property"). Lord Nicholls recognised that there was a case for saying that a party should be allowed to keep inherited property, but commented:

"Plainly, when present, this factor is one of the circumstances of the case. It represents a contribution made to the welfare of the family by one of the parties to the marriage. The judge should take it into account. He should decide how important it is in the particular case. The nature and value of the property, and the time when and circumstances in which the property was acquired, are among the relevant matters to be considered. However, in the ordinary course, this factor can be expected to carry little weight, if any, in a case where the claimant's financial needs cannot be met without recourse to this property." (p 610)

24. In *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24; [2006] 2 AC 618 two appeals were heard together, one in respect of a marriage that had lasted less than three years. Lord Nicholls started his judgment under the heading "*The requirements of fairness"* by observing that under the 1973 Act the first consideration had to be given to the welfare of the children of the marriage. After this a number of strands could be identified. The first was financial needs. He commented at para 11:

> "The parties share the roles of money-earner, home-maker and child-carer. Mutual dependence begets mutual obligations of support. When the marriage ends fairness requires that the assets of the parties should be divided primarily so as to make provision for the parties' housing and financial needs, taking into account a wide range of matters such as the parties' ages, their future earning capacity, the family's standard of living, and any disability of either party. Most of these needs will have been generated by the marriage, but not all of them. Needs arising from age or disability are instances of the latter."

25. A second strand was compensation.

> "This is aimed at redressing any significant prospective economic disparity between the parties arising from the way they conducted their marriage. For instance, the parties may have arranged their affairs in a way which has greatly advantaged the husband in terms of his earning capacity but left the wife severely handicapped so far as her own earning capacity is concerned. Then the wife suffers a double loss: a diminution in her earning capacity and the loss of a share in her husband's enhanced income. This is often the case. Although less marked than in the past, women may still suffer a disproportionate financial loss on the breakdown of a marriage because of their traditional role as home-maker and child-carer." (para 13)

26. A third strand was sharing. Lord Nicholls postulated that marriage was a partnership. When a marriage ended each was entitled to an equal share of the assets of the partnership unless there was good reason to the contrary, albeit that the yardstick of equality was to be applied as an aid, not a rule. One good reason might be the difference between "matrimonial property" generated during the marriage and "non-matrimonial property" - property brought by one party to the marriage or inherited by or given to one party during the marriage.

27. There was general agreement among the other members of the House with these propositions, although not all agreed on the precise definition of "matrimonial property" nor on the relevance of the length of the marriage to the principle of sharing. Lady Hale, with whom Lord Mance agreed, identified a sub-category of matrimonial property, which the parties treated as separate property and which might not be subject to the sharing principle.

28. The implications of these two decisions were considered by the Court of Appeal, Sir Mark Potter P, Thorpe and Wilson LJJ in *Charman v Charman (No 4)* [2007] EWCA Civ 503; [2007] 1 FLR 1246. The court observed that in *Miller* the House had unanimously identified three main principles which governed distribution of property in ancillary relief proceedings – "need (generously interpreted), compensation and sharing" and that each of the matters set out in sub-paragraphs (b) to (h) of section 25(2) of the 1973 Act could be assigned to one of the three (paras 68-69).

29. As to the principle of sharing, the court said this, at para 66:

> "To what property does the sharing principle apply? The answer might well have been that it applies only to matrimonial property, namely the property of the parties generated during the marriage otherwise than by external donation; and the consequence would have been that non-matrimonial property would have fallen for redistribution by reference only to one of the two other principles of need and compensation to which we refer in para 68, below. Such an answer might better have reflected the origins of the principle in the parties' contributions to the welfare of the family; and it would have been more consonant with the references of Baroness Hale of Richmond in *Miller* at paras 141 and 143 to 'sharing … the fruits of the matrimonial partnership' and to 'the approach of roughly equal sharing of partnership assets'. We consider, however, the answer to be that, subject to the exceptions identified in *Miller* to which we turn in paras 83 to 86, below, the principle applies to all the parties' property but, to the extent that their property is non-matrimonial, there is likely to be better reason for departure from equality. It is clear that both in *White* at p 605 F-G and p 989 respectively, and in *Miller*, at paras 24 and 26, Lord Nicholls of Birkenhead approached the matter in that way; and there was no express suggestion in *Miller*, even on the part of Baroness Hale of Richmond, that in *White* the House had set too widely the general application of what was then a yardstick."

30. The "exceptions identified in *Miller"* referred to the possible exception in respect of assets that the parties had treated as separate property. As to these the court commented that the discussion about these perhaps

> "foreshadowed future, albeit no doubt cautious, movement in the law towards a more frequent distribution of property upon divorce in accordance with what, by words or conduct, the parties appear previously to have agreed."

Nuptial agreements, separation agreements and public policy

31. It used to be contrary to public policy for a married couple who were living together, or a couple about to get married, to make an agreement that provided for the contingency that they might separate. Marriage involved a duty to live together and an agreement making provision for the possibility of separation might act as an encouragement to separate. Such agreements were void and the court would pay no regard to them: *Cocksedge v Cocksedge* (1844) 14 Sim 244; 13 LJ Ch 384; *H v W* (1857) 3 K & J 382. The same was not true of an agreement to separate or an agreement that governed a separation that had already taken place. Lord Atkin in *Hyman v Hyman* [1929] AC 601 at p 625-626 gave a short history of such contracts and commented on their effect:

> "We have to deal with a separation deed, a class of document which has had a chequered career at law. Not recognized by the Ecclesiastical Courts, such contracts were enforced by the common law. Equity at first frowned. Lord Eldon doubted but enforced them: cf. *St. John v. St. John* (1803) Ves. 525, 529 and *Bateman v. Countess of Ross* (1813) 1 Dow 235; and see the arguments of Sir Fitzroy Kelly and Mr Turner and of Mr Bethell in *Wilson v. Wilson* (1848) 1 H. L. C. 538, 550-553, 564, 565. Finally they were fully recognized in equity by Lord Westbury's leading judgment in *Hunt v. Hunt* (1861) 4 D. F. & J. 221, in which he followed Lord Cottenham's decision in *Wilson v. Wilson* 1 H. L. C. 538, 550-553, 564, 565, where his argument for the respondent had prevailed. Full effect has therefore to be given in all courts to these contracts as to all other contracts. It seems not out of place to make this obvious reflection, for a perusal of some of the cases in the matrimonial courts seems to suggest that at times they are still looked at askance and enforced grudgingly. But there is no caste in contracts. Agreements for separation are formed, construed and dissolved and to be enforced on precisely the same principles as any respectable commercial agreement, of whose nature indeed they sometimes partake. As in other contracts stipulations will not be enforced which

> are illegal either as being opposed to positive law or public policy. But this is a common attribute of all contracts, though we may recognize that the subject-matter of separation agreements may bring them more than others into relation with questions of public policy."

32. In *Hyman v Hyman* the husband had left the wife for another woman. Adultery by the husband was not at the time a ground for divorce unless there were aggravating circumstances, such as incest. The parties had entered into a deed of separation under which the husband had paid two lump sums and agreed to make weekly payments of £20 for the life of the wife. The deed included a covenant by the wife that she would not institute any proceedings to make him pay more than this. When the Matrimonial Causes Act 1923 gave the wife the right to petition for divorce on the grounds of her husband's adultery alone, the wife divorced her husband and applied to the court for maintenance pursuant to section 190(1) of the Supreme Court of Judicature (Consolidation) Act 1925. This gave the court the power, on any decree for divorce, to order the husband to pay maintenance. The husband argued that the wife was precluded by her covenant from bringing this claim. The House rejected this argument. Lord Hailsham LC held at p 614 that:

> "the power of the court to make provision for a wife on the dissolution of her marriage is a necessary incident of the power to decree such a dissolution, conferred not merely in the interests of the wife, but of the public, and that the wife cannot by her own covenant preclude herself from invoking the jurisdiction of the court or preclude the court from the exercise of that jurisdiction."

Lord Atkin made the same point at p 629.

33. The subsequent history was set out by Lady Hale in *MacLeod v MacLeod* at paras 21 to 23. The same principle was applied to other statutory powers to award maintenance. In *Bennett v Bennett* [1952] 1 KB 249 the wife sought to enforce an agreement to pay maintenance given by her husband in consideration of her agreement not to seek a court order for maintenance. The Court of Appeal held that because that agreement was of no effect it did not constitute valid consideration for her husband's agreement and her claim failed.

34. This unfortunate situation was remedied by the Maintenance Agreements Act 1957. The preamble to this Act stated:

> "An Act to make provision with respect to the validity and alteration by the court of financial arrangements in connection with agreements

between the parties to a marriage, whether made during the continuance or after the dissolution or annulment of the marriage, for the purposes of those parties' living separately; and for purposes connected therewith."

35. The Act provided:

"1.—(1) This section applies to any agreement in writing made, whether before or after the commencement of this Act, between the parties to a marriage for the purposes of their living separately, being—

(a) an agreement containing financial arrangements, whether made during the continuance or after the dissolution or annulment of the marriage; or

(b) a separation agreement which contains no financial arrangements in a case where no other agreement in writing between the same parties contains such arrangements.

(2) If an agreement to which this section applies includes a provision purporting to restrict any right to apply to a court for an order containing financial arrangements, that provision shall be void but any other financial arrangements contained in the agreement shall not thereby be rendered void or unenforceable but, unless void or unenforceable for any other reason, and subject to the next following subsection, shall be binding on the parties to the agreement: . . .

(3) Where an agreement to which this section applies is for the time being subsisting and the parties thereto are for the time being either both domiciled or both resident in England, and on an application by either party the High Court or, subject to the next following subsection, a magistrates' court is satisfied either—

(a) that by reason of a change in the circumstances in the light of which any financial arrangements contained in the agreement were made or, as the case may be, financial arrangements were omitted therefrom, the agreement should be altered so as to make different, or, as the case may be, so as to contain, financial arrangements; or

> (b) that the agreement does not contain proper financial arrangements with respect to any child of the marriage,
>
> the court may by order make such alterations in the agreement by varying or revoking any financial arrangements contained therein or by inserting therein financial arrangements for the benefit of one of the parties to the agreement or of a child of the marriage as may appear to the court to be just having regard to all the circumstances or, as the case may be, as may appear to the court to be just in all the circumstances in order to secure that the agreement contains proper financial arrangements with respect to any child of the marriage; and the agreement shall have effect thereafter as if any alteration made by the order had been made by agreement between the parties and for valuable consideration."

36. These provisions are largely reproduced in sections 34 and 35 of the 1973 Act, albeit that the definition of a "maintenance agreement" does not state that it is an agreement made "for the purposes of their living separately". Wilson LJ at para 134 of his judgment in this case remarks that sections 34 and 35 have been dead letters for more than 30 years. It seems likely that issues as to maintenance have, since the 1973 Act came into force, been pursued in ancillary relief proceedings. As to these section 35(6) provides

> "For the avoidance of doubt it is hereby declared that nothing in this section or in section 34 above affects any power of a court before which any proceedings between the parties to a maintenance agreement are brought under any other enactment (including a provision of this Act) to make an order containing financial arrangements or any right of either party to apply for such an order in such proceedings."

37. Although separation agreements do not override the powers of the Court to grant ancillary relief, they have been held to carry considerable weight in relation to the exercise of the court's discretion when granting such relief. In *Edgar v Edgar* [1980] 1 WLR 1410 the husband and wife had separated and in 1976, without any pressure from the husband but rather at the instigation of the wife, concluded a deed of separation which had been negotiated through solicitors. Under this the husband agreed to purchase a house for the wife, to confer on her capital benefits worth approximately £100,000, to pay her £16,000 a year and to make periodical payments for the children of the marriage. The wife agreed that if she obtained a divorce she would not seek a lump sum or property transfer orders.

38. The husband complied with all his obligations under the separation deed but, in 1978, the wife petitioned for divorce and applied for ancillary relief, including a lump sum payment. Ormrod LJ said this about the weight to be given to the separation agreement at p 1417:

> "To decide what weight should be given, in order to reach a just result, to a prior agreement not to claim a lump sum, regard must be had to the conduct of both parties, leading up to the prior agreement, and to their subsequent conduct, in consequence of it. It is not necessary in this connection to think in formal legal terms, such as misrepresentation or estoppel; *all* the circumstances as they affect each of two human beings must be considered in the complex relationship of marriage. So, the circumstances surrounding the making of the agreement are relevant. Undue pressure by one side, exploitation of a dominant position to secure an unreasonable advantage, inadequate knowledge, possibly bad legal advice, an important change of circumstances, unforeseen or overlooked at the time of making the agreement, are all relevant to the question of justice between the parties. Important too is the general proposition that formal agreements, properly and fairly arrived at with competent legal advice, should not be displaced unless there are good and substantial grounds for concluding that an injustice will be done by holding the parties to the terms of their agreement. There may well be other considerations which affect the justice of this case; the above list is not intended to be an exclusive catalogue.
>
> I agree with Sir Gordon Willmer in *Wright v Wright* [1970] 1WLR 1219, 1224, that the existence of an agreement,
>
> > '… at least makes it necessary for the wife, if she is to justify an award of maintenance, to offer prima facie proof that there have been unforeseen circumstances, in the true sense, which make it impossible for her to work or otherwise maintain herself.'
>
> Adapting that statement to the present case, it means that the wife here must offer prima facie evidence of material facts which show that justice requires that she should be relieved from the effects of her covenant in clause 8 of the deed of separation, and awarded further capital provision."

39. Oliver LJ summarised his conclusions as follows at p 1424:

> "… in a consideration of what is just to be done in the exercise of the court's powers under the Act of 1973 in the light of the conduct of the parties, the court must, I think, start from the position that a solemn and freely negotiated bargain by which a party defines her own requirements ought to be adhered to unless some clear and compelling reason, such as, for instance, a drastic change of circumstances, is shown to the contrary."

The court held that no good reason had been shown not to hold the wife to her agreement.

40. Sitting in the Court of Appeal after his retirement, Sir Roger Ormrod in *Camm v Camm* (1982) 4 FLR 577 at p. 579, which was another case where ancillary relief was claimed in the face of the terms of a separation agreement, said:

> "It has been stressed all through those same cases that the court must attach considerable importance, the amount of importance varying from case to case, to the fact that there was an agreement, because the court, naturally, will not lightly permit parties who have made a contractual agreement between themselves, even if it is not legally enforceable, to depart from that contractual agreement unless some good reason is shown."

In that case the court did not hold the wife to her agreement, which she had entered into under great pressure and which failed to make adequate provision for her needs.

41. In *Smith v McInerney* [1994] 2 FLR 1077 the husband, who had entered into a separation agreement with his wife, sought a lump sum and property adjustment order when his circumstances changed as a result of being made redundant. Thorpe J cited *Edgar v Edgar* and *Camm v Camm* and remarked at p 1081:

> "As a matter of general policy I think it is very important that what the parties themselves agree at the time of separation should be upheld by the courts unless there are overwhelmingly strong considerations for interference."

42. The approach of the courts to separation agreements, as evidenced by the cases cited above, differed markedly from the approach to nuptial agreements that

merely anticipated the possibility of separation or divorce and which were consequently considered to be void as contrary to public policy. Contrast the statement of Thorpe J in *Smith v McInerney* quoted above with what he said at about the same time in *F v F (Ancillary Relief: Substantial Assets)* [1995] 2 FLR 45. In the latter case a rich German husband relied on a marital property regime which confined the wife to the pension of a retired German judge in the event of their divorce (the wife was in the judicial civil service at the time of the marriage). Thorpe J accepted that such agreements were commonplace in the society from which the parties came, but he did "not attach any significant weight" to the ante-nuptial agreement, and said (at p 66):

> "The rights and responsibilities of those whose financial affairs are regulated by statute cannot be much influenced by contractual terms which were devised for the control and limitation of standards that are intended to be of universal application throughout our society."

43. Judges sitting in the Family Division were prepared to give some weight to ante-nuptial agreements, but certainly not to the extent of holding that they should govern the terms of ancillary relief unless there were strong reasons for departing from them. In *S v S (Matrimonial Proceedings: Appropriate Forum)* [1997] 1 WLR 1200, Wilson J suggested at pp 1203-1204 that there might come a case

> "where the circumstances surrounding the prenuptial agreement and the provision therein contained might, when viewed in the context of the other circumstances of the case, prove influential or even crucial. Where other jurisdictions, both in the United States and in the European Community, have been persuaded that there are cases where justice can only be served by confining parties to their rights under prenuptial agreements, we should be cautious about too categorically asserting the contrary. I can find nothing in section 25 to compel a conclusion, so much at odds with personal freedoms to make arrangements for ourselves, that escape from solemn bargains, carefully struck by informed adults, is readily available here."

44. In *N v N (Jurisdiction: Pre-nuptial agreement)* [1999] 2 FLR 745, 752, Wall J recognised that although they were unenforceable, ante-nuptial agreements might have evidential weight in subsequent proceedings for divorce. Some weight was given to an ante-nuptial agreement in *C v C (Divorce: Stay of English Proceedings)* [2001] 1 FLR 624 (Johnson J) (where a French ante-nuptial agreement was a significant factor in staying English proceedings); *M v M (Prenuptial Agreement)* [2002] 1 FLR 654, para 44 ("tending to guide the court to a more modest award than might have been made without it," per Connell J); and *G v G (Financial Provision: Separation Agreement)* [2004] 1 FLR 1011 (CA)

(where parties had been married before). But contrast *Haneef v Haneef* [1999] EWCA Civ 803 (a decision on leave to appeal); *J v V (Disclosure: Offshore Corporations)* [2003] EWHC 3110 (Fam), [2004] 1 FLR 1042 (Coleridge J) (agreement signed on the eve of marriage without advice or disclosure and without allowance for arrival of children). See also *X v X (Y and Z Intervening)* [2002] 1 FLR 508, paras 78-103 (Munby J), and *K v K (Ancillary Relief: Prenuptial Agreement)* [2003] 1 FLR 120, 131-132 (R Hayward Smith QC sitting as Deputy High Court Judge) for a review of the authorities.

45. Some judges cited dicta in *Edgar v Edgar* in the context of ante-nuptial agreements without observing that those dicta were made in the very different context of a separation agreement – see *N v N* at p 753; *M v M* at para 21, *K v K* at p 131.

46. A change of attitude on the part of Thorpe LJ was apparent from his decision in *Crossley v Crossley* [2007] EWCA Civ 1491, [2008] 1 FLR 1467, 1472, at para 15 Thorpe LJ described the ante-nuptial agreement there as "a factor of magnetic importance." The marriage was a short marriage between two wealthy individuals who entered into an ante-nuptial agreement after having taken legal advice. Mrs Crossley asserted that her husband's disclosure had been inadequate and therefore the agreement should be avoided. The issue before the court concerned disclosure. Thorpe LJ drew attention to these facts: the marriage was a childless marriage of very short duration, for a substantial portion of which the parties were living apart; the marriage was between mature adults, both of whom had been previously married and divorced; both parties had very substantial independent wealth; the ante-nuptial agreement provided for the retention by each of the parties of their separate properties and division of joint property (of which there was in fact none). He accepted that the combination of these factors gave rise to a very strong case that a possible result of the section 25 exercise would be that the wife receives no further financial award, and concluded (at para 15):

> "All these cases are fact dependent and this is a quite exceptional case on its facts, but if ever there is to be a paradigm case in which the court will look to the prenuptial agreement as not simply one of the peripheral factors in the case but as a factor of magnetic importance, it seems to me that this is just such a case …"

47. Cases of post-nuptial settlements other than separation agreements are rare. One such was *NA v MA* [2006] EWHC 2900 (Fam); [2007] 1 FLR 1760. That case is of interest because, on one view, it anticipated the approach of the Privy Council in *MacLeod*. The very wealthy husband had discovered that his wife had committed adultery with one of his friends. He pressurised her into signing an agreement that provided that she would receive a specified lump sum and annual

payments if their marriage ended in divorce. The wife signed it because the husband insisted that she should do so if the marriage was to continue. Despite this, Baron J held at para 67 that "as the idea of an agreement evolved it hardened into a legal, post-nuptial agreement". It was on this basis, as we understand it, that the husband sought to have the agreement converted into an order of the court. When dealing with the law the judge did not distinguish clearly between ante-nuptial, post-nuptial and separation agreements. She said at para 12:

> "It is an accepted fact that an agreement entered into between husband and wife does not oust the jurisdiction of this court. For many years, agreements between spouses were considered void for public policy reasons but this is no longer the case. In fact, over the years, pre-nuptial 'contracts' have become increasingly common place and are, I accept, much more likely to be accepted by these courts as governing what should occur between the parties when the prospective marriage comes to an end. That is, of course, subject to the discretion of the court and the application of a test of fairness/manifest unfairness. It may well be that Parliament will provide legislation but, until that occurs, current authority makes it clear that the agreements are not enforceable per se, although they can be persuasive (or definitive) depending upon the precise circumstances that lead to their completion."

48. The judge went on to apply the law of undue influence, holding at paras 20 and 21

> "I am clear that, to overturn the agreement, I have to be satisfied that this wife's will was overborne by her husband exercising undue pressure or influence over her. I am also clear that if I do not overturn the agreement per se, I still have to consider whether it is fair and should be approved so as to become a court order."

She overturned the agreement on the ground of undue influence.

MacLeod v MacLeod

49. This was an appeal to the Privy Council from the High Court of Justice of the Isle of Man. It involved a claim for ancillary relief under the Manx Matrimonial Proceedings Act 2003, which contained provisions identical to sections 23 to 25 and 34 to 36 of the 1973 Act. The husband and wife had married in Florida in 1994, after signing an ante-nuptial agreement. A year later they

moved to the Isle of Man. Six years and five children later the marriage ran into difficulties and the parties executed a deed which made substantial variations to the ante-nuptial agreement. By August 2003 the marriage had totally broken down and in October 2004 a provisional decree of divorce was made. The wife sought ancillary relief, arguing that the deed of variation should be disregarded. The husband contended that it should be upheld, subject to one variation in favour of the wife.

50. The Board, in an advice delivered by Lady Hale, summarised the law in relation to nuptial agreements that we have set out above and pointed out the distinction between separation agreements and agreements providing for the consequences of a possible future separation. At para 31 the Board referred to the position of ante-nuptial agreements:

> "The Board takes the view that it is not open to them to reverse the long standing rule that ante-nuptial agreements are contrary to public policy and thus not valid or binding in the contractual sense. The Board has been referred to the position in other parts of the common law world. It is clear that they all adopted the rule established in the 19th century cases. It is also clear that most of them have changed that rule, and provided for ante-nuptial agreements to be valid in certain circumstances. But with the exception of certain of the United States of America, including Florida, this has been done by legislation rather than judicial decision."

51. The Board went on to draw a distinction between ante-nuptial and post-nuptial agreements, holding that the latter did constitute contracts. We do not agree with this distinction and, in order to explain where we part company with the reasoning of the Board, we must set this out in detail.

> "35 In the Board's view the difficult issue of the validity and effect of ante-nuptial agreements is more appropriate to legislative rather than judicial development. It is worth noting, for example, that in the Florida case of *Posner v Posner* (1970) 233 So 2d 381, where such agreements were recognised, attention was drawn to the statutory powers of the courts to vary such agreements. The Board is inclined to share the view expressed by Baron J in *NG v KR* (Pre-nuptial Contract) [2009] 1 FCR 35, para 130, that the variation power in section 50 of the 2003 Act (section 35 of the 1973 Act) does not apply to agreements made between people who are not yet parties to a marriage. Yet it would clearly be unfair to render such agreements enforceable if, unlike post-nuptial agreements, they could not be varied.

36 Post-nuptial agreements, however, are very different from pre-nuptial agreements. The couple are now married. They have undertaken towards one another the obligations and responsibilities of the married state. A pre-nuptial agreement is no longer the price which one party may extract for his or her willingness to marry. There is nothing to stop a couple entering into contractual financial arrangements governing their life together, as this couple did as part of their 2002 agreement. There is a presumption that the parties do not intend to create legal relations: see *Balfour v Balfour* [1919] 2 KB 571. There may also be occasional problems in identifying consideration for the financial promises made (now is not the time to enter into debate about whether domestic services constitute good consideration for such promises). But both of these are readily soluble by executing a deed, as was done here.

37 There is also nothing to stop a married couple from entering into a separation agreement, which will then be governed by sections 49 to 51 of the 2003 Act (sections 34 to 36 of the 1973 Act). As already noted, section 49 applies to 'any agreement in writing made at any time between the parties to a marriage'. There is nothing to limit this to people who are already separated or on the point of separating. It is limited to agreements containing 'financial arrangements' or to separation agreements which contain no financial arrangements. And 'financial arrangements' are limited to those governing their rights and liabilities towards one another when living separately. But section 49(1)(b) provides that such financial arrangements shall be binding 'unless they are void or unenforceable for any other reason'.

38 Leaving aside the usual contractual reasons, such as misrepresentation or undue influence, the only other such reason might be the old rule that agreements providing for a future separation are contrary to public policy. But the reasons given for that rule were founded on the enforceable duty of husband and wife to live together. This meant that there should be no inducement to either of them to live apart: see, for example, *H v W* 3 K & J 382, 386. There is no longer an enforceable duty upon husband and wife to live together. The husband's right to use self-help to keep his wife at home has gone. He can now be guilty of the offences of kidnapping and false imprisonment if he tries to do so: see *R v Reid* [1973] QB 299. The decree of restitution of conjugal rights, disobedience to which did for a while involve penal sanctions, has not since the abolition of those sanctions been used to force the

couple to live together: see *Nanda v Nanda* [1968] P 351. It was abolished by the Matrimonial Proceedings and Property Act 1970, at the same time as the Law Reform (Miscellaneous Provisions) Act 1970 abolished all the common law actions against third parties who interfered between husband and wife.

39 Hence the reasoning which led to the rule has now disappeared. It is now time for the rule itself to disappear. It has long been of uncertain scope, as some provisions which contemplate future marital separation have been upheld: see, for example, *Lily, Duchess of Marlborough v Duke of Marlborough* [1901] 1 Ch 165. This means that sections 49 to 51 of the 2003 Act (sections 34 to 36 of the 1973 Act) can apply to such agreements in just the same way as they do to any other. In particular, they can be varied in either of the circumstances provided for in section 50(2). The first is that there has been a change in the circumstances in the light of which any financial arrangements were made or omitted; following the amendment proposed by the Law Commission in 1969, this now includes a change which the parties had actually foreseen when making the agreement. The second is that the agreement does not contain proper financial arrangements with respect to any child of the family.

40 In the Board's view, therefore, the 2002 agreement was a valid and enforceable agreement, not only with respect to the arrangements made for the time when the parties were together, but also with respect to the arrangements made for them to live separately. However, the latter arrangements were subject to the court's powers of variation and the provisions which purported to oust the jurisdiction of the court, whether on divorce or during the marriage, were void. The existence of such powers does not deprive such agreements of their utility. Countless wives and mothers benefited from such agreements at a time when it was difficult for them to take their husbands to court to ask for maintenance. Enforcing an existing agreement still has many attractions over going to court for discretionary relief.

41 The question remains of the weight to be given to such an agreement if an application is made to the court for ancillary relief. In *Edgar v Edgar* [1980] 1 WLR 1410, the solution might have been more obvious if mention had been made of the statutory provisions relating to the validity and variation of maintenance agreements. One would expect these to be the starting point. Parliament had laid down the circumstances in which a valid and binding agreement relating to

> arrangements for the couple's property and finances, not only while the marriage still existed but also after it had been dissolved or annulled, could be varied by the court. At the same time, Parliament had preserved the parties' rights to go to court for an order containing financial arrangements. It would be odd if Parliament had intended the approach to such agreements in an ancillary relief claim to be different from, and less generous than, the approach to a variation application. The same principles should be the starting point in both. In other words, the court is looking for a change in the circumstances in the light of which the financial arrangements were made, the sort of change which would make those arrangements manifestly unjust, or for a failure to make proper provision for any child of the family. On top of that, of course, even if there is no change in the circumstances, it is contrary to public policy to cast onto the public purse an obligation which ought properly to be shouldered within the family.
>
> 42 The Board would also agree that the circumstances in which the agreement was made may be relevant in an ancillary relief claim. They would, with respect, endorse the oft-cited passage from the judgment of Ormrod LJ in *Edgar v Edgar* [1980] 1 WLR 1410, 1417, in preference to the passages from the judgment of Oliver LJ, both quoted above, at para 25. In particular the Board endorses the observation that "It is not necessary in this connection to think in formal legal terms, such as mispresentation [sic] or estoppel". Family relationships are not like straightforward commercial relationships. They are often characterised by inequality of bargaining power, but the inequalities may be different in relation to different issues. The husband may be in the stronger position financially but the wife may be in the stronger position in relation to the children and to the home in which they live. One may care more about getting or preserving as much money as possible, while the other may care more about the living arrangements for the children. One may want to get out of the relationship as quickly as possible, while the other may be in no hurry to separate or divorce. All of these may shift over time. We must assume that each party to a properly negotiated agreement is a grown up and able to look after him- or herself. At the same time we must be alive to the risk of unfair exploitation of superior strength. But the mere fact that the agreement is not what a court would have done cannot be enough to have it set aside."

52. We wholeheartedly endorse the conclusion of the Board in paras 38 and 39 that the old rule that agreements providing for future separation are contrary to

public policy is obsolete and should be swept away, for the reasons given by the Board. But for reasons that we shall explain, this should not be restricted to post-nuptial agreements. If parties who have made such an agreement, whether ante-nuptial or post-nuptial, then decide to live apart, we can see no reason why they should not be entitled to enforce their agreement. This right will, however, prove nugatory if one or other objects to the terms of the agreement, for this is likely to result in the party who objects initiating proceedings for divorce or judicial separation and, arguing in ancillary relief proceedings that he or she should not be held to the terms of the agreement.

53. We now turn to explain why we would not draw the distinction drawn by the Board between ante- and post-nuptial agreements. The Board advances two reasons for this, one specific the other general. The specific reason is that section 35 of the 1973 Act applies to post-nuptial but not to ante-nuptial settlements and it would be unfair to render the latter enforceable if they could not be varied (para 35). The general reason is that post-nuptial agreements are very different from ante-nuptial agreements. We shall deal with each in turn.

The specific reason

54. Our first reservation in relation to this reason is that we question whether the Board was right to hold that sections 34 and 35 apply to all post-nuptial agreements rather than just to separation agreements. We consider that the original provisions in the Maintenance Agreements Act 1957 applied only to separation agreements. The preamble to the Act and the statement in section 1(1) that the section applies to any agreement between the parties to a marriage *for the purpose of their living separately* so indicate. Furthermore post-nuptial agreements of couples living together that provided for the contingency of future separation were void, so Parliament cannot have intended the Act to apply to them.

55. When the provisions of the 1957 Act were incorporated into the 1973 Act, they did not include the preamble or the words that we have emphasised above. But it remained the case that post-nuptial agreements that made provision for the contingency of separation were considered to be contrary to public policy. For this reason we find it hard to accept that Parliament intended to extend the ambit of the relevant provisions.

56. More fundamentally, we do not accept that the protection of section 35 must be a precondition to holding that a nuptial agreement takes effect as a contract. If Wilson LJ is right to say that section 35 is a dead letter, the theoretical scope of its protection cannot be critical to the question of whether nuptial agreements have contractual effect.

The general reason

57. Is there a material distinction between ante-nuptial and post-nuptial agreements? Wilson LJ was not persuaded that there is (paras 125-126) and nor are we. The question should be tested by comparing an agreement concluded the day before the wedding with one concluded the day after it. Nuptial agreements made just after the wedding are not unknown and likely to become more common if the law distinguishes them from ante-nuptial agreements.

58. In *MacLeod* the Board made the following comments about the differences between ante- and post-nuptial agreements:

> "There is an enormous difference in principle and in practice between an agreement providing for a present state of affairs which has developed between a married couple and an agreement made before the parties have committed themselves to the rights and responsibilities of the married state purporting to govern what may happen in an uncertain and unhoped for future." (para 31)

59. This is true, but does not apply fully to a post-nuptial agreement entered into at the start of married life, for that also purports to govern what may happen in an uncertain and unhoped for future.

> "Post-nuptial agreements, however, are very different from pre-nuptial agreements. The couple are now married. They have undertaken towards one another the obligations and responsibilities of the married state. A pre-nuptial agreement is no longer the price which one party may extract for his or her willingness to marry." (para 36)

60. As to the last sentence, this focuses on one possible type of duress. But duress can be applied both before and after the marriage. The same principle applies in either case. In either case the duress will lead to the agreement carrying no, or less, weight. As to the first two sentences, we do not see why different principles must apply to an agreement concluded in anticipation of the married state and one concluded after entry into the married state.

61. This is not to say that there are no circumstances where it is right to distinguish between an ante-nuptial and a post-nuptial agreement. The circumstances surrounding the agreement may be very different dependent on the stage of the couple's life together at which it is concluded, but it is not right to

proceed on the premise that there will always be a significant difference between an ante- and a post-nuptial agreement. Some couples do not get married until they have lived together and had children.

Does contractual status matter?

62. Is it important whether or not post-nuptial or ante-nuptial agreements have contractual status? The value of a contract is that the court will enforce it. But in ancillary relief proceedings the court is not bound to give effect to nuptial agreements, and is bound to have regard to them, whether or not they are contracts. Should they be given greater weight because in some other context they would be enforceable? Or is the question of whether or not they are contracts an irrelevance? This can be tested in this way. Did the identification of the fact that there were no public policy reasons not to treat post-nuptial agreements as contracts alter the weight that the Board attached to them in *MacLeod*? The Board did not say that they had to be given more weight as a result of sweeping away the public policy objections to them. Those objections had long ceased to be relevant and had not inhibited courts from giving some and, in some circumstances, decisive weight to ante-nuptial agreements. The circumstances surrounding the conclusion of a contract will either result in the contract being of full effect, or of no effect at all. The courts have always adopted a more nuanced approach to ante- and post-nuptial agreements. We cannot see why it mattered whether or not the agreement in *MacLeod* was a contract.

63. In summary, we consider that the Board in *MacLeod* was wrong to hold that post-nuptial agreements were contracts but that ante-nuptial agreements were not. That question did not arise for decision in that case any more than in this and does not matter anyway. It is a red herring. Regardless of whether one or both are contracts, the ancillary relief court should apply the same principles when considering ante-nuptial agreements as it applies to post-nuptial agreements.

The Board's approach to post-nuptial agreements

64. What was the approach that the Board held in *MacLeod* should be applied to post-nuptial agreements? The Board held that the court should adopt the same approach as that laid down by Parliament for varying maintenance agreements in section 35 of the 1973 Act, "looking for a change in the circumstances in the light of which the financial arrangements were made, the sort of change which would make those arrangements manifestly unjust" (para 41). The Board also endorsed the "oft-cited passage" from the judgment of Ormrod LJ in *Edgar,* which we have cited at para 38 above.

65. These tests are appropriate for a separation agreement. They are not necessarily appropriate for all post-nuptial agreements. A separation agreement is designed to take effect immediately and to address the circumstances prevailing at the time that it is made, as well, of course, as those contemplated in the future. It will have regard to any children of the family, to the assets of husband and wife, to their incomes and to their pension rights. Thus it makes sense to look for a significant change of circumstances as the criterion justifying a departure from the agreement. The same will be true to a lesser extent where a post-nuptial agreement is made well on in a marriage, as in *NA v MA* and *MacLeod* itself, or at the start of a marriage if one or both parties bring significant property to it. But where a young couple enter into an agreement just after embarking on married life, owning no property of value, there will be no relevant circumstances prevailing at the time of their agreement. In that event change of circumstances will not be such a useful test. The circumstances will almost inevitably have changed by the time the marriage founders and the effect to be given to the post-nuptial agreement will depend on wider considerations.

66. *MacLeod* has done a valuable service in sweeping away the archaic notions of public policy which have tended to obfuscate the approach to nuptial agreements. But for the reasons that we have given we have not found that it assists in approaching the problem at the heart of this appeal for we have been able to accept neither its thesis that ante-nuptial agreements are fundamentally different from post-nuptial agreements nor, without reservation, its approach to post-nuptial settlements.

The issues raised

67. The issues raised on the facts of this case can be placed under three heads:

a. Were there circumstances attending the making of the agreement that detract from the weight that should be accorded to it?

b. Were there circumstances attending the making of the agreement that enhance the weight that should be accorded to it; the foreign element?

c. Did the circumstances prevailing when the court's order was made make it fair or just to depart from the agreement?

We shall have to consider these questions in the context of the facts of this case, but at this stage we propose to address the issues of principle that they raise.

Factors detracting from the weight to be accorded to the agreement

68. If an ante-nuptial agreement, or indeed a post-nuptial agreement, is to carry full weight, both the husband and wife must enter into it of their own free will, without undue influence or pressure, and informed of its implications. The third and fifth of the six safeguards proposed in the consultation document (see para 5 above) were designed to ensure this. Baron J applied these safeguards, found that they were not satisfied, and accorded the agreement reduced weight for this reason. The Court of Appeal did not consider that the circumstances in which the agreement was reached diminished the weight to be attached to it. In so far as the safeguards were not strictly satisfied, this was not material on the particular facts of this case.

69. The safeguards in the consultation document are designed to apply regardless of the circumstances of the particular case, in order to ensure, inter alia, that in all cases ante-nuptial contracts will not be binding unless they are freely concluded and properly informed. It is necessary to have black and white rules of this kind if agreements are otherwise to be binding. There is no need for them, however, in the current state of the law. The safeguards in the consultation document are likely to be highly relevant, but we consider that the Court of Appeal was correct in principle to ask whether there was any *material* lack of disclosure, information or advice. Sound legal advice is obviously desirable, for this will ensure that a party understands the implications of the agreement, and full disclosure of any assets owned by the other party may be necessary to ensure this. But if it is clear that a party is fully aware of the implications of an ante-nuptial agreement and indifferent to detailed particulars of the other party's assets, there is no need to accord the agreement reduced weight because he or she is unaware of those particulars. What is important is that each party should have all the information that is material to his or her decision, and that each party should intend that the agreement should govern the financial consequences of the marriage coming to an end.

70. It is, of course, important that each party should intend that the agreement should be effective. In the past it may not have been right to infer from the fact of the conclusion of the agreement that the parties intended it to take effect, for they may have been advised that such agreements were void under English law and likely to carry little or no weight. That will no longer be the case. As we have shown the courts have recently been according weight, sometimes even decisive weight, to ante-nuptial agreements and this judgment will confirm that they are right to do so. Thus in future it will be natural to infer that parties who enter into an ante-nuptial agreement to which English law is likely to be applied intend that effect should be given to it.

71. In relation to the circumstances attending the making of the nuptial agreement, this comment of Ormrod LJ in *Edgar v Edgar* at p 1417, although made about a separation agreement, is pertinent:

> "It is not necessary in this connection to think in formal legal terms, such as misrepresentation or estoppel; *all* the circumstances as they affect each of two human beings must be considered in the complex relationship of marriage."

The first question will be whether any of the standard vitiating factors: duress, fraud or misrepresentation, is present. Even if the agreement does not have contractual force, those factors will negate any effect the agreement might otherwise have. But unconscionable conduct such as undue pressure (falling short of duress) will also be likely to eliminate the weight to be attached to the agreement, and other unworthy conduct, such as exploitation of a dominant position to secure an unfair advantage, would reduce or eliminate it.

72. The court may take into account a party's emotional state, and what pressures he or she was under to agree. But that again cannot be considered in isolation from what would have happened had he or she not been under those pressures. The circumstances of the parties at the time of the agreement will be relevant. Those will include such matters as their age and maturity, whether either or both had been married or been in long-term relationships before. For such couples their experience of previous relationships may explain the terms of the agreement, and may also show what they foresaw when they entered into the agreement. What may not be easily foreseeable for less mature couples may well be in contemplation of more mature couples. Another important factor may be whether the marriage would have gone ahead without an agreement, or without the terms which had been agreed. This may cut either way.

73. If the terms of the agreement are unfair from the start, this will reduce its weight, although this question will be subsumed in practice in the question of whether the agreement operates unfairly having regard to the circumstances prevailing at the time of the breakdown of the marriage.

Factors enhancing the weight to be accorded to the agreement; the foreign element

74. The issue raised under this heading is whether the foreign elements of a case can enhance the weight to be given to an ante-nuptial agreement. In this case the husband was French and the wife German and the agreement had a German

law clause. We have already explained why we do not consider it material in English ancillary relief proceedings whether the nuptial agreement under consideration is or is not a contract. The court can overrule the agreement of the parties, whether contractual or not, and applies the same criteria when considering whether to do so. When dealing with agreements concluded in the past, and the agreement in this case was concluded in 1998, foreign elements such as those in this case may bear on the important question of whether or not the parties intended their agreement to be effective. In the case of agreements made in recent times and, *a fortiori*, any agreement made after this judgment, the question of whether the parties intended their agreement to take effect is unlikely to be in issue, so foreign law will not need to be considered in relation to that question.

Fairness

75. *White v White* and *Miller v Miller* establish that the overriding criterion to be applied in ancillary relief proceedings is that of fairness and identify the three strands of need, compensation and sharing that are relevant to the question of what is fair. If an ante-nuptial agreement deals with those matters in a way that the court might adopt absent such an agreement, there is no problem about giving effect to the agreement. The problem arises where the agreement makes provisions that conflict with what the court would otherwise consider to be the requirements of fairness. The fact of the agreement is capable of altering what is fair. It is an important factor to be weighed in the balance. We would advance the following proposition, to be applied in the case of both ante- and post-nuptial agreements, in preference to that suggested by the Board in *MacLeod:*

> **"The court should give effect to a nuptial agreement that is freely entered into by each party with a full appreciation of its implications unless in the circumstances prevailing it would not be fair to hold the parties to their agreement.**"

76. That leaves outstanding the difficult question of the circumstances in which it will not be fair to hold the parties to their agreement. This will necessarily depend upon the facts of the particular case, and it would not be desirable to lay down rules that would fetter the flexibility that the court requires to reach a fair result. There is, however, some guidance that we believe that it is safe to give directed to the situation where there are no tainting circumstances attending the conclusion of the agreement.

Children of the family

77. Section 25 of the 1973 Act provides that first consideration must be given to the welfare while a minor of any child of the family who is under 18. A nuptial agreement cannot be allowed to prejudice the reasonable requirements of any children of the family.

Autonomy

78. The reason why the court should give weight to a nuptial agreement is that there should be respect for individual autonomy. The court should accord respect to the decision of a married couple as to the manner in which their financial affairs should be regulated. It would be paternalistic and patronising to override their agreement simply on the basis that the court knows best. This is particularly true where the parties' agreement addresses existing circumstances and not merely the contingencies of an uncertain future.

Non-matrimonial property

79. Often parties to a marriage will be motivated in concluding a nuptial agreement by a wish to make provision for existing property owned by one or other, or property that one or other anticipates receiving from a third party. The House of Lords in *White v White* and *Miller v Miller* drew a distinction between such property and matrimonial property accumulated in the course of the marriage. That distinction is particularly significant where the parties make express agreement as to the disposal of such property in the event of the termination of the marriage. There is nothing inherently unfair in such an agreement and there may be good objective justification for it, such as obligations towards existing family members. As Rix LJ put it at para 73

> "…if the parties to a prospective marriage have something important to agree with one another, then it is often much better, and more honest, for that agreement to be made at the outset, before the marriage, rather than left to become a source of disappointment or acrimony within marriage."

Future circumstances

80. Where the ante-nuptial agreement attempts to address the contingencies, unknown and often unforeseen, of the couple's future relationship there is more

scope for what happens to them over the years to make it unfair to hold them to their agreement. The circumstances of the parties often change over time in ways or to an extent which either cannot be or simply was not envisaged. The longer the marriage has lasted, the more likely it is that this will be the case. Once again we quote from the judgment of Rix LJ at para 73.

> "I have in mind (and in this respect there is no real difference between an agreement made just before or just after a marriage) that a pre-nuptial agreement is intended to look forward over the whole period of a marriage to the possibility of its ultimate failure and divorce: and thus it is potentially a longer lasting agreement than almost any other (apart from a lease, and those are becoming shorter and subject to optional break clauses). Over the potential many decades of a marriage it is impossible to cater for the myriad different circumstances which may await its parties. Thorpe LJ has mentioned the very relevant case of a second marriage between mature adults perhaps each with children of their own by their first marriages. However, equally or more typical will be the marriage of young persons, perhaps not yet adults, for whom the future is an entirely open book. If in such a case a pre-nuptial agreement should provide for no recovery by each spouse from the other in the event of divorce, and the marriage should see the formation of a fortune which each spouse had played an equal role in their different ways in creating, but the fortune was in the hands for the most part of one spouse rather than the other, would it be right to give the same weight to their early agreement as in another perhaps very different example?"

The answer to this question is, in the individual case, likely to be 'no'.

81. Of the three strands identified in *White v White* and *Miller v Miller*, it is the first two, needs and compensation, which can most readily render it unfair to hold the parties to an ante-nuptial agreement. The parties are unlikely to have intended that their ante-nuptial agreement should result, in the event of the marriage breaking up, in one partner being left in a predicament of real need, while the other enjoys a sufficiency or more, and such a result is likely to render it unfair to hold the parties to their agreement. Equally if the devotion of one partner to looking after the family and the home has left the other free to accumulate wealth, it is likely to be unfair to hold the parties to an agreement that entitles the latter to retain all that he or she has earned.

82. Where, however, these considerations do not apply and each party is in a position to meet his or her needs, fairness may well not require a departure from

their agreement as to the regulation of their financial affairs in the circumstances that have come to pass. Thus it is in relation to the third strand, sharing, that the court will be most likely to make an order in the terms of the nuptial agreement in place of the order that it would otherwise have made.

83. So far as concerns the general approach of the court to ante-nuptial agreements, Wilson LJ at para 130 endorsed the following comments of Baron J at first instance

> "111. I am certain that English courts are now much more ready to attribute the appropriate (and, in the right case, decisive) weight to an agreement as part of 'all the circumstances of case' [within the meaning of section 25(1) of the Act of 1973] …
>
> 119. Upon divorce, when a party is seeking *quantification* of a claim for financial relief, it is the court that determines the result after applying the Act. The court grants the award and formulates the order with the parties' agreement being but one factor in the process and perhaps, in the right case, it being the most compelling factor …"

We also would endorse these comments.

84. We now turn to apply these principles to the facts of this case.

The background to the signing of the agreement

85. At the time the parties met in November 1997 they were both living in London. The wife comes from a very rich German family, whose wealth is derived primarily from two very successful businesses in chromatography, filtration and the processing/refinement of paper, and the manufacture of paper. The husband comes from a family which is well-off, his father having been a senior executive with IBM, at one time in charge of its European operations. He now resides in London for tax reasons, but retains property in Antibes. When the couple met the husband had been working in London for about 2 years with JP Morgan & Co, and was earning about £50,000, which was a substantial sum at that date, particularly given his age, and which had increased to about £120,000 by the time the ante-nuptial agreement was executed. They became engaged in June 1998 and were married in November 1998. They made London their home.

86. It was the wife who suggested that the parties should enter into an ante-nuptial agreement. Although the judge was sure that the wife wanted her husband to love her for herself, the wife emphasised her father's insistence, because she felt it made her seem less insensitive to her future spouse, given that the terms excluded all his potential rights (even in times of crisis). The wife did not make it obvious that she personally demanded it as a precondition of marriage. The judge found that the husband was eager to comply because he did not want the wife to be disinherited, he wanted to marry her, and he could not perceive of circumstances where he would wish to make a claim.

87. The wife's family decided that this agreement would be drawn up in Germany by a notary, Dr N Magis, who had undertaken other work for the family. The instructions to Dr Magis came originally from the wife's mother on 6 July, 1998, who told him that the marriage was to be in London in the autumn and that neither of the parties wished to make any claim on the other in the event of divorce. Dr Magis pointed out that such a deal might leave a young mother with children in difficulty but he was informed that the daughter's income was some DM500,000 a year plus other monies managed by their father and so despite the future son-in-law's excellent income "even in the worse case scenario there would be no risk to their daughter". On the same day, 6 July, 1998, Dr Magis spoke by telephone to the wife. She confirmed the facts given by her mother. It was agreed that the draft was to be prepared as quickly as possible in order to give the husband "an opportunity to prepare for the conclusion of the contract" which was to be signed on the first weekend of August. Dr Magis was insistent that the husband had sufficient time so that he could take advice if he wished and fully understand the implications of what he was signing.

88. On 17 July, 1998 Dr Magis sent by fax to the wife a draft of the agreement, under cover of a letter in which he wrote: "You wanted to discuss the content of the agreement with your future spouse and have it translated into a language convenient for him". In the draft, which was in German, there was a clause for the parties to insert the approximate value of their respective assets; but the wife telephoned Dr Magis that day and said that the clause should be deleted and that she and the husband would separately notify each other of the value of their assets.

89. A second draft was produced by 20 July, 1998 and it was sent to the wife's father. On 23 July, 1998 the wife telephoned Dr Magis and told him that she had discussed the draft with her father and he wanted additions in relation to company shares – specifically that the husband should not be able to inherit them directly or "circuitously via their children". It was agreed that this would be dealt with by the wife's drawing up a will. A final draft version was made available to the wife in London at about this date.

90. The judge found that it was highly unlikely that the wife showed the husband the first draft, or that she informed him about her mother's or father's involvement in the drawing up the terms of the agreement. But the judge rejected the husband's evidence that he did not see the draft at all. The judge found that the wife showed him the final draft which was available on about 24 July, 1998, about one week before the signing ceremony. The basic terms were made clear to the husband, but the husband was not made aware that Dr Magis wanted him to have a translation to give him a proper opportunity to consider the precise terms and see a lawyer.

91. On 1 August, 1998 the parties attended at the office of Dr Magis near Düsseldorf. Their meeting with him lasted for between two and three hours. The husband told Dr Magis that he had seen the draft agreement but that he did not have a translation of it. Dr Magis was angry when he learned of the absence of a translation, which he considered to be important for the purpose of ensuring that the husband had had a proper opportunity to consider its terms. Dr Magis indicated that he was minded to postpone its execution but, when told that the parties were unlikely again to be in Germany prior to the marriage, he was persuaded to continue. Dr Magis, speaking English, then took the parties through the terms of the agreement in detail and explained them clearly; but he did not offer a verbatim translation of every line. The parties executed the agreement (which bears the date of 4 August, 1998) in his presence.

92. Not only did the husband not take advantage of Dr Magis' wish to postpone execution so that he could take independent legal advice, but in the 4 months or so following the execution of the agreement at the beginning of August 1998 until the marriage in London on 28 November, 1998, the husband did not take the opportunity to seek independent advice.

Events leading up to the breakdown of the marriage

93. The parties lived together in London for more than a year after the marriage. In April 2000 the husband was posted to New York by his employers, J P Morgan. The family moved there, but the wife did not find life in America congenial. So she returned to London in May 2001. The husband was transferred back to London in October of that year. Their older daughter (now 11) was born here in September 1999 before they left and their younger daughter (now 8) in May 2002 after their return. In July 2003 he left his employers and embarked on his research studies at Oxford. Both parties "accepted that [he] was miserable and discontented [and] a change of tack was inevitable". He embarked upon research for a doctorate in biotechnology at Oxford University, thinking that a "combination of scientific knowledge and his banking experience would put him in a good position to capitalise upon and exploit his financial expertise in future

years" (Baron J, paras 50 and 51). During the first five years of the marriage, while he was working for J P Morgan, the husband generated a very substantial amount of income. He had amassed about $500,000 of capital out of his earnings, but during the next two years he expended it for the benefit of the family. Meantime the wife's father had transferred to her a substantial amount of capital, which raised her shareholding in the two groups of companies to their present level. He also paid her a substantial sum in return for her surrender of any entitlement under German law to a portion of his estate on her death.

94. The husband's work at Oxford led him to spend many nights away from home. By this time the marriage was already in difficulties. By August 2006 separation had become inevitable and the wife moved with the children from the matrimonial home, a rented flat in Knightsbridge where the husband still lives into another rented flat in Knightsbridge. From then on there was no way back, and proceedings for divorce followed soon afterwards. Wilson LJ's assessment was that throughout the marriage the family's standard of living had been extremely comfortable, albeit tempered by the wife's aversion to profligacy: para 117.

95. It was originally the husband's intention to return to the financial sector once he had obtained his doctorate, but he no longer wishes to do so and Baron J held that this course would not be open to him in any event.

The foreign element and the agreement

96. The wife was German, and the husband was French. The agreement was drafted by a German lawyer under German law. They were then living in London and London was plainly intended to be their first matrimonial home.

97. The agreement stated (in recital 2) that (a) the husband was a French citizen and, according to his own statement, did not have a good command of German, although he did, according to his own statement and in the opinion of the officiating notary (Dr Magis), have an adequate command of English; (b) the document was therefore read out by the notary in German and then translated by him into English; (c) the parties to the agreement declared that they wished to waive the use of an interpreter or a second notary as well as a written translation; and (d) a draft of the text of the agreement had been submitted to the parties two weeks before the execution of the document.

98. Clause 1 stated the intention of the parties to get married in London and to establish their first matrimonial residence there. By clause 2 the parties agreed that the effects of their marriage in general, as well as in terms of matrimonial property

and the law of succession, would be governed by German law. Clause 3 provided for separation of property, and the parties stated: "Despite advice from the notary, we waive the possibility of having a schedule of our respective current assets appended to this deed."

99. Clause 5 provided for the mutual waiver of claims for maintenance of any kind whatsoever following divorce:

> "The waiver shall apply to the fullest extent permitted by law even should one of us – whether or not for reasons attributable to fault on that person's part – be in serious difficulties.
>
> The notary has given us detailed advice about the right to maintenance between divorced spouses and the consequences of the reciprocal waiver agreed above.
>
> Each of us is aware that there may be significant adverse consequences as a result of the above waiver.
>
> Despite reference by the notary to the existing case law in respect of the total or partial invalidity of broadly worded maintenance waivers in certain cases, particularly insofar as such waivers have detrimental effects for the raising of children and/or the public treasury, we ask that the waiver be recorded in the above form …
>
> Each of us declares that he or she is able, based on his or her current standpoint, to provide for his or her own maintenance on a permanent basis, but is however aware that changes may occur."

100. Clause 7(2) recorded that Dr Magis had pointed out to the parties that, despite the choice of German law, foreign law might, from the standpoint of foreign legal systems, apply to the legal relationships between the parties, in particular in accordance with the local law of the matrimonial residence, the law of the place and/or nationality of the husband, with nationality and the place where assets were located being especially relevant to inheritance. The agreement said: "The notary has pointed out that he has not provided any binding information about the content of foreign law, but has recommended that we obtain advice from a lawyer or notary practising in the respective legal system." By letter to the parties dated 3 August, 1998 Dr Magis again stressed that, before taking up permanent residence abroad, they should take the advice of a local lawyer in relation to the effect of the agreement there.

101. The unchallenged evidence before the judge was that: (a) the agreement was valid under German law; (b) the choice of German law was valid; (c) there was no duty of disclosure under German law; (d) the agreement would be recognised as valid under French conflict of laws rules.

102. The terms of the agreement recite that the parties intend to establish their first matrimonial residence in London and it confirms by clause 7(2) that the law of their matrimonial residence may come to apply to their legal relationship as spouses. It was therefore inherent in the agreement that another system of law might apply its terms and so it could never be regarded as foolproof.

Applicable law

103. In England, when the court exercises its jurisdiction to make an order for financial relief under the Matrimonial Causes Act 1973, it will normally apply English law, irrespective of the domicile of the parties, or any foreign connection: *Dicey, Morris and Collins, Conflict of Laws*, vol 2, 14th ed 2006, Rule 91(7), and e.g. *C v C (Ancillary Relief: Nuptial Settlement)* [2004] EWCA Civ 1030, [2005] Fam 250, at para 31.

104. The United Kingdom has made a policy decision not to participate in the results of the work done by the European Community and the Hague Conference on Private International Law to apply uniform rules of private international law in relation to maintenance obligations. Although the United Kingdom Government has opted in to Council Regulation (EC) No 4/2009 of 18 December, 2008 on jurisdiction, applicable law and enforcement of decisions and cooperation in matters relating to maintenance obligations, the rules relating to applicable law will not apply in the United Kingdom. That is because the effect of Article 15 of the Council Regulation is that the law applicable to maintenance obligations is to be determined in accordance with the 2007 Hague Protocol on the law applicable to maintenance obligations, but only in the Member States bound by the Hague Protocol.

105. The United Kingdom will not be bound by the Hague Protocol, because it agreed to participate in the Council Regulation only on the basis that it would not be obliged to join in accession to the Hague Protocol by the EU. The United Kingdom Government's position was that there was very little application of foreign law in family matters within the United Kingdom, and in maintenance cases in particular the expense of proving the content of that law would be disproportionate to the low value of the vast majority of maintenance claims.

106. For the purposes of the present appeal it is worth noting that the Hague Protocol allows the parties to designate the law applicable to a maintenance obligation, but also provides that, unless at the time of the designation the parties were fully informed and aware of the consequences of their designation, the law designated by the parties shall not apply where the application of that law would lead to manifestly unfair or unreasonable consequences for any of the parties (Article 8(1), (5)).

107. The ante-nuptial agreement had provision for separation of property and exclusion of community of property of accrued gains (clause 3), in relation to which the chosen law would have governed: *Dicey, Morris and Collins*, vol 2, para 28-020. But although the economic effect of *Miller/Macfarlane* may have much in common with community of property, it is clear that the exercise under the 1973 Act does not relate to a matrimonial property regime: *cf* Case C-220/95 *Van den Boogaard v Laumen* (Case C-220/95) [1997] ECR I-1147, [1997] QB 759; *Agbaje v Agbaje* [2010] UKSC 13, [2010] 2 WLR 709, para 57.

108. In summary, the issues in this case are governed exclusively by English law. The relevance of German law and the German choice of law clause is that they clearly demonstrate the intention of the parties that the ante-nuptial agreement should, if possible, be binding on them (see para 74 above).

The decision of the trial judge

109. Baron J held that the ante-nuptial agreement was not a valid contract under English law: paras 129, 132. Nevertheless she said that in assessing the husband's needs she would take account of all the circumstances of the case and that his award should be circumscribed to a degree to reflect the fact that at the outset he agreed to sign the agreement. As she explained in para 139:

> "… he understood the underlying premise that he was not entitled to anything if the parties divorced. In essence, he accepted that he was expected to be self-sufficient. As a man of the world that was abundantly clear. His decision to enter into the agreement must therefore affect the award."

110. Baron J found that the ante-nuptial agreement fell foul of a number of the safeguards set out in para 4.23 of the Home Office consultation document and was, prima facie, unfair: para 38. She said that its preparation was very one-sided and therefore was demonstrably not neutral: para 76(d). She held that it was defective under English law because the husband received no independent advice; that it

deprived him of all claims to the furthest permissible legal extent even in a situation of want, which was manifestly unfair; that there was no disclosure by the wife; that there were no negotiations; and that two children had been born of the marriage: para 137. It was with these factors in mind that she conducted her assessment.

111. In the result the judge awarded the husband £700,000 to put towards his then debts of £800,000 and £25,000 to buy a car; £2.5m to buy a home of his own in London; €630,000 to buy a home in Germany (to remain owned by the wife or an entity set up by her) for the purpose of caring for his children in accordance with a shared residence order during his periods of residence with them (for 15 years); and £2.335m as a capitalised revenue *Duxbury* fund to provide the husband with a total annual income for life of £100,000, taking into account an annual gross taxable earning capacity of £30,000 until retirement at age 65. Thus the husband's award amounted in total to £5.560m (excluding the award of €630,000 for housing in Germany). She also awarded him periodical payments of £35,000 for each child until they ceased full time education. No indication is given in the judgment of the extent of the discount, if any, that she made to take account of the terms of the ante-nuptial agreement.

The decision of the Court of Appeal

112. The wife sought and was granted permission to appeal against this order to the Court of Appeal. On 2 July 2009 the Court of Appeal (Thorpe, Rix and Wilson LJJ) set aside the order of Baron J: [2009] EWCA Civ 649. Thorpe LJ said that, despite the appearance of the ante-nuptial contract as a factor, the impression given by the judge's award was of a negligible resulting discount: para 43. He held that, in order to give proper weight to the ante-nuptial contract, the sum of £2.5m for housing should not be the husband's absolutely but should be held by him only for the years of parenting. The income fund should be capitalised at a rate to cover his needs only until the younger child's 22nd birthday. Thus, while he would not interfere with the awards for the car, for the payment of the husband's debts, for housing in Germany and the periodical payments for the children, the major funds should be provided for his role as a father rather than as a former husband: para 50. Wilson LJ, who delivered the leading judgment on the facts, said that the judge's application of the law to the facts was plainly wrong. She erred in the exercise which she conducted under section 25 of the Matrimonial Causes Act 1973 in not giving decisive weight to the ante-nuptial contract. The result was that relief should have been granted to the husband only indirectly, in his capacity as a home-maker for the girls: paras 135, 149. Rix LJ, agreeing with both judgments, also said that the ante-nuptial contract should be given decisive weight in the section 25 exercise: para 81.

113. The husband cross-appealed on the sum awarded for housing in Germany based on fresh evidence. His appeal on that matter was allowed and it was remitted to the judge to determine the appropriate figure in the fresh circumstances. Wilson LJ noted that the wife had conceded that, notwithstanding her success in the appeal and thus of her submission that the husband's claim should be limited to that of a home-maker for the girls, it was appropriate for her to be ordered to meet the costs of the financial proceedings up to July 2008 when Baron J delivered her judgment and to clear the husband's other debts: para 152. Nevertheless the costs of the appeal were awarded to the wife. She was ordered to pay the costs of the cross-appeal.

Discussion

The circumstances in which the ante-nuptial agreement was made

114. The Court of Appeal differed from the finding of the trial judge that the ante-nuptial agreement was tainted by the circumstances in which it was made. Wilson LJ, with whom the other two members of the court agree, dealt with these matters in detail. The judge had found that the husband had lacked independent legal advice. Wilson LJ held that he had well understood the effect of the agreement, had had the opportunity to take independent advice, but had failed to do so. In these circumstances he could not pray in aid the fact that he had not taken independent legal advice.

115. The judge held that the wife had failed to disclose the approximate value of her assets. Wilson LJ observed that the husband knew that the wife had substantial wealth and had shown no interest in ascertaining its approximate extent. More significantly, he had made no suggestion that this would have had any effect on his readiness to enter into the agreement.

116. The judge held that the absence of negotiations was a third vitiating factor. Wilson LJ observed that the judge had given no explanation as to why this was a vitiating factor, and that the absence of negotiations merely reflected the fact that the background of the parties rendered the entry into such an agreement commonplace.

117. We agree with the Court of Appeal that the judge was wrong to find that the ante-nuptial agreement had been tainted in these ways. We also agree that it is not apparent that the judge made any significant reduction in her award to reflect the fact of the agreement. In these circumstances, the Court of Appeal was entitled to

replace her award with its own assessment, and the issue for this court is whether the Court of Appeal erred in principle.

Need

118. Baron J had held that the ante-nuptial agreement was "manifestly unfair" in that it made no provision for the possibility that the husband might be reduced to circumstances of real need. Wilson LJ at para 144 appears to have thought that there was nothing unfair about this and, inferentially, that had the husband been in a situation of real need the agreement would none the less have been good reason for the court to decline to alleviate this by an order of ancillary relief. We would not go so far as this.

119. We stated at para 73 above that the question of the fairness of the agreement can often be subsumed in the question of whether it would operate unfairly in the circumstances prevailing at the breakdown of the marriage, and this is such a case. Had the husband been incapacitated in the course of the marriage, so that he was incapable of earning his living, this might well have justified, in the interests of fairness, not holding him to the full rigours of the ante-nuptial agreement. But this was far from the case. On the evidence he is extremely able, and has added to his qualifications by pursuing a D Phil in biotechnology. Furthermore the generous relief given to cater for the needs of the two daughters will indirectly provide in large measure for the needs of the husband, until the younger daughter reaches the age of 22. Finally the Court of Appeal did not upset the judge's order that the wife should fund the discharge of debts of £700,000 owed by the husband, only a small part of which she had challenged.

120. In these circumstances we consider that the Court of Appeal was correct to conclude that the needs of the husband were not a factor that rendered it unfair to hold him to the terms of the ante-nuptial agreement, subject to making provision for the needs of the children of the family.

Compensation

121. There is no compensation factor in this case. The husband's decision to abandon his lucrative career in the city for the fields of academia was not motivated by the demands of his family, but reflected his own preference.

Sharing

122. This dispute raises the question of whether, as a result of his marriage, the husband should be entitled to a portion of the wealth that his wife has received from her family, in part before the marriage and in part during, but quite independently of it. When he married her he agreed that he should have no such entitlement.

123. Our conclusion is that in the circumstances of this case it is fair that he should be held to that agreement and that it would be unfair to depart from it. We detect no error of principle on the part of the Court of Appeal. For these reasons we would dismiss this appeal.

LORD MANCE

124. I concur with the conclusion reached by the majority and with most of the majority's reasoning. I address only three specific areas: (i) whether ante- and post-nuptial agreements have contractual force; (ii) the starting point when considering the weight such agreements bear; and (iii) the Court of Appeal's exercise of its discretion.

125. *(i) Do ante- and post-nuptial agreements have contractual force?* In the old cases, the public policy objections, seen as existing to both ante- and post-nuptial agreements, were based on "the policy of the law, founded upon the relation which exists between the husband and wife, and the importance to society of maintaining that relation between them": *Cartwright v Cartwright* (1853) de G, M & G 982 p.990; and see *H v W* (1857) 3 K & J 382, where a provision in an ante-nuptial settlement, whereby income would be paid to the husband instead of the wife if the wife lived separately from him "through any fault of her own" was held void, because it might induce the husband to consent to her living apart and to "refuse to take steps to enforce the restitution of conjugal rights": p.386. The reasoning in these cases is, as Lady Hale observed in *MacLeod v MacLeod* [2010] 1 AC 298, in legal terms obsolete.

126. The objections thus swept away are not however the only objections which would exist to any regime which made ante- or post-nuptial agreements binding *tout court*. Parties who make such agreements are not necessarily on an equal standing, above all emotionally. They may not have a full appreciation of such an agreement's significance and likely impact. Above all, they may well not foresee, or cater adequately for, the way in which not only their relationship but their whole

lives and individual circumstances may change, especially over time and very often as a direct or indirect result of their marriage.

127. In a context, like the present, where the English courts have jurisdiction and grant a decree of divorce or nullity, the further objections identified in the preceding paragraph are catered for by Part II of the Matrimonial Causes Act 1973. Hence, the majority's description in para 63 of the legal effect of any ante- or post-nuptial agreement as a "red herring" in this case. The principle established in *Hyman v Hyman* [1929] AC 601, precluding the ousting of the court's statutory jurisdiction after such a decree, must in my view apply to any such agreement.

128. Like Lady Hale, para 138 (1) and (2) and para 156, I go no further and express no view on the binding or other nature of an ante-nuptial agreement. It is not difficult to envisage circumstances in which, if such an agreement were to be regarded as having contractual force, its enforcement could be sought before a court, particularly an overseas court, lacking the jurisdiction under Part II of the 1973 Act which applies only when the forum is an English divorce court. I also agree in this respect with what Lady Hale says in para 159.

129. *(ii) The starting point*: The majority (para 75) and Lady Hale (para 169) both accept the overriding criterion or guiding principle for exercise of the statutory discretion as being one of fairness. But they suggest differently worded tests for approaching this exercise where there has been an ante-nuptial agreement. I cannot think the difference in wording likely to be important in practice. It appears to relate primarily to the starting point or onus, when feeding into the discretionary exercise the circumstances as they currently appear compared with those that existed or were contemplated at the date of the ante-nuptial agreement. The words "intending it to have legal effect" in Lady Hale's first sentence must, in relation to any future ante-nuptial agreement, be implicit in the majority's formulation "freely entered into by each party with a full appreciation of its implications". If Lady Hale's second sentence had used the word "unfair", rather than "fair", its effect would, as I see it, match precisely that of the second part of the majority's formulation ("unless in the circumstances, etc …."). My own inclination, in agreement with the majority, is that this is how the application of the overriding criterion should be approached. Given an ante-nuptial agreement, made freely and with full appreciation of the circumstances, it is natural in the first instance to ask whether there is anything in the circumstances as they now appear to make it unfair to give effect to the agreement. But the ultimate question remains on any view what is fair, and the starting point or onus is, as I have said, unlikely to matter once all the facts are before the court.

130. *(iii) The Court of Appeal's exercise of discretion*: I agree with the majority that there is no reason to set aside the Court of Appeal's re-exercise of the

statutory discretion, undertaken after concluding that Baron J had erred in principle. Baron J held the husband to be entitled to a house of his own (para 140(a)). The Court of Appeal limited this aspect of the award - confining his entitlement to the period, generously assessed, during which he could be expected to provide a home for the children, and concluding that he had no further needs requiring him to retain such a house outright or for a longer period. Viewing the position overall, I do not see that we would be justified in concluding that the husband has or is likely after that period to have needs generated as a result of parenthood which will not be covered by the Court of Appeal's order or his own resources. It follows that I agree with Rix LJ's conclusion (para 81) that: "The provision of a home for the husband and for his needs as a father, carer and home-maker for the children will, in the circumstances, more than adequately provide him with the means to support his own needs. There is no case for making that home and financial support his to command for the whole of his life-time."

LADY HALE

131. The issue in this case is simple: what weight should the court hearing a claim for ancillary relief under the Matrimonial Causes Act 1973 give to an agreement entered into between the parties before they got married which purported to determine the result? I propose to call these "ante-nuptial agreements" because our legislation already uses the term "ante-nuptial" to refer to things done before a marriage. I should also point out that, although our judgments talk only of marriage and married couples, our conclusions must also apply to couples who have entered into a civil partnership.

132. The issue may be simple, but underlying it are some profound questions about the nature of marriage in the modern law and the role of the courts in determining it. Marriage is, of course, a contract, in the sense that each party must agree to enter into it and once entered both are bound by its legal consequences. But it is also a status. This means two things. First, the parties are not entirely free to determine all its legal consequences for themselves. They contract into the package which the law of the land lays down. Secondly, their marriage also has legal consequences for other people and for the state. Nowadays there is considerable freedom and flexibility within the marital package but there is an irreducible minimum. This includes a couple's mutual duty to support one another and their children. We have now arrived at a position where the differing roles which either may adopt within the relationship are entitled to equal esteem. The question for us is how far individual couples should be free to re-write that essential feature of the marital relationship as they choose.

133. A further question is how far this question can and should be determined by this Court and how far it should be left to Parliament, preferably with the advice and assistance of the Law Commission. There is not much doubt that the law of marital agreements is in a mess. It is ripe for systematic review and reform. The Commission has a current project to examine the status and enforceability of agreements made between spouses and civil partners (or those contemplating marriage or civil partnership) concerning their property and finances and a consultation paper will be published shortly (see Law Commission, *Annual Report 2009-10*, 2010, Law Com No 323, paras 2.68 to 2.75).

134. This is just the sort of task for which the Law Commission was established by the Law Commissions Act 1965 and in which it has had such success, particularly in the field of family law. The Commission can research and review the law over the whole area, not just the narrow section which is presented by the facts of an individual case. It can consider such research as there is into the use and abuse of marital agreements of all kinds. It can commission research into the experience and attitudes of practitioners and the public. It can identify and discuss the full range of policy arguments, including a detailed examination of the experience of legislative reform in other common law countries (see, for example, I M Ellman, *Marital Agreements and Private Autonomy in the United States*, where initial enthusiasm has been tempered by experience in practice). It can examine critically their economic impact, and in particular whether they can be expected to increase certainty and decrease cost, or whether in fact the reverse may happen, and in any event whether the suggested benefits will outweigh the suggested costs (see, for example, R H George, P G Harris and J Herring, "Pre-Nuptial Agreements: For Better or Worse?" [2009] Fam Law 934). It can develop options for reform across the whole field, upon which it can consult widely. In the light of all this, it can make detailed proposals for legislative reform, which can be put before Parliament.

135. In short, that is the democratic way of achieving comprehensive and principled reform. There is some enthusiasm for reform within the judiciary and the profession, and in the media, and one can well understand why. But that does not mean that it is right. This is a complicated subject upon which there is a large literature and knowledgeable and thoughtful people may legitimately hold differing views. Some may regard freedom of contract as the prevailing principle in all circumstances; others may regard that as a 19th century concept which has since been severely modified, particularly in the case of continuing relationships typically (though not invariably) characterised by imbalance of bargaining power (such as landlord and tenant, employer and employee). Some may regard people who are about to marry as in all respects fully autonomous beings; others may wonder whether people who are typically (although not invariably) in love can be expected to make rational choices in the same way that businessmen can. Some may regard the recognition of these factual differences as patronising or

paternalistic; others may regard them as sensible and realistic. Some may think that to accord a greater legal status to these agreements will produce greater certainty and lesser costs should the couple divorce; others may question whether this will in fact be achieved, save at the price of inflexibility and injustice. Some may believe that giving greater force to marital agreements will encourage more people to marry; others may wonder whether they will encourage more people to divorce. Perhaps above all, some may think it permissible to contract out of the guiding principles of equality and non-discrimination within marriage; others may think this a retrograde step likely only to benefit the strong at the expense of the weak.

136. These difficult issues cannot be resolved in an individual case, in particular a case with such very unusual features as this one. Different people will naturally react to this particular human story in different ways, depending upon their values and experience of life. There may be some, for example, who are astonished that an intelligent young man, who was apparently happy to sign away all claims upon his bride-to-be's considerable fortune, should now be seeking to make any claims upon her at all. There may be others who are astonished that a fabulously wealthy young woman should begrudge what is a very small proportion of her estate to ensure that the father of her children can live in reasonable comfort for the rest of his days.

137. Above all, perhaps, the court hearing a particular case can all too easily lose sight of the fact that, unlike a separation agreement, the object of an ante-nuptial agreement is to deny the economically weaker spouse the provision to which she – it is usually although by no means invariably she – would otherwise be entitled (see, for example, G F Brod, "Premarital Agreements and Gender Justice" (1994) 6 Yale Journal of Law and Feminism 229). This is amply borne out by the precedents available in recent text-books (see, for example, I Harris and R Spicer, *Prenuptial Agreements: A Practical Guide* (2008, Appendix D), or H Wood, D Lush, D Bishop, and A Murray, *Cohabitation: Law, Practice and Precedents* (2009, 4th ed, pp 583 – 592)). Would any self-respecting young woman sign up to an agreement which assumed that she would be the only one who might otherwise have a claim, thus placing no limit on the claims that might be made against her, and then limited her claim to a pre-determined sum for each year of marriage regardless of the circumstances, as if her wifely services were being bought by the year? Yet that is what these precedents do. In short, there is a gender dimension to the issue which some may think ill-suited to decision by a court consisting of eight men and one woman.

138. It is for that reason that I have chosen to write a separate judgment, for although there is much within the majority judgment with which I agree, there are some points upon which I disagree. Specifically:

(1) I disagree with the view, mercifully *obiter* to the decision in this case, that ante-nuptial agreements are legally enforceable contracts.

(2) I disagree with the view, also mercifully *obiter* to the decision in this case, that it is open to this court to hold that they are.

(3) I disagree with the view that, in policy terms, there are no relevant differences between agreements made before and agreements made after a marriage.

(4) I disagree with the way in which the majority have formulated the test to be applied by a court hearing an application for financial relief, which I believe to be an impermissible gloss upon the courts' statutory duties. However, I agree that the court must consider the agreement in the light of the circumstances as they now exist and that the way the matter was put by the Privy Council in *MacLeod v MacLeod* [2008] UKPC 64, [2010] 1 AC 298, was too rigid, and in some cases, too strong; and I broadly agree with the majority upon the relevant considerations which the court should take into account.

(5) I disagree with the approach of the Court of Appeal to the actual outcome of this case, which the majority uphold. In my view it is inconsistent with the continued importance attached to the status of marriage in English law. This is independent of the weight to be attached to the agreement in this case.

(6) I consider that the reform of the law on ante- and post-nuptial agreements should be considered comprehensively, not limited to agreements catering for future separation or divorce.

I understand that Lord Mance shares my misgivings on points (1) and (2) above. He also takes the view that the difference between our formulations of the test, referred to in point (4) above, is unlikely to be important in practice. As the ultimate question is what is fair, the starting point is unlikely to matter once all the facts are before the court. I hope that he is right.

The story so far: the different types of agreement between husband and wife

139. It may be helpful to give a brief account of how the law has got into its current mess (for which I must take some of the blame). The common law

regarded husband and wife as one person, and that person was the husband. He acquired ownership or control over all his wife's property and income, along with liability for her pre-marriage debts. She had no contractual capacity of her own and so of course they could not make contracts with one another. If the wife's family had property, it became common to make a marriage settlement which would preserve property for the wife's separate use. This was for the purposes of avoiding the property getting into her husband's hands, providing some security for the wife, and preserving it for their children or to revert to the wife's family if the couple were childless.

140. Legislation in the 19th century progressively extended the concept of the wife's separate property, so that after the Married Women's Property Act 1882 everything which a woman owned on marriage or acquired thereafter remained or became her separate property. The system of separate property thus established remains the only matrimonial property regime applicable in the law of England and Wales. It also meant that the wife eventually acquired full contractual capacity and so a husband and wife could now make contracts with one another as well as with third parties.

141. Agreements between a husband and a wife fall into three broad categories: (a) those made during their cohabitation, (b) those made upon or during their separation, and (c) those made in connection with current matrimonial proceedings. Of these, separation (type (b)) agreements have the longest history. Unlike modern ante-nuptial agreements, their original purpose was usually to make some sort of provision for the wife rather than to deprive her of it. At common law, the husband did have an obligation to support his wife, but until statute intervened she could only enforce this by pledging his credit for "necessaries". There is no need here to trace the evolution of the statutory remedies but two points are worth noting: first, the obligation to maintain while living apart generally depended upon the husband either having committed a matrimonial offence or having agreed to maintain his wife in a separate household; and secondly, the obligations of husband and wife only became fully mutual with the major reforms which came into force in 1971 and are now largely contained in the Matrimonial Causes Act 1973. Moreover, until then there were many more people who lived apart for a long time without ever taking divorce or other matrimonial proceedings. An enforceable contractual obligation was therefore usually a great advantage for the wife.

142. There is nothing to stop a husband and wife from making legally binding arrangements, whether by contract or settlement, to regulate their property and affairs while they are still together (type (a) agreements). These days, the commonest example of this is an agreement to share the ownership or tenancy of the matrimonial home, bank accounts, savings or other assets. Agreements for housekeeping or personal allowances, on the other hand, might run into

difficulties. In *Balfour v Balfour* [1919] 2 KB 571, a husband agreed to pay his wife £30 per month when he returned to his work in Ceylon while she remained in England for medical reasons. Duke LJ doubted whether the wife had given consideration for the husband's promise. Atkin LJ would have had no difficulty in finding that her promise to spend the money for its intended purposes was consideration, but held that the couple had never intended that the arrangement should have contractual force: ". . . the small courts of this country would have to be multiplied one hundredfold if these arrangements were held to result in legal obligations" (p 579). But any problems posed by the doctrine of consideration or the need to express contractual intent could be solved by making the agreement by deed.

143. However, agreements between husband and wife were also subject to two quite separate rules, each of which has a basis in public policy. The first rule ("public policy rule 1") was that agreements between husband and wife (or indeed between third parties and husband and/or wife) which provided for what was to happen in the event of their *future* separation or divorce were contrary to public policy and therefore void. This rule was developed in the context of agreements or settlements which made some or better financial provision for the wife if she were to live separately from her husband (for a comparatively recent example, see *Re Johnson's Will Trusts* [1967] Ch 387). Such an agreement could be seen as encouraging them to live apart – for example, by encouraging her to leave him, if it was sufficiently generous or more than she would get if she stayed with him, or encouraging him to leave her, or to agree to her going, if it were not so generous. Such encouragement was seen as inconsistent with the fundamental, life-long and enforceable obligation of husband and wife to live with one another.

144. The second rule ("public policy rule 2") was developed in the context of separation agreements (type (b) agreements). Agreements for an immediate or existing separation between the spouses were not caught by public policy rule 1. Their purpose was usually two fold. They relieved the couple of the duty to live together: this meant that neither was guilty of the matrimonial offence of desertion and neither could petition for or enforce a decree of restitution of conjugal rights. They might also make provision for the wife and any children. In return she might agree not to go to court for a maintenance order. However, in the leading case of *Hyman v Hyman* [1929] AC 601 it was firmly established that such agreements could not oust the statutory powers of the courts to award financial provision should the couple divorce.

145. As recounted in *MacLeod v MacLeod* [2008] UKPC 64, [2010] 1 AC 298, at paras 20 to 24, that rule was later held to apply to other statutory powers to award maintenance. But in *Bennett v Bennett* [1952] 1 KB 249, it was held that, at least if the wife's promise not to go to court was the main consideration for the husband's promise to pay and could not be severed, the whole agreement

(although made by deed) was contrary to public policy and therefore the husband's promise to pay was unenforceable. Following consideration by the *Royal Commission on Marriage and Divorce 1951-1955* (see *Report*, (1956) (Cmd) 9678, pp 192 – 195), that problem was resolved, and the rule in *Hyman v Hyman* confirmed, by the Maintenance Agreements Act 1957. The promise not to go to court was void but this did not render void or unenforceable the other financial arrangements in the agreement. Recognising that this might cause hardship to the payer as well as the payee, the *quid pro quo* was a power to vary or revoke those arrangements, if there was a change in the circumstances in the light of which they were made or the agreement did not contain proper financial arrangements for a child of the family. The provisions in the 1957 Act were later amended in two significant respects by the Matrimonial Proceedings and Property Act 1970 and are now consolidated in the Matrimonial Causes Act 1973, ss 34 to 36. First, while the 1957 Act applied only to agreements made between husband and wife "for the purposes of their living separately", sections 34 to 36 of the 1973 Act apply to "any agreement in writing made [at any time] between the parties to a marriage". Secondly, the agreement may be varied even if the change in circumstances is one which the parties had foreseen when making the agreement. Subject to this, agreements for a present or immediate separation were and remain valid and enforceable like any other contract.

146. The Court of Appeal in this case suggested (at para 134) that the power to vary such agreements has become a "dead letter". It is easy to see why this might be so. Matrimonial practice has changed out of all recognition since the days of the 1957 Act. In those days, many couples separated without ever obtaining a divorce. A divorce could only be obtained if one of the parties had been guilty of a matrimonial offence (or had been incurably of unsound mind for at least five years). The theory was that the innocent spouse was punishing the guilty one by divorcing him or her. There could be no question of divorce by consent. Until 1963, collusion was an absolute bar to obtaining the relief which, often enough, both parties desperately wanted. So the parties had to be very cautious about anything which made it look as if they had agreed terms for their divorce. And the powers of the divorce court to award financial provision were much more limited than they are now. The parties might well agree terms in a separation agreement which were quite different from, and perhaps more generous than, anything which the court might order.

147. All of that has now changed. One of the first priorities of the Law Commission was the reform of family law, and their efforts led to the radical changes brought about by the Divorce Reform Act 1969, the Matrimonial Proceedings and Property Act 1970, and the Law Reform (Miscellaneous Provisions) Act 1970. All of these came into force on 1 January 1971. The first two were consolidated in the Matrimonial Causes Act 1973. The sole ground for divorce is now that the marriage has irretrievably broken down; separation and

consent to a divorce is one of the ways of proving this. The theory of the innocent party punishing the guilty has gone. Divorce has become a great deal simpler and easier to obtain. It is fair to assume that there are now far fewer married couples living apart for long periods without divorcing than there were in the 1950s.

148. The court also has comprehensive powers to award financial provision, to transfer and settle property, and to share out pension rights. So the court can now do most things that the couple might want to agree. Divorcing spouses are actively encouraged to agree between themselves what the consequences of their divorce should be. Indeed, despite the impression given in the high profile cases which reach the press, that is what the great majority of people do (see, for example, J Eekelaar, M Maclean and S Beinart, *Family Lawyers: The Divorce Work of Solicitors* (2000); M Maclean and J Eekelaar, *Family Law Advocacy* (2009)). If they do reach agreement, it is standard practice to embody its terms in a consent order. This is, on the one hand, because public policy rule 2 means that they cannot oust the jurisdiction of the court in any event and, on the other hand, because a properly drafted court order can finally dispose of the parties' claims against one another (see, for example, *Dinch v Dinch* [1987] 1 WLR 252).

149. So another type of marital agreement (a type (c) agreement) has come on the scene, an agreement to compromise the parties' mutual financial and property claims on divorce. Unlike orders made by consent in ordinary civil proceedings, however, the matrimonial order derives its authority from the court and not from the parties' agreement, even if embodied in a deed (see, for example, *de Lasala v de Lasala* [1980] AC 546). The court has an independent duty to check the agreed arrangements and to approve them (see *Xydhias v Xydhias* [1999] 2 All ER 386, at p 394). As Butler-Sloss LJ put it in *Kelley v Corston* [1998] QB 686, at p 714,

> "The court has the power to refuse to make the order although the parties have agreed to it. The fact of the agreement will, of course, be likely to be an important consideration but would not necessarily be determinative. The court is not a rubber stamp."

In fact, as *Xydhias* itself showed, this too can cut both ways. The fact that the order derives its authority from the court rather than the parties' agreement also means that the court can treat them as having agreed upon the essentials of their arrangements, even if their agreement would not be contractually binding because they have not agreed upon all the details. The court may therefore decide to give effect to these, even though it is not a legally binding contract.

150. Thus it is not surprising if practitioners have forgotten about the power to vary marital agreements. Most couples can be persuaded to get a divorce instead.

The focus has therefore changed, away from the technical question of whether or not the agreement between the spouses is enforceable as an ordinary contract, in favour of the broader question which is before us now: what is the weight to be given to an agreement between a husband and a wife as to the financial consequences of their separation or divorce by a court which is invited to make orders about it?

151. But before turning to that question, it is necessary to consider the fate of the public policy rule 1 (see para 143 above) and the decision of the Judicial Committee of the Privy Council in *MacLeod v MacLeod* [2008] UKPC 64, [2010] 1 AC 298. *MacLeod* was concerned with an agreement made by deed between a married couple while they were still living together. It provided partly for what was to happen while they were still together and partly for what was to happen in the (by then not unlikely) event of their divorcing in the future. Its terms were similar, but not identical, to the terms of an ante-nuptial agreement entered into before the couple married in the State of Florida, where such agreements are legally binding.

152. The Board held that the rationale for the first rule of public policy no longer held good. Since the abolition of the decree of restitution of conjugal rights by the Matrimonial Proceedings and Property Act 1970, s 20, the spouses no longer have a legally enforceable obligation to live together. Providing for what is to happen in the event of a future separation or divorce no longer conflicts with the legally enforceable obligations of marriage. Hence the Board held that a post-nuptial agreement providing for future separation was valid and enforceable in the same way as any other contract between spouses. The Board would not, however, have felt able to take that step had there not been a power to vary such a contract in the light of changes in the circumstances since it was made or for the sake of the children for whom they were responsible. The injustice of enforcing maintenance agreements without any power of variation had been recognised by Parliament when it enacted the 1957 Act and confirmed in what is now section 35 of the 1973 Act.

153. Secondly, the Board held that these powers of alteration applied, not only to agreements for a current or immediate separation, but also to agreements for a future separation. Although the "financial arrangements" contained in the agreement must relate to a period when the couple are living separately, section 34(2) defines a "maintenance agreement" as "any agreement in writing made . . . between the parties to a marriage". It was no longer limited to agreements made for the purpose of their living separately. The Board did express the view, *obiter*, that sections 34 to 36 did not apply to agreements made between people who were not yet husband and wife and offered some observations, again *obiter*, about why the matter should be left to Parliament.

154. To sum up the position relating to agreements between husband and wife:

(1) There is nothing to stop husbands and wives from making legally enforceable agreements about their property and finances which are to operate while they are living together, subject to the normal contractual requirements.

(2) There is nothing to stop husbands and wives who are on the point of separating, or who are already separated, from making legally enforceable agreements about their financial rights and obligations while they are living apart.

(3) Following *MacLeod v MacLeod*, there is also nothing to stop husbands and wives who are not yet separated from making legally enforceable agreements about their financial rights and obligations while they are living apart.

(4) However, the court has power to vary the financial arrangements for their separation, made in agreements between husbands and wives, under sections 35 and 36 of the 1973 Act.

(5) None of these agreements can oust the jurisdiction of the court to make financial orders should the parties separate or divorce.

(6) Even if the parties have agreed what the court's order should be, the order derives its authority from the court and not from the parties' agreement.

(7) The court therefore has its own independent duty to check the arrangements agreed between the parties and to evaluate them in the light of its statutory duties under section 25 of the 1973 Act.

Ante-nuptial agreements

155. So where does this leave ante-nuptial agreements, made, not between husband and wife, but in contemplation of the couple's impending marriage, and providing, perhaps among other things, for the possibility of their eventual separation or divorce? If the rationale for public policy rule 1 no longer applies to post-nuptial agreements, following *MacLeod*, it is hard to see how it can still apply

to ante-nuptial agreements. So why should these not also be regarded as valid and enforceable in the same way as separation agreements and, if *MacLeod* is right, other post-nuptial agreements?

156. It was not necessary for the Board to decide that question in *MacLeod* and it is not necessary for this Court to decide it now. The Court of Appeal in this case accepted that the law could only be changed by legislation and neither party has suggested otherwise to this Court. Without legislation, it is not self-evident what the right answer should be. There are many different permutations. (i) It could be that *MacLeod* was right to hold that sections 34 to 36 of the 1973 Act apply to post-nuptial agreements providing for a future separation and also right to express the view, *obiter*, that they do not apply to such agreements made before marriage. (ii) It could be that *MacLeod* was wrong to hold that sections 34 to 36 apply to any post-nuptial agreement, other than an agreement for a present or immediate separation. (iii) It could be that the Board was wrong to consider that the words "made between the parties to a marriage" in section 34(2) apply only to agreements made while the parties are in fact married. (iv) It could be that the existence of a power of variation is not as important as the Board thought that it was, in assessing whether there are still public policy objections to holding such agreements contractually binding.

157. It will come as little surprise that I adhere to the views expressed by the Board in *MacLeod.* They accord with the wording of the Act. This was not a particularly adventurous piece of statutory construction, once it is realised that the change in the definition of the agreements covered by sections 34 to 36 was made in the same Act of Parliament, the Matrimonial Proceedings and Property Act 1970, which also swept away the basis of public policy rule 1, the enforceability of the duty to live together. Indeed, that change of wording may be said to strengthen the Board's construction. Making such agreements enforceable, subject to a power of variation, would be entirely logical and consistent. It would, however, have been considerably more adventurous to interpret the words "made between the parties to a marriage", in section 34(2) of the 1973 Act, to include a couple who were not yet husband and wife when the agreement was made. After all, another feature of the reforms which came into force on 1 January 1971 was the abolition of the action for breach of promise of marriage.

158. Furthermore, without a power of variation, there remain serious policy objections, albeit different from the original ones, to recognising ante-nuptial agreements as valid and enforceable in the contractual sense. Is it to be assumed that, although section 34(1) does not apply, public policy rule 2 (the rule in *Hyman v Hyman*) does? If it does, what is the answer to the *Bennett v Bennett* problem if the beneficiary spouse wishes to sue upon the agreement? If it does not, can it be right that the intending spouses can oust the jurisdiction of the courts before their marriage but are unable to do so afterwards? If, on the other hand, either of the

spouses wishes to enforce the agreement without going to the family court, can it be right that they should be able to do so without any power of variation no matter what the circumstances?

159. It is no answer to these questions, it seems to me, that these days most people do go to the divorce courts. They should not be obliged to do so. The existence of a power of variation means that they are likely to agree a variation for themselves without going to court. There are still people with conscientious objections to divorce. There are still people who are reluctant to accept that their marriage is over even though there may be temporary difficulties. There are other people who will not be able to go to the divorce courts here because they have been pipped to the post by the "first to file" jurisdictional rules in the Brussels II Revised Regulation (Council Regulation (EC) No 2201/2003). But in any event, this Court should not be developing the common law in such a way as to produce an injustice and thus to encourage people to seek a divorce when they would not otherwise wish to do so. Even if the old rationale for public policy rule 1 has gone, I still believe that it is the public policy of this country to support marriage and to encourage married people to stay married rather than to encourage them to get divorced.

160. A better answer, it may be, is that *MacLeod* did not need to decide whether post-nuptial contracts providing for a future separation were legally binding either. It too was a case about the weight to be given to such an agreement when the couple came to divorce. Some may think that the question whether an agreement is contractually binding has little if any relevance to the weight which it should be given by the court. Others, however, may think differently, especially if the agreement contains provisions to be implemented during cohabitation which have in fact been honoured. At all events, as the author of (but not the only contributor to) the Board's unanimous advice in *MacLeod*, I must accept some of the blame for the mess in which we now find ourselves.

161. All of this is to emphasise that this Court is not deciding whether ante-nuptial agreements are contractually binding. Nor is it overruling *MacLeod* on the question of post-nuptial agreements. The matter is obviously one for the Law Commission to sort out. My only plea is for a comprehensive and rational approach. Should public policy rule 2 (the rule in *Hyman v Hyman*) apply to all marital agreements, before or after marriage, before or after separation, and to all its terms, whether operating during cohabitation or after the couple have separated? Or if that rule is to be disapplied to any or all of them, to what extent and in what circumstances? Should there be a power to vary all marital agreements and all their terms, and if so in what circumstances and on what grounds? Should all, some or none of their terms be legally enforceable? By what rules of private international law should such agreements be governed? This last is a particularly complicated question, particularly in a case such as this, where the agreement

included both a choice of matrimonial property regime and also a choice of applicable law. It would be a great help if we could clarify our choice of law rules relating to matrimonial property regimes. All of these questions require careful consideration.

162. Once again, I adhere to the view expressed in *MacLeod*, that there may be important policy considerations justifying a different approach as between agreements made before and after a marriage. This is recognised in those jurisdictions which have legislated to make ante-nuptial agreements enforceable. It is, for example, common for them to contain safeguards which do not apply to agreements made after the marriage. Most important is whether, and if so in what circumstances, couples should be allowed to contract out of the fundamental obligations of the married state which they are about to enter.

Taking the agreement into account

163. It follows from the well-established principles outlined in paragraph 149 above that, as the court always has to exercise its own discretion, if there is to be a starting point for the exercise of that discretion it has to be the statutory duty under section 25 of the 1973 Act. This applies to all applications for orders for financial provision, property adjustment and pension provision ancillary to divorce, judicial separation and nullity decrees. It is in mandatory terms (see paras 20 and 21 above). Furthermore, the same rules and considerations apply to (now almost unheard of) applications to the divorce court under section 27 of the 1973 Act for financial provision in cases of neglect to maintain (see section 27(3)) and to applications for financial provision in magistrates' courts under the Domestic Proceedings and Magistrates Courts Act 1978 (see section 3(1) and (2) of that Act, which mirror section 25(1) and (2)(a) to (g) of the 1973 Act). Corresponding provisions also apply between civil partners (see Civil Partnership Act 2004, s 72(1) and (2) and Scheds 5 and 6).

164. Until 1984, as is well known, section 25 contained a "tailpiece" which directed the court as to the overall objective of its discretion. This was so to exercise its powers:

> ". . . as to place the parties, so far as it is practicable . . . to do so, in the financial position in which they would have been if the marriage had not broken down and each had properly discharged his or her financial obligations and responsibilities towards the other".

This was deleted from section 25 by the Matrimonial and Family Proceedings Act 1984. Implicitly, as Lord Nicholls of Birkenhead said in *White v White* [2001] 1 AC 596, at p 604, "the objective must be to achieve a fair outcome". But in deciding what was fair, the courts had, perforce, to work out some principled reasons for making any order at all, in the context of a separate property regime. The House of Lords eventually did so in the trio of cases, *White v White* (above) and *Miller v Miller, McFarlane v McFarlane* [2006] UKHL 24, [2006] 2 AC 618. Put simply, the House discerned three possible rationales for making an order: the sharing of matrimonial assets, meeting needs arising from or during the marriage, and compensating for sacrifices made because of the marriage. I do not understand the majority judgment in this Court to be casting any doubt, either on the overall objective of a fair outcome, or upon the three possible reasons for the redistribution.

165. *White* is important for another reason. The leading opinion, with which Lord Hoffmann, Lord Hope of Craighead and Lord Hutton agreed, was delivered by Lord Nicholls. He emphasised that there should be no discrimination between the different contributions of the spouses to the welfare of the family which should be seen as equally valuable. But he also emphasised at pp 605-606:

> "This is not to introduce a presumption of equal division under another guise. . . . a presumption of equal division would go beyond the permissible bounds of interpretation of section 25. In this regard section 25 differs from the applicable law in Scotland. . . . *A presumption of equal division would be an inpermissible judicial gloss on the statutory provision.* That would be so even though the presumption would be rebuttable. . . . It is largely for this reason that I do not accept [counsel's] invitation to enunciate a principle that in every case the 'starting point' in relation to a division of the assets of the husband and wife should be equality. He sought to draw a distinction between a presumption and a starting point. But a starting point principle of general application would carry a risk that in practice it would be treated as a legal presumption, with formal consequences regarding the burden of proof." [My emphasis]

166. These observations are, in my opinion, equally applicable to the consideration of any nuptial or ante-nuptial agreement in the mandatory exercise under section 25. It would be "an inadmissible judicial gloss" to introduce a presumption or a starting point or anything which suggested that there was a burden of proof upon either party. In any event, the concept of an onus or burden of proof is inapplicable in a discretionary exercise such as this. He or she who asserts a fact must, of course, prove it. But it is for the court to carry out the exercise of discretion in the way in which Parliament requires it to do.

167. In my opinion, the test adopted by the majority (in para 75) comes close to introducing such a presumption. For this once again I must accept some responsibility. In *MacLeod v MacLeod* , at para 41, the Board said this:

> "It would be odd if Parliament had intended the approach to such agreements in an ancillary relief claim to be different from, and less generous than, the approach to a variation application. The same principles should be the starting point in both. In other words, the court is looking for a change in the circumstances in the light of which the financial arrangements were made, *the sort of change which would make those arrangements manifestly unjust*, or for a failure to make proper provision for any child of the family. On top of that, of course, even if there is no change in the circumstances, it is contrary to public policy to cast onto the public purse an obligation which ought properly to be shouldered within the family." (emphasis supplied)

This may have come as a surprise to those former practitioners, such as Wilson LJ, who (for the reasons explained earlier) had never had occasion to look at section 35. But it would of course have been odd for Parliament to adopt one test when looking at the variation of a legally enforceable contract and another test when looking at the weight which should be given to such a contract in proceedings for ancillary relief.

168. With the benefit of hindsight, I would qualify that statement heavily in two ways. First, and most important, there seems no warrant for the inclusion of the word "manifestly" before "unjust". That is nowhere to be found in the legislation. Secondly, in so far as it may be derived from cases on separation agreements, such as *Edgar v Edgar* [1980] 1 WLR 1410, it fails to acknowledge the manifold factual differences which there may be between the different types of marital agreement. It is, as the majority point out, one thing to look for a very significant change of circumstances in a case such as *Edgar*, which concerned a deed of separation made when the parties were already separated and quite shortly before the divorce proceedings were begun, or indeed in *MacLeod*, where the marriage was already in serious trouble and the parties had the possibility of early separation and divorce very much in mind. It is another to adopt the same approach when the agreement was made many years ago, before there was any question of the couple separating, and there are bound to have been many changes in the circumstances in which it was made. In this respect, therefore, I agree with the majority that the *MacLeod* test was too strict.

169. It seems to me clear that the guiding principle in *White, Miller and McFarlane* is indeed fairness: but it is fairness in the light of the actual and

foreseeable circumstances at the time when the court comes to make its order. Those circumstances include any marital agreement made between the parties, the circumstances in which that agreement was made, and the events which have happened since then. The test to be applied to such an agreement, it seems to me, should be this:

> **"Did each party freely enter into an agreement, intending it to have legal effect and with a full appreciation of its implications? If so, in the circumstances as they now are, would it be fair to hold them to their agreement?"**

That is very similar to the test proposed by the majority, but it seeks to avoid the "impermissible judicial gloss" of a presumption or starting point, while mitigating the rigours of the *MacLeod* test in an appropriate case. It allows the court to give full weight to the agreement if it is fair to do so and I adhere to the view expressed in *MacLeod* that it can be entirely fair to hold the parties to their agreement even if the outcome is very different from what a court would order if they had not made it. It may well be that Lord Mance is correct in his view that the difference between my formulation and that of the majority is unlikely to be important in practice. I would prefer not to take that risk.

170. As Lord Nicholls emphasised in *Miller*, at paras 26 to 29, there can be no inflexible rule about how a judge should approach the task. It may be that a judge, if called upon to decide matters, will find it convenient to conduct the usual section 25 exercise before deciding what weight to give to the agreement. He or she will then have a view of how the usual principles would apply to the particular facts of the case. It may be, on the other hand, that the case is so clear cut, as in *Crossley v Crossley* [2007] EWCA Civ 1491, [2008] 1 FLR 1467, that it is more convenient to begin with the agreement. If, for example, all the agreement seeks to do is to preserve property acquired before the marriage for the benefit of the spouse to whom it belongs, the court would be most unlikely to interfere unless the outcome would put a spouse or children in real need. It is not for this Court to be prescriptive about how a trial judge should conduct the statutory exercise.

171. In principle, though, I agree that the test should be the same, whether the agreement is a compromise of the proceedings, a separation agreement, a post-nuptial agreement made while the couple are together, or an ante-nuptial agreement. But the way in which it works out may be very different, depending upon the facts of the case. I therefore also agree that it is difficult to be prescriptive about the factors to be taken into account, and the weight to be given to them, because this would be to "fetter the flexibility that the court requires to reach a just result" (para 76, above). It may be, however, that the court will generally attach more weight to a separation agreement, made to cater for the existing and future

separation of the parties, than to a post-nuptial agreement, made while the parties are still together but also to cater for the possibility of a future separation, and more weight to such an agreement than to an ante-nuptial agreement, catering for a marriage which has not yet taken place and for a separation which the parties neither want nor expect to happen.

The circumstances in which the agreement was made

172. The court will be looking first for a clear indication that the parties intended a divorce court to give effect to their agreement. The textbook and other precedents which I have seen certainly do their best to make this clear. The court should also take into account the parties' understanding as to the legal effect of their agreement. This is bound to change as a result of *MacLeod* and this case. People who entered into separation agreements should always have been advised that they were legally binding as contracts unless and until varied and although not binding upon the divorce court would often be respected on the *Edgar* principles. People who entered into post-nuptial agreements in England and Wales will have been given rather different legal advice until *MacLeod* and people who enter into ante-nuptial agreements will have been given rather different advice until this case. People who have entered into such agreements in other countries will also have been given different advice. The parties' expectations and understandings as to the effect of their agreement should they later divorce will therefore be an important factor in deciding what is fair.

173. If the parties did expect the court to give effect to their agreement, the court will then ask whether there were any vitiating factors, such as fraud, duress or misrepresentation, which would make a contract voidable in English law. If there were, the agreement should in principle be ignored. But that is not all. It would be wrong to take a more legalistic view of such factors in the case of ante- and post-nuptial agreements than has long been taken in the case of separation agreements. Hence the wise words of Ormrod LJ in Edgar v Edgar [1980] 1 WLR 1410, 1417 (quoted in para 38 above) that "it is not necessary in this connection to think in formal legal terms, such as misrepresentation or estoppel". There may be something in the circumstances in which the agreement was made which, while falling short of a vitiating factor in the usual contractual sense, indicates that one party has taken an unfair advantage over the other.

174. Relevant to whether one party has taken advantage of the other will be whether there were the safeguards which have generally been regarded as essential in those countries in the common law world which have legislated to give validity to such agreements. These normally include mutual disclosure of assets, independent legal advice, and a degree of distance in time between the agreement and the wedding. These were also included in the safeguards proposed in the

Home Office Consultation Paper referred to in the majority judgment at para [5]. These factors should be taken into account in deciding how much weight should be given to the agreement whether or not they are sufficient to "vitiate" it in the *Edgar* sense. On the other hand, in the case of an ante-nuptial agreement, the court cannot avoid also asking itself whether the marriage would have taken place at all without it, difficult though it may be to discern an accurate answer to that question in the light of later events. This too can cut both ways, because it may or may not indicate that one has taken an unfair advantage of the other.

Later events

175. The focus both of my test and that of the majority is upon whether it is now fair to give effect to the agreement. The longer it is since the agreement was made, the more likely it is that later events will have overtaken it. Marriage is not only different from a commercial relationship in law, it is also different in fact. It is capable of influencing and changing every aspect of a couple's lives: where they live, how they live, who goes to work outside the home and what work they do, who works inside the home and how, their social lives and leisure pursuits, and how they manage their property and finances. A couple may think that their futures are all mapped out ahead of them when they get married but many things may happen to push them off course – misfortunes such as redundancy, bankruptcy, illness, disability, obligations to other family members and especially to children, but also unexpected opportunities and unexplored avenues. The couple are bound together in more than a business relationship, so of course they modify their plans and often compromise their individual best interests to accommodate these new events. They may have no choice if their marriage is to survive. And these are events which take place while it is still hoped that the marriage will survive. There may be people who enter marriage in the belief that it will not endure, but for most people the hope and the belief is that it will. There is also a public interest in the stability of marriage. Marriage and relationship breakdown can have many damaging effects for the parties, their children and other members of their families, and also for society as a whole. So there is also a public interest in encouraging the parties to make adjustments to their roles and life-styles for the sake of their relationship and the welfare of their families.

176. All of this means that it is difficult, if not impossible, to predict at the outset what the circumstances will be when a marriage ends. It is even more difficult to predict what the fair outcome of the couple's financial relationship will be. A couple who always thought that one would be the breadwinner and one would be the homemaker may be astonished to find that the homemaker has become a successful businesswoman who is supporting her homemaker husband rather than the other way about. A couple who assumed that each would run their own independent professional life and keep their finances entirely separate may find this quite impossible when they have children, especially if they have more than

one or one of them has special needs. An older couple who marry a second time round may think it fair at the time to preserve their assets for the sake of the children of their first marriages, but may find that one has to become a carer for the other and will be left homeless and in reduced circumstances if the grown-up children take priority even though they are now well-established in life and have no pressing need of their inheritance.

177. All of these are changes which would entitle the court to vary a separation (or post-nuptial) agreement which turned out to be unfair, even if the parties had foreseen them, and should now be taken into account in deciding whether it is fair to uphold their agreement. On the other hand, if things have indeed turned out much as the parties expected and intended, it could well be fair to give effect to their agreement. Some of the precedents I have seen are of comparatively wealthy couples making a prediction of comparatively generous sums which ought to provide for the "reasonable requirements" of the recipient spouse in a way which might well have attracted the "millionaire's defence" in the days before *White v White*. In effect, therefore, they are contracting out of sharing but not out of compensation and support.

178. Provided that the provision made is adequate, why should they not be able to do so? On the one hand, the sharing principle reflects the egalitarian and non-discriminatory view of marriage, expressly adopted in Scottish law (in section 9(1)(a) of the Family Law (Scotland) Act 1985 and adopted in English law at least since *White v White.* On the other hand, respecting their individual autonomy reflects a different kind of equality. In the present state of the law, there can be no hard and fast rules, save to say that it may be fairer to accept the modification of the sharing principle than of the needs and compensation principles.

The relevance of conduct?

179. It must also be borne in mind that these are often complicated agreements, providing not only for what is to happen on divorce or death, but also for what is to happen during the marriage. The parties' subsequent conduct in relation to the agreement must be among the relevant circumstances when considering what weight should be given to it. Both parties may have conducted, and continued to conduct, their lives on the basis that their affairs are and will be governed by their agreement. In *MacLeod*, for example, the agreement made provision for the wife while they were still together and the husband had put this into effect. In this case, the wife acquired further assets from her father, which would not have happened had the agreement not been in place. Such factors obviously increase the weight which should be given to the agreement.

180. Conduct in relation to the agreement itself is one thing. But what about conduct in the relationship generally? In the section 25 exercise, the courts do not take conduct into account unless there is a substantial imbalance between the parties, such that it would be inequitable to disregard it. Such cases are very rare. But what if the agreement were to provide for different outcomes, depending upon how the parties have behaved during the marriage? What, for example, if the precedent referred to earlier, providing for the wife to have a predetermined sum for each year of marriage, were also to provide that she should only have this if she has been a good housewife? These are deep waters indeed, but in my view the court would be just as reluctant to enter into such an inquiry in relation to a nuptial agreement as it is now in relation to the section 25 exercise and correspondingly reluctant to hold the couple to their agreement. All the examples that I have seen, both in textbooks and in real cases, are scrupulous in making no reference to marital conduct.

The foreign element

181. In strict legal terms the so-called "foreign element" is irrelevant. If the proceedings take place in England and Wales, the applicable law is that of England and Wales, irrespective of where the parties come from, how long they have been here, or how close their connection is with this jurisdiction. The United Kingdom has made a deliberate choice not to adopt the Hague Protocol on the law applicable to maintenance obligations and has only agreed to participate in the Council Regulation (EC) No 4/2009 on the basis that it would not be required to do so. English family lawyers seem to have a horror of having to apply foreign law which must appear strange to European lawyers who are quite used to doing so. Anyone who chooses to divorce here must be advised that the court will apply English law and not the law of the country which the parties have chosen or with which the marriage has the closest connection.

182. In another sense, however, the foreign element cannot be totally irrelevant. It may affect the relevant considerations in a number of ways. It may be a crystal clear indication that the parties intended their agreement to be legally binding, not only upon themselves, but also on the court. On the other hand, a foreign couple may have been warned, as this couple were warned, that their agreement might not have the same effect in other countries as it did in the country where it was made. But it means that their expectations may have been very different. The agreement may also have affected their later behaviour to a greater extent than it would have done had they not regarded it as legally binding.

183. None of this is to suggest that evidence of foreign law will be necessary in a foreign case. The relevance is not as to the effect of a foreign agreement in English law because, by the time the case gets to the divorce court, it has none. The

relevance is as to the parties' intentions and expectations at the time when they entered into it.

This case

184. The agreement with which we are concerned was ante-nuptial, in the sense that it was made before the marriage. However, it did more than provide for what was to happen should the couple separate or divorce. It purported to choose German law as the law applicable to all aspects of the marriage; it determined the matrimonial property regime which would govern the marriage, in this case separation of property rather than the deferred community of property which is the default position in German law; it excluded the statutory equalisation of their German pension rights; each party waived the right to a compulsory portion of the estate of the first to die which they would otherwise have under German law; and each party waived any claim to maintenance of any kind whatsoever in the event of their divorce. Most of this is already English law. The matrimonial property regime of England and Wales has to all intents and purposes been a separate property regime since 1882. English law does not provide for the compulsory equalisation of pension rights or for the survivor automatically to inherit a compulsory portion of the estate of a deceased spouse. The difficulty lies with the exclusion of all claims to maintenance on divorce, because in English law this cannot be done (nor, it appears, is it entirely effective in German law).

185. No-one has argued that this agreement should be ignored. That might have been a tenable view while public policy rule 1 survived (and even while it was still thought to have survived, the courts were increasingly inclined to take these agreements into account) but that view is no longer tenable now that the rule has gone. Equally no-one has argued in this Court that the agreement should be "presumptively dispositive". As we have seen, that would be inconsistent with the statutory regime governing financial relief.

186. As may often be the case with these agreements, if the judge had first asked herself what would have been the fair outcome without the agreement and then asked herself what difference the agreement should make, she might well have come closer to the solution adopted by the Court of Appeal. She would have asked herself whether any of the three principles identified by the House of Lords in *White, Miller,* and *McFarlane* would justify an award to the husband. She would have concluded that there was no scope for the sharing of matrimonial assets, because in effect there were none. Unusually, this couple had acquired no matrimonial home or other property together. The wife was already independently wealthy before they married and was given even greater wealth during the marriage. But this was undoubtedly intended for her alone. It would not have come to her had her family not been confident that it would remain her separate

property. The judge might well also have concluded that there was no scope for compensating the husband for sacrifices made for the sake of the marriage and the family, although I have some reservations about this. The husband had (perhaps) sacrificed a career in investment banking for a much less lucrative career in scientific research. But it could be said that that was for his own sake rather than for the sake of the family. In the circumstances, he was probably right to concede that the basis of any award should be "needs" rather than "sharing" or "compensation".

187. However, "needs" is a convenient shorthand for a rather more complicated concept, which is the (now) mutual commitment which each spouse makes to support the other. Under the former "tailpiece" or statutory objective, this was a life-long commitment, surviving divorce although ending on the receiving party's remarriage. Under the present law, it is no longer life-long. Each party has a responsibility to try to adjust to living without such support. But they may still be entitled to support for requirements which arose as a result of or during the marriage. Usually, of course, this is because of the demands of child-rearing and the (often life-long) financial disadvantage which results. But among the statutory factors is disability. If this arises during the marriage, it may be entirely proper to expect the normal support commitment to continue after the marriage ends.

188. In some cases, the support requirement generated by the marriage might go further than this. Most spouses want their partners to be happy – partly, of course, because they love them and partly because it is not much fun living with a miserable person. So, choices are often made for the sake of the overall happiness of the family. The couple may move from the city to the country; they may move to another country; they may adopt a completely different life-style; one of them may give up a well-paid job that she hates for the sake of a less lucrative job that she loves; one may give up a dead-end job to embark upon a new course of study. These sorts of things happen all the time in a relationship. The couple will support one another while they are together. And it may generate a continued need for support once they are apart. Whether this is seen as needs or compensation may not matter very much. It can only be for this reason that the husband in this case had any real claim upon his wife apart from his claims as the father of her children.

189. In those circumstances, is it fair to give effect to their agreement? First, did the parties intend it to have legal effect? There can be no doubt that they did. Second, were there any contractually vitiating circumstances? There is nothing to suggest that there were. Thirdly, is there anything in the circumstances in which it was made to suggest that the wife-to-be was taking an unfair advantage of her husband-to-be? I think not. He did not have an English translation and he did not have independent legal advice. He was presented with a "take it or leave it" agreement. This must have been what the judge meant when she referred to the lack of negotiations, and it could be an indication that an unfair advantage has

been taken. But in this case the husband did know the essence of what he was agreeing to and there is nothing at all to suggest that he wanted to negotiate for something different. He was not a naïve young person in a vulnerable position. He was a financially sophisticated and highly educated young man. He was marrying for love and not for money. In common with the Court of Appeal, therefore, I see nothing in the circumstances in which the agreement was made to make it unfair to hold the parties to it (although I worry that this very experienced and thoughtful judge who had the advantage of seeing and hearing the parties may have seen something which we have not).

190. However, that does not inevitably mean that it is fair to give the agreement its full weight in the circumstances as they now are. We would not, for example allow this wife to cast the burden of supporting her husband onto the state. More relevantly, the agreement did not cater for the fact that they might have children together. It is common ground that provision must be made for their two children. His Honour Judge Collins CBE decided that it is in their best interests to spend time living with each of their parents. These are the children of an extremely rich mother, although she did not want the family to have an unduly lavish life style. Nevertheless, since there are ample means available to enable them to do so, the children should be able to enjoy the same standard of living while they are with their father as they have when they are with their mother. Hence it was accepted that he should have a home for them, not only in England, but also when they were spending time with him in Germany or (now) near the mother's home in Monaco, and also the means to support them generously in their homes with him.

191. The issue is whether this should all come to an abrupt end when the youngest child grows up. When unmarried parents separate, the court has no power to make provision for the parents. It can only provide for the child and indirectly for the parent by taking the child's need for care into account when making provision for the child. Provision for the child has to cease when the child ceases education or vocational training, unless there are special circumstances (Children Act 1989, Sched 1, para 3(2)). And the courts have held that capital payments, or property settlements, to provide the child with a home should revert to the other parent when the child grows up. There is therefore no power to provide for an unmarried parent whose financial position has been irredeemably compromised by the demands of bringing up children or looking after the family. Married parents are different, in that the court has power to make provision, not only for the child, but also for the parent. There is no reason in principle why the court should limit its support in the same way that it has to limit its support for the unmarried parent. Quite the reverse: this is what distinguishes marriage from cohabitation in our law. Where parents are married, the court can look beyond the needs of the child while growing up and look independently at the needs of the parent, and in particular those generated as a result of parenthood. Not only this, these days parents often expect to continue to be a resource for their grown-up children, a base to which

they can return and a source of the unconditional love and support which is what parenthood is all about.

192. That may well be why the wife agreed to discharge most of the husband's debts and also acknowledged before Baron J that the husband should have a house, not just while the children were growing up, but for life. The Court of Appeal appeared so anxious to disagree with the *obiter* views of the Board in *MacLeod* that it decided to treat these parents as if they had never been married. That cannot be the right approach. This couple were married in England. They intended to make their matrimonial home in England. They had been advised that their agreement might not be effective under the laws of another country where they chose to live. The main concern of the wife and her family was to ensure that the husband acquired no proprietary claim to shares in the wife's family companies – which might then become forfeit. This was in no way prejudiced, as the judge made clear, by a lump sum order which the wife could readily meet out of her cash income.

193. In my view the Court of Appeal erred in principle in treating a parent who has been married to the other parent in the same way as they would treat a parent who has not. If, for example, a parent has irredeemably compromised her position in the labour market as a result of her caring responsibilities, she is entitled to at least some provision for her future needs, even after the children have grown up. It would not be fair for an ante- or post-nuptial agreement to deprive her of that. Where parents are not married to one another, there is nothing the court can do to compensate her. But where they are, there is. A nuptial agreement should not stand in the way of producing a fair outcome.

194. I would therefore have varied the judge's order so that the husband was entitled to his English home, or any home bought to replace it, for life. I would also have asked myself whether there were likely to be any continuing support needs attributable to his parental status after the children grew up. The answer to that is probably "no" although I also consider that the husband's decision to leave his lucrative career in banking and acquire further qualifications with a view to changing direction was not as completely selfish as some may have thought it to be. The wife appears to have agreed with it at the time. And why should she not? The couple were rich enough each to be able to pursue their own dreams. She had not been happy in New York and perhaps she understood why her husband was no longer happy in banking. If the decision was taken for the good of the family as a whole, this would have been for the benefit of the children as well as their parents. Happy parents make for happy children. Discontented parents make for discontented children. The judge found that, once that step had been taken, there was no going back.

195. It may be that the case should have gone back to the judge on this basis, as well as on the cross-appeal, for we are not in a position to make findings of fact which she did not make. But while I am clear that she did not give enough weight to the agreement in this case, I am equally clear that the Court of Appeal erred in equating married with unmarried parenthood. Marriage still counts for something in the law of this country and long may it continue to do so.

CROSSLEY v CROSSLEY
[2007] EWCA Civ 1491

Court of Appeal

Thorpe, Keene and Wall LJJ

19 December 2007

Financial relief – Practice and procedure – Pre-nuptial contract – Hearing to show cause why pre-nuptial agreement should not prevail – Within judge's case management discretion

The couple met when the husband was about 60, and the wife about 48; they became engaged a few months later. Each was independently wealthy; the husband was worth about £45m and the wife about £18m. Following negotiations involving experienced lawyers, the couple signed a prenuptial contract, agreeing that in the event of a divorce, neither would be entitled to any financial assistance from the other. Just over a year after getting married the couple separated; within 2 years of the marriage the wife had petitioned for divorce. There were no children. The wife sought financial relief from the husband, issuing a Form A. The husband responded with a summons seeking an order that the wife show cause why her claims for ancillary relief should not be resolved in accordance with the prenuptial agreement, and also seeking consequential directions to include departure from the automatic timetable. The judge concluded that the overriding objective to deal with cases justly, contained in r 2.51D of the Family Proceedings Rules 1991, permitted him to ignore r 2.61B governing procedure before the first appointment. He directed that Form Es be completed without documents or questionnaires, and that the first appointment under the automatic timetable be adjourned to a hearing to address the question why the prenuptial agreement should not prevail. The wife's solicitors were directed to set out in a detailed letter the wife's case on non-disclosure, to be answered by the husband in his Form E. The wife appealed, arguing that the judge had erred in law in directing the husband's summons to be heard as a preliminary issue, that he did not have the power to depart from the mandatory procedure set out in the FPR 1991, and in particular that she should not have been prevented from filing a questionnaire because this had precluded her from alleging substantial non-disclosure by the husband at the time of the signing of the prenuptial agreement.

Held – dismissing the wife's appeal –

(1) The judge had not directed the husband's summons to be heard as a preliminary issue. The court was still going to conduct the s 25 of the Matrimonial Causes Act 1973 exercise by reference to all the statutory criteria; the existence of the prenuptial agreement could not oust the court's obligation to apply s 25. However, following a short childless marriage, in which both parties had been independently wealthy before the marriage, there was a very strong case that a possible result of the s 25 exercise would be that the wife received no further financial award. If there ever were to be a paradigm case in which the court would look to the prenuptial agreement as not simply one of the peripheral factors in the case but as a factor of magnetic importance, this was that case (see paras [14], [15]).

(2) The FPR 1991 were not intended to be a straitjacket precluding sensible case management. Applying the overriding objective in r 2.51D, it was very important that judicial case management should seek to save expense, should seek to deal with the case in ways proportionate to the financial position of the parties, should allot to each case an appropriate share of the court's resources, and should identify the issues at an early date, in particular regulating the extent of the disclosure of documents and expert

evidence so that they were proportionate to the issues in question. The case management in the instant case had been an admirable illustration of judicial initiative and good sense (see paras [15], [17]).

(3) The judge had provided an alternative mechanism to allow the wife to assert material non-disclosure, namely the stating of the case in a swiftly written letter to be answered in the husband's Form E (see para [16]).

(4) The approach of the judge accorded with a developing view that prenuptial contracts were gaining in importance. This case demonstrated the discretionary power of the judge to require a party to show cause why a contractual agreement should not rule the outcome of an ancillary relief claim, not just when the contract was made post-separation and in contemplation of an application, but also when the contract pre-dated the breakdown of the marriage (see paras [17], [18]).

Statutory provisions considered

Matrimonial Causes Act 1973, s 25(2)
Family Proceedings Rules 1991 (SI 1991/1247), rr 2.51B, 2.61B

Cases referred to in judgment

Morgan v Hill [2006] EWCA Civ 1602, [2007] 1 WLR 855, [2007] 1 FLR 1480, CA
OS v DS (Oral Disclosure: Preliminary Hearing) [2004] EWHC 2376 (Fam), [2005] 1 FLR 675, FD
Smith v Smith [2000] 3 FCR 374, CA

Charles Howard QC and Susan Wilkins for the appellant
James Turner QC and Deepak Nagpal for the respondent

THORPE LJ:

[1] Mr Howard QC, leading Ms Wilkins, brings this application for permission before the court on behalf of the wife, who is locked in ancillary relief proceedings with the husband. The papers suggest that the husband is a 62-year-old property developer who has an independent fortune which he declared to be in the order of £45m in December 2005. The wife, who is some 50 years of age, at the same date declared her fortune to be worth, I think, some £18m.

[2] The parties had met in about June 2005 and became engaged in September 2005. Thereafter there were negotiations between experienced lawyers to settle the terms of a prenuptial contract. This seems to me to have been an entirely appropriate step for the parties to take. The husband had been married once before and had had a long-term previous relationship, and had four children as a result. The wife had been three times previously married and had three children from those previous marriages.

[3] The prenuptial agreement was signed on 16 November 2005 and its terms were recorded in the judgment of Bennett J which we are this morning reviewing. He said:

> 'The critical part of the premarital agreement is in Article 8, which is to the effect that both of them should walk away from the marriage with whatever they had brought into it. That may be a rather inaccurate way of putting it but that is broadly what it amounts to. At 8.3(c) it says:
>
> > "Neither party shall apply to any court in any jurisdiction for any order for financial provision of any kind based on the marriage of Stuart and Susan …"'

The marriage was celebrated on 5 January 2006 and seems to have brought little or no happiness to either of the parties. By the month of March 2007 they had separated, and on 15 August 2007 the wife petitioned for divorce.

[4] On 11 September 2007 she issued a Form A, which is the preliminary step that a petitioner may take to pursue her claims for financial provision. The effect of such an issue on 11 September was to trigger a date for the exchange of Forms E – 7 November. Questionnaires and other documents would then have to be exchanged on 28 November and there would be a first appointment before the court on 12 December. Plainly that was a development that was not going to go unchallenged, given the terms of the prenuptial agreement, and on 20 September the husband issued a summons, which sought by its first paragraph an order that the wife show cause why her claims for ancillary relief should not be resolved in accordance with clause 8 of the premarital agreement entered into by the parties. Paragraph 2 sought consequential directions including transfer to the High Court and the vacation of the automatic timetable flowing from the issue of the Form A.

[5] That was the summons that came before Bennett J on 30 October. At that date the husband was represented by Mr Lewis Marks QC and Mr James Ewins. The wife was represented by Mr Philip Moor QC, who had settled a skeleton argument eloquently elaborating her case in resistance to the husband's application. There was an equally full submission in writing by leading and junior counsel for the husband, and accordingly Bennett J had an opportunity to consider the relatively short procedural point that was before him for decision. He said at the outset:

> 'BENNETT J: Thank you both for your summaries and your skeleton arguments. Do you want to hear what I have got in mind?
> MR MARKS: My Lord, certainly.
> BENNETT J: I think Form Es should be completed without documents, without questionnaires, and in the Form Es it can be explained why the prenuptial agreement is or is not what I would call a knockout blow. The first appointment will be adjourned to the hearing in front of the High Court Judge hearing the application of Mr Marks.'

[6] That proposal was clearly acceptable to Mr Marks. Mr Moor then sought to dissuade the judge from his preliminary approach. He said that his case was that the matter could not be dealt with as a preliminary point, to which Bennett LJ responded:

> 'You can argue that out in front of the judge in February.'

[7] Mr Moor went on to state that an important plank of his case was that the husband had not made full disclosure of the fortune upon which the prenuptial agreement had been negotiated. He said specifically:

> 'We are asserting non-disclosed assets in Andorra and Monaco.'

[8] In relation to the first point Mr Marks in reply was quite specific. He said:

> '… we are not suggesting for a moment that a judge would simply reach a conclusion, without regard to the other s 25 factors, that this claim should be dismissed. Our contention will not be that there is an agreement and, there, that is the end of it. It will be, as we have made, I thought, very plain in our document, that there is an agreement and, in all the circumstances of the case, the wife should be held to it because it is a short childless marriage, where both parties are independently wealthy and where neither of them have made any significant moneys during the course of this marriage.'

[9] Mr Moor had pressed for conventional delivery of questionnaires, so that he might develop the case that there were very substantial concealed assets in Andorra and in Monaco. The judge's solution was to direct, as we see from para [15] of his judgment, that Mr Tooth, who acts for the wife, should write a detailed letter as soon as possible to the husband's solicitors setting out the wife's case on non-disclosure to be answered by the husband in his Form E. He continued: 'It seems to me that even having heard Mr Moor's persuasive submissions I should adhere to that which I provisionally proposed to counsel at the beginning of this short hearing'.

[10] So matters ended on 30 October, and on 8 November the letter directed by para [15] was written and it was supported by some documentation that demonstrated payments out from an account in Andorra. The husband had, through the lips of Mr Marks on 30 October, accepted that there was such an account in his daughter's name over which he had powers of withdrawal, and he had accepted that there was some account in Monaco which had been used in order to defray charges relating to the use of a yacht. So it hardly seems to me that the delivery of the letter of 8 November opened any major areas for judicial investigation: but that is only a superficial view and a more profound view will have to be taken by the judge who takes the case on 13 February.

[11] The appellant's notice challenging the case management of Bennett J was filed on 14 November, and on 19 November Wilson LJ directed an oral hearing of the application on notice, with appeal to follow if permission granted. The grounds of appeal are fourfold. One, that the judge erred in law in directing that the respondent's summons of 20 September be heard as a preliminary issue. Two, the judge erred in law in failing to apply the FPR 1991 (SI 1991/1247) to the petitioner's application, given that the rules are mandatory. Three, that he was plainly wrong in finding that the overriding objective in r 2.51D permitted him to ignore r 2.61B. And finally, that he was wrong to prevent the petitioner from filing a questionnaire, thus precluding her from challenging the respondent's disclosure in circumstances where she alleges that the respondent was guilty of substantial non-disclosure at the time of the signing of the prenuptial agreement.

[12] Mr Charles Howard QC has prepared a skeleton argument for the purposes of this hearing and it is, as it were, in supplement to the skeleton argument that had been settled by Mr Moor on 8 November in support of the appellant's notice. So, in a sense, we have the combined wisdom of Mr Moor and Mr Howard for the wife, and the combined wisdom of Mr Marks leading Mr Ewins, and Mr James Turner QC leading Mr Deepak Nagpal, for the husband. In his oral submissions Mr Howard has advanced seven points

which are essentially elaborating the four grounds of appeal. He says that first, the judge should not have set up a hearing at which the preliminary point taken by the husband might be decided in his favour. He says so to do would effectively be the ouster of the jurisdiction of the court and the court's obligation to carry out its own investigations and to apply all the criteria contained in s 25(2) of the Matrimonial Causes Act 1973. He further argues that preliminary issues can only be ordered if they are confined to the determination of an issue of hard fact, as is well illustrated by the practice established in the case of *OS v DS (Oral Disclosure: Preliminary Hearing)* [2004] EWHC 2376 (Fam), [2005] 1 FLR 675. They should not be used where the objective is to determine what weight is to be given to an individual fact within the statutory criteria. That submission, he says, is supported by the authority of *Smith v Smith* [2000] 3 FCR 374 and by the decision in the case *Morgan v Hill* [2006] EWCA Civ 1602, [2007] 1 WLR 855, [2007] 1 FLR 1480, to which My Lord, Keene LJ and I were parties. He particularly stresses that if there was to be any early valuation of the impact of the prenuptial agreement, full disclosure was a necessary prerequisite. Here there was an obvious risk of a determination against his client without any documents, questionnaires, valuations, s 25 affidavits or oral evidence. At a minimum, nothing should have been elevated for decision without, or in advance of, a fully prepared first appointment.

[13] Then Mr Howard has elaborated the submission, which was well made by Mr Philip Moor below, that the provisions of r 2.61 are emphatically mandatory. Time and time again the language of the rule is that the judge 'must', and that is in contrast to a very limited allowance of discretion that results from either the use of the word 'may' or the addition of a phrase such as 'unless the judge otherwise directs'. Mr Howard has met the consideration of the overriding objectives within the rules forcefully, by saying that the use of the overriding objective cannot preclude or shorten the essential preparation of the core material necessary to enable the judge to deal with the first appointment. He suggests that what Bennett J has ordered, far from shortening the process and saving costs, will have the reverse effect, because on 13 February a foreseeable if not an inevitable outcome is that the judge will have to adjourn the first appointment for the supplement of all that Bennett J has excluded.

[14] Now Mr Howard has argued his case very forcefully and skilfully, but he has failed to persuade me that there is any weight in any of the four grounds advanced. They are very cogently answered in the respondent's skeleton argument, which Mr Marks and Mr Turner have framed to meet each of the four grounds of appeal individually. In relation to the first ground Mr Turner has submitted that the judge plainly did not direct the husband's summons to be heard as a preliminary issue. That, I think, is incontrovertibly correct. Mr Turner accepts that the court must conduct the s 25 exercise by reference to all the statutory criteria. He accepts that the existence of the agreement cannot oust the court's obligation to apply s 25. He accepts that a prenuptial agreement is one aspect of the case. However, he emphasises that this is a childless marriage of very short duration, for a substantial portion of which the parties were living apart. The marriage was between mature adults, both of whom had been previously married and divorced; both parties have and had prior to the marriage very substantial independent wealth. The

prenuptial agreement provides for the retention by each of the parties of their separate properties and division of joint property if any, and finally that there is no such joint property. Upon those facts Mr Turner, correctly, in my view, adds that the combination of these factors gives rise to a very strong case that a possible result of the s 25 exercise will be that the wife receives no further financial award.

[15] All these cases are fact dependent and this is a quite exceptional case on its facts, but if ever there is to be a paradigm case in which the court will look to the prenuptial agreement as not simply one of the peripheral factors in the case but as a factor of magnetic importance, it seems to me that this is just such a case. As to the second and third grounds, that the judge was bound by the provisions of r 2.61, I am quite unpersuaded, as was the judge, that these individual rules were intended to be some sort of straitjacket precluding sensible case management. I would particularly stress the overriding objectives that govern all these rules, carefully and fully drafted in r 2.51D. It is easy to attach this case on its facts to a number of the objectives there articulated. It is very important that the judge in dealing with the case should seek to save expense. It is very important that he should seek to deal with the case in ways proportionate to the financial position of the parties. It is very important, more so today than it was when these rules were drafted, that he should allot to each case an appropriate share of the court's resources, taking into account the need to allot resources to other cases. In his general duty of case management he is required to identify the issues at an early date and particularly to regulate the extent of the disclosure of documents and expert evidence so that they are proportionate to the issues in question.

[16] Finally in relation to ground four, the assertion that the judge prevented the petitioner from filing a questionnaire, Mr Turner quite rightly points out that that inhibition was not designed and did not have the effect of preventing the wife from raising her assertion of material non-disclosure; he simply provided an alternative mechanism, namely the stating of the case in a swiftly written letter which would then be answered by the husband in his Form E.

[17] So I have found the skeleton submitted by Mr Turner to be a completely persuasive document. To that extent we have not called on him for any oral argument. Bennett J's management of this case in the orders which he made, so far from being questionable in my eyes, seem to me an admirable illustration of judicial initiative and good sense. Mr Howard has submitted that his client has effectively been denied access to the London court. She has been denied the right to advance her claims for financial provision. I simply cannot so regard the prenuptial agreement, and the actions that she has taken demonstrate that it has not that effect. The orders that have been made to date demonstrate that it is not being given that effect by a court. I would classify, in the circumstances of this case, the contract into which the parties entered in December 2005 as in many respects akin to a marital property regime into which parties enter in civil law jurisdictions in order to provide for the property consequences of a possible future divorce. It can be categorised as something akin to a contract for the separation of goods within the French legal system. It does seem to me that the role of contractual dealing, the opportunity for the autonomy of the parties, is becoming increasingly important. As counsel have pointed out, the possibility of legislation for

prenuptial contracts was raised by this government in I think 1998, and although the responses to the white paper consultation were few in number, there was certainly not in any way a disincentive to further progress. Since then, Resolution has formulated a very convincing paper for the legislation of prenuptials, and much of the debate concerning possible reform of s 25 of the Matrimonial Causes Act has emphasised the opportunity for some statutory acknowledgement of the importance of prenuptials. There is, in my judgment, an even stronger argument for legislative consideration, given the resolution of the European Union to formulate some regulation to tackle the difficulties that arise from different approaches in the member states. There is an obvious divide between the provisions of the civil law jurisdictions and the absence of any marital property tradition in the common law systems. Undoubtedly there would be some narrowing between this European divide if greater opportunity were given within our justice system for parties to contract in advance of marriage, to make provision for the possibility of dissolution. The approach that Bennett J took in this case seems to me to accord with a developing view that prenuptial contracts are gaining in importance in a particularly fraught area that confronts so many parties separating and divorcing.

[18] For all those reasons I would grant permission only in recognition of the point made by Mr Turner in his skeleton argument that this case, although extremely uncommon on its facts, has some general importance, in that it demonstrates the discretionary power of the judge to require a party to show cause why a contractual agreement should not rule the outcome of an ancillary relief claim, not just when the contract is made post-separation and in contemplation of an application, but also when the contract has been made prenuptially or postnuptially but before the breakdown of the marriage.

[19] I would therefore grant permission, but dismiss the resulting appeal.

KEENE LJ:

[20] I agree. If Bennett J's order prevented a consideration of the factors referred to in s 25 of the 1973 Act, one would of course be greatly concerned, but I do not accept that that is the position. Moreover, if the appellant can persuade the judge on 13 February that more information is required before such a consideration can take place, then that course of action is not ruled out by Bennett J's order. I note that at the very end of his judgment, at para [16], the judge said this:

> 'The Form Es will stand, and each party must explain in the relevant section why the prenuptial agreement is of such great importance or, from the wife's point of view why it is not and that there should be a full investigation and a full hearing.'

[21] I emphasise those final words. That door, therefore, is not necessarily closed, but likewise such a course of action may not be the outcome. In the meantime the judge's order seems to me to be a sensible attempt to achieve the overriding objective, and having granted permission I too would dismiss this appeal.

WALL LJ:

[22] I also agree. I would prefer, speaking for myself, to limit my decision strictly to the facts of this particular case. I regard it as an eminently sensible piece of case management by Bennett J. Of course it raises issues of importance and for that reason we give permission, but like my Lords I would dismiss the appeal.

Application granted; appeal dismissed.

Solicitors: *Sears Tooth* for the appellant
Withers LLP for the respondent

PHILIPPA JOHNSON
Law Reporter

S v S (ANCILLARY RELIEF) [2008] EWHC 2038 (Fam)

Family Division

Eleanor King J

20 August 2008

Financial relief – Agreement – Draft order – Subsequent notice of intention to proceed with application for ancillary relief – Notice to show cause why draft order should not be perfected

Financial relief – Practice – Notice to show cause why draft order should not be perfected – Whether agreement to be listed as preliminary issue – Extent of further disclosure

The parties separated after a 21-year marriage and the wife applied for ancillary relief; the couple's three children were adult. At a round table meeting the couple reached an agreement that the assets, agreed to be about £78m, should be divided 45% to the wife, and 55% to the husband. In the course of the following few weeks a draft order was prepared, passing back and forth between the parties' solicitors as the details, in particular those concerning tax planning, were refined. In the meantime the husband transferred over £34m to the wife or to her trusts, as required under the agreement. The bulk of the family assets were held in a family settlement, protected from inheritance tax, and the agreement provided for a new sub-fund of the settlement to be created, excluding the husband as a beneficiary and naming the wife as the principal beneficiary and the adult children as secondary beneficiaries. As agreed, about £22m of the wife's money was transferred to these sub-funds. The only element of the agreement not implemented by the husband was a modest pension sharing provision, which could be implemented only if the court made an order. Eventually the terms of the draft order were approved by both the husband and the wife, save as to costs, in particular the costs of implementation; this draft was signed by the wife, but never released to the husband's solicitors. The wife had in the meantime become concerned that changes to the tax system meant that capital gains tax would shortly become payable on any capital released from the family settlement; she therefore applied for an advance of £11m from the sub-fund, which would be free of capital gains tax, but subject to inheritance tax. The trustees were resistant, but eventually the wife obtained an order from the Jersey court that the £11m be advanced to her. For tax planning reasons the remaining funds were removed from the sub-fund and placed in a new trust, in which the wife was no longer the principal beneficiary, but had equal status to the children. The wife then issued a notice of intention to proceed with her application for ancillary relief; the husband responded with a notice to show cause why the ancillary relief order should not be made in terms of the draft order. The wife argued that while the percentage division had been agreed, there had not been a concluded agreement, and that there remained a number of unresolved and significant issues requiring resolution; in particular she sought restoration as the primary beneficiary in the new trust fund, and made allegations of non-disclosure and of financial mismanagement by the husband that had resulted in an obligation on her to pay US tax.

Held – directing a hearing to determine the husband's notice to show cause –

(1) It would be wrong to stay the ancillary relief proceedings and to list the issue of the agreement as a preliminary issue isolated from a proper consideration of the factors in s 25 of the Matrimonial Causes Act 1973. However, in circumstances in which there was a factor of such magnetic importance that it must necessarily dominate the discretionary process, the vehicle of a notice to show cause could

appropriately be considered as the proportionate and just route by which to determine the extent to which that factor should be determinative of the action. The overriding objective to deal with cases justly, set out in r 2.51D of the Family Proceedings Rules 1991, allowed judicial case management to seek to save expense and deal with matters in a way that was proportionate to the financial position of the parties and allotted an appropriate share of the court's resources. There was no reason why, in an appropriate case, the status of an alleged agreement should not be dealt with as a notice to show cause, determined against the backdrop of a consideration of the s 25 factors (see para [23]).

(2) The husband had a very strong case that an agreement had been concluded, and had been implemented by both parties. It was unlikely that a court would find that the unresolved issue as to how the costs of implementing the agreement were to be paid went to the heart of the agreement. When considering any time lapse for the purpose of considering changes in circumstance, the relevant time lapse was not from conclusion of the agreement, but from the last occasion on which the wife was seen to be relying on the terms of the agreement. On that basis there were no changes of circumstances that would inevitably lead a court to conclude that the original agreement could not stand. The issues raised by the wife concerning the trust had arisen as a consequence of the wife's own actions, carried out subsequent to, and in reliance on, the implementation of the terms of the agreement. There was scant, if any, evidence of material non-disclosure on the husband's part and any tax owed as a result of financial management decisions could be split in the same proportion as the assets (see paras [59], [60], [63], [70], [79], [80], [82], [86]).

(3) The agreement was a factor of such magnetic importance that it must necessarily dominate the discretionary process; if the court were to find that there had been an agreement upon which both parties had relied for nearly 3 years, and which had been implemented in its entirety save for the pension share, that would give rise to a strong argument that a possible result of the s 25 exercise would be the making of an order in the terms sought by the husband. There was therefore to be a listing for a final hearing at which the husband's notice to show cause would be determined. There was to be no further disclosure and no replies to questionnaires would be ordered, except to ascertain whether, in regard to one specific set of assets held by a family settlement, there had been a separation as opposed to an apportionment of assets. The wife was to file and serve a *Scott* schedule setting out any allegations against the husband in respect of non-disclosure or financial misconduct, with the evidence in support, and in default would be debarred from raising those issues at trial (see paras [86], [89], [90], [91], [93]–[95]).

Statutory provisions considered

Matrimonial Causes Act 1973, s 25(1), (2)(f)
Family Proceedings Rules 1991 (SI 1991/1247), rr 2.51D, 2.61

Cases referred to in judgment

Barder v Caluori [1988] AC 20, [1987] 2 WLR 1350, [1987] 2 FLR 480, [1987] 2 All ER 440, HL
Beach v Beach [1995] 2 FLR 160, FD
Charman v Charman (No 2) [2006] EWHC 1879 (Fam), [2007] 1 FLR 593, [2006] All ER (D) 32 (Aug), FD
Crossley v Crossley [2007] EWCA Civ 1491, [2008] 1 FLR 1467, CA
Dean v Dean [1978] Fam 161, [1978] 3 WLR 288, [1978] 3 All ER 758, FD
Edgar v Edgar [1980] 1 WLR 1410, (1981) 2 FLR 19, [1980] 3 All ER 887, CA
Smith v Smith [2000] 3 FCR 374, CA
Soulsbury v Soulsbury [2007] EWCA Civ 969, [2008] Fam 1, [2008] 2 WLR 834, [2008] 1 FLR 90, CA
X and X (Y and Z Intervening) [2002] 1 FLR 508, FD

Xydhias v Xydhias [1999] 1 FLR 683, [1999] 2 All ER 386, CA

Martin Pointer QC and *Justin Warshaw* for the applicant
Jeremy Posnansky QC for the respondent

Cur adv vult

ELEANOR KING J:

[1] This is a case management directions hearing in ancillary relief proceedings between SS (the wife) and CS (the husband).

[2] The wife is 58 and the husband 61. They married on 23 September 1975 and separated in August 2004; this was therefore a marriage of 21 years. There are three adult children: R who is 30, A who is 29 and C who is 27.

[3] The wife now lives with her new partner. The husband lives alone although he has a girlfriend.

[4] The wife issued a divorce petition on 3 May 2005 and decree nisi was pronounced on 14 September 2005.

[5] The parties are very wealthy. In late 2005 their total assets amounted to something in the region of £78m. The parties' cases are conventionally put: the husband was the wealth creator and the wife the home maker.

[6] On 29 November 2005 a round table meeting was held in an attempt to resolve the ancillary relief proceedings by agreement.

[7] The husband's case is that the decisions made at that meeting and the effect of subsequent negotiations that were necessary in order to refine details, drafting and collateral issues such as tax, amount to a concluded agreement (the 'agreement') between the parties. This 'agreement' he says has subsequently been implemented in its entirety (save for a modest pension share provision which cannot in law be implemented prior to the making of an order). The result is that the wife has had assets to the tune of approximately £34m transferred to her or her trusts pursuant to the agreement.

[8] In those circumstances the husband submits that it does not matter that the final draft order was signed by the wife but not released to the husband's solicitors for reasons which are dealt with below.

[9] The wife's case is that whilst there was an agreement that the assets should be divided as to 45% to the wife and 55% to the husband, there has not been a concluded agreement and there remain a number of unresolved and significant issues which require resolution via ancillary relief proceedings. Those proceedings can, it is said on her behalf, be dealt with in a somewhat truncated manner due to the agreement between the parties as to the proportions in which the assets were to be split. The outstanding issues will require the trustees of the family settlement to be joined as parties and may require the variation of nuptial settlements.

[10] On 4 February 2008 the wife filed a notice of intention to proceed with an application for ancillary relief: Form A. In it she indicates her intention to seek all forms of ancillary relief and to vary a nuptial settlement.

[11] On 30 April 2008 the husband issued a notice to show cause why an order should not be made in the terms of a draft order which the husband says had been agreed between the parties.

[12] The matter came before District Judge Redgrave on 8 May 2008. The district judge transferred the matter to the High Court and made directions which essentially allowed for either course to be pursued in that she ordered

the filing of Form E and of questionnaires and requests for documents but listed a further directions hearing in the High Court in respect of both the ancillary relief proceedings and the the husband's notice to show cause.

[13] So it was that the matter came before the court with the husband and the wife each represented by leading counsel: Mr Pointer QC for the wife and Mr Posnansky QC for the husband.

[14] The wife seeks to persuade the court to make directions in the ancillary relief proceedings, albeit on a slightly more limited basis than would be normal given the concession made by the wife as to the proportions in which the assets should be held (although requiring replies to her questionnaire). The husband submitted that the court should stay the ancillary relief proceedings and hear the notice to show cause, with a view to making an order in the terms he submitted had been agreed. This course would leave open to the court the possibility of reinstating the ancillary relief proceedings in the event that the court was not satisfied that:

(i) there was an agreement; and
(ii) that the wife should be held to its terms.

[15] The case management decision which the court has to make is to decide which of these two approaches to adopt in giving directions for the future management of the case or whether to adopt either of them in their entirety.

The legal framework

[16] The Court of Appeal recently considered case management issues in *Crossley v Crossley* [2007] EWCA Civ 1491, [2008] 1 FLR 1467. This was an appeal against a case management decision of Bennett J, where he had been asked significantly to limit the issues to be litigated at trial on account of the fact that there was one factor of such magnetic importance that it must necessarily dominate the application of s 25 of the Matrimonial Causes Act 1973 and the discretionary process.

[17] In *Crossley* the Court of Appeal considered how ancillary relief proceedings could best be case-managed in circumstances where there is a factor of magnetic importance. In that case it was a prenuptial agreement in the context of a 2-year, childless marriage where each party was independently wealthy.

[18] Thorpe LJ said:

> '[15] All these cases are fact dependent and this is a quite exceptional case on its facts, but if ever there is to be a paradigm case in which the court will look to the prenuptial agreement as not simply one of the peripheral factors in the case but as a factor of magnetic importance, it seems to me that this is just such a case. As to the second and third grounds, that the judge was bound by the provisions of r 2.61, I am quite unpersuaded, as was the judge, that these individual rules were intended to be some sort of straitjacket precluding sensible case management. I would particularly stress the overriding objectives that govern all these rules, carefully and fully drafted in r 2.51D. It is easy to attach this case on its facts to a number of the objectives there

> articulated. It is very important that the judge in dealing with the case should seek to save expense. It is very important that he should seek to deal with the case in ways proportionate to the financial position of the parties. It is very important, more so today than it was when these rules were drafted, that he should allot to each case an appropriate share of the court's resources, taking into account the need to allot resources to other cases. In his general duty of case management he is required to identify the issues at an early date and particularly to regulate the extent of the disclosure of documents and expert evidence so that they are proportionate to the issues in question.'

[19] I bear in mind Thorpe LJ's observations throughout my consideration of this application.

[20] I have been invited by both Mr Posnansky QC and Mr Pointer QC to look at a number of authorities which relate to cases where there has been an alleged agreement. It is no part of my case management task to decide whether there was in fact an agreement and if so whether the wife should be held to it. Consideration of the authorities is however, I accept, a necessary backdrop against which to assess the strength of the husband's submission that there is an agreement and, if there is one, of its importance within the discretionary process upon which the court has to embark in order to achieve a fair outcome to the ancillary relief proceedings.

[21] Mr Pointer submits that:

(a) an application to stay the ancillary relief application is wrong;
(b) an application utilising the procedural route of a notice to show cause in order to obtain a determination of the status of 'the agreement' as a preliminary issue in isolation is wrong;
(c) in any event, there is no concluded agreement in this case and the court's duty to consider all the s 25 circumstances must lead the court to having an ancillary relief trial, albeit truncated as to disclosure, but, significantly, with the court able to make such orders as in its discretion it thinks fit, which orders may be different from those 'agreed' between the parties.

[22] In any consideration of the authorities relating to 'agreements' the starting point must always be *Edgar v Edgar* [1980] 1 WLR 1410, (1981) 2 FLR 19, [1980] 3 All ER 887 and Ormrod LJ's classic exposition of the law at 1417, 25 and 893 respectively:

> 'Under s 25(1) it is the duty of the court to have regard to all the circumstances of the case and, in particular, to the matters detailed in paragraphs (a) to (g) …
>
> To decide what weight should be given in order to reach a just result to a prior agreement not to claim a lump sum, regard must be had to the conduct of both parties, leading up to the prior agreement, and to their subsequent conduct, in consequence of it. It is not necessary in this connection to think in formal legal terms, such as misrepresentation or estoppel, all the circumstances as they affect each of two human beings must be considered in the complex relationships of the marriage. So, the

circumstances surrounding the making of the agreement are relevant. Undue pressure by one side, exploitation of a dominant position to secure an unreasonable advantage, inadequate knowledge, possibly bad legal advice, an important change of circumstances, unforeseen or overlooked at the time of the making of the agreement, are all relevant to the question of justice between the parties. Important too is the general proposition that, formal agreements, properly and fairly arrived at with competent legal advice should not be displaced unless there are good and substantial grounds for concluding that an injustice will be done by holding the parties to the terms of their agreement.'

[23] The following propositions drawn from the authorities referred to by counsel, seem to me to be of particular relevance on the facts of this case:

(i) The existence of a concluded agreement is a matter of great weight:

> '24 formal agreements, properly and fairly arrived at with competent legal advice should not be displaced unless there are good and substantial grounds for concluding that an injustice will be done by holding the parties to the terms of their agreement' (*Edgar)*

See also *X and X (Y and Z Intervening)* [2002] 1 FLR 508:

> '[103] The court will not lightly permit parties who have made an agreement between themselves to depart from it'

Recently in *Soulsbury v Soulsbury* [2007] EWCA 969; [2008] Fam 1, [2008] 2 WLR 834, [2008] 1 FLR 90 Ward LJ seemed to go further:

> '[45] … I accept that if there are negotiations to compromise a claim for ancillary relief, then there is a duty to seek the court's approval as is stated in *Smallman*. But as *Smallman* states, and I do not see how that authority of this court can be ignored by me, even an agreement subject to the approval of the court is binding on the parties to the extent that neither can resile from it.'

It is not necessary for the purposes of this judgment to consider how Ward's LJ recent observation fits with the body of case-law. Its significance for the purposes of the case management decision I have to make is that it is a further example of the importance of agreements in the eyes of the Court of Appeal.

(ii) The court when considering whether there is an agreement and its effect if there is, does so against the backdrop of s 25:

In Dean v Dean [1978] Fam 161, [1978] 3 WLR 288, [1978] 3 All ER 758 at 172, 298 and 767 respectively :

> 'The court must, in performing its duty under s 25 in circumstances where there is an agreement between the parties, adopt the broad rather than the particular approach.

> On the one hand, the court has a duty under s 25, but at the same time the court owes a duty to uphold agreements validly arrived at …'

In *Xydhias v Xydhias* [1999] 1 FLR 683, [1999] 2 All ER 386 the Court of Appeal noted that at 691 and 394 respectively:

> 'An even more singular feature of the transition from compromise to order in ancillary relief proceedings is that the court does not either automatically or invariably grant the application to give the bargain the force of an order. The court conducts an independent assessment to enable it to discharge its statutory function to make such orders as reflect the criteria listed in s 25 of the Matrimonial Causes Act 1973 as amended.'

Mr Pointer relies on *Smith v Smith* [2000] 3 FCR 374 in support of his submission that the issue of an agreement should not be dealt with as a preliminary issue *in isolation* by way of a notice to show cause. *Smith v Smith* is an example of a case where the court at first instance fell into the trap of considering an agreement as a preliminary issue in isolation without any consideration of the s 25 factors. As a consequence an order was made holding a wife to an agreement which singularly failed to meet her basic needs. Thorpe LJ said: (at 381f)

> 'My greatest criticism of this judgment is one that is perhaps not directed against the judge himself. I believe that the omissions in the judgment are probably the product of the way the case was presented and argued. It seems as if it was almost presented to the judge as a preliminary issue for him to decide whether the existence of the contract in September 1996 disentitled the wife, as a matter of either law or discretion, from an investigation of her statutory claims. That was simply not the judicial function. As Ormrod LJ had made clear first in the unreported case of *Brockwell v Brockwell* [1975] CA Transcript 468 and then in Edgar, when a wife brings to the court her statutory claims for determination the existence of an earlier contract is only one of the considerations to which the judge must give weight. In the application of the statutory criteria to the case, Ormrod LJ said that it should be brought in under the head of conduct: s 25(2)(f) of the Matrimonial Causes Act 1973.'

I do not take *Smith v Smith* to be saying that the court must always hear a case as a full blown ancillary relief hearing where there is an alleged agreement, but rather as a trenchant reminder that an agreement forms part of all the circumstances of a case and that, even if such an agreement be found to be of magnetic importance, the court should only ever consider such an agreement against the backdrop of all the s 25 factors.

> There is no reason why in an appropriate case, the status of an alleged agreement should not be dealt with as a notice to show cause determined against the backdrop of a consideration of the

s 25 factors. Such an approach is in my judgment, fundamentally different from one where the court embarks on a consideration of evidence as to the existence of an agreement as a preliminary issue, in a vacuum, with no consideration of the surrounding circumstances or s 25 factors.

I therefore accept Mr Pointer's submission to the extent that I agree that it would be wrong to 'stay' the ancillary relief proceedings and to list the issue of the agreement as a preliminary issue isolated from a proper consideration of the s 25 factors.

I do not accept however that there may not be circumstances in which there is a factor of such magnetic importance that it must necessarily dominate the discretionary process. In such a case the vehicle of a 'notice to show cause' can appropriately be regarded as the proportionate and just route by which to determine the extent to which that factor should be determinative of the action.

(iii) An application for a notice to show cause is therefore an appropriate means by which an aggrieved party can bring the matter before the court. In *Dean v Dean*, *Xydhias v Xydhias* and *X and X (Y and Z Intervening)* [2002] 1 FLR 508 such a procedure was adopted. I note also the Court of Appeal's approach in *Crossley* where the prenuptial contract was the dominant factor:

> '[18] this case … demonstrates the discretionary power of the judge to require a party to show cause why a contractual agreement should not rule the outcome of an ancillary relief claim, not just when the contract is made post-separation and in contemplation of an application, but also when the contract has been made prenuptially or postnuptially before the breakdown of the marriage.'

(iv) Public policy requires the court to consider whether there has been an agreement and also to 'exclude from the trial lists unnecessary litigation': Xydhias and Crossley. In Xydhias the Court of Appeal said at 692–693 and 395–396 respectively:

> 'If there is a dispute as to whether the negotiations led to an accord that the process should be abbreviated, the court has discretion in determining whether an accord was reached. In exercising that discretion the court should be astute to discern the antics of a litigant who, having consistently pressed for abbreviation, is seeking to resile and to justify his shift by reliance on some point of detail that was open for determination by the court at its abbreviated hearing. If the court concludes that the parties agreed to settle on terms then it may have to consider whether the terms were vitiated by a factor such as material non-disclosure or tainted by a factor within the parameters set in *Edgar v Edgar* …

> Litigants in ancillary relief proceedings are subjected to great emotional and psychological stresses, particularly as the date of trial approaches. In my opinion there are sound policy reasons supporting the conclusion that the judge is entitled to exercise a broad discretion to determine whether the parties have agreed to settle. The pilot scheme depends on judicial control of the process from start to finish. The court has a clear interest in curbing excessive adversariality and in excluding from trial lists unnecessary litigation.'

(v) The overriding objective to deal with cases justly, set out in r 2.51D of the Family Proceedings Rules (FPR) 1991, allows judicial case management to seek to save expense and deal with matters in a way that is proportionate to the financial position of the parties and allots an appropriate share of the court's resources. The FPR 1991 are not intended to be a straightjacket precluding sensible case management: *Crossley* [para [15], [17]].

(vi) It is not necessary for every detail to have been resolved prior to the court taking the view that there is an agreement to which a party should be held: *Xydhias v Xydhias* [1999] 1 FLR 683, [1999] 2 All ER 386. The first stage of negotiation, which should then be recorded in a simple heads of agreement, is '*what is the applicant to receive*? (696a and 398 respectively). Points of detail can thereafter be determined by the court at an abbreviated hearing. (692g and 395 respectively).

(vii) In determining whether there has been an agreement the court will look at all the circumstances including the extent to which the parties themselves attached importance to the agreement and the extent to which the parties themselves have acted upon it: *X and X (Y and Z Intervening)*.

The procedural route

[24] Mr Pointer poses three questions which he suggests are key in determining how the matter should be dealt with:

(a) Is there in fact an agreement?

(b) In the event that there was, has there been a change in circumstances such that the wife should not now be held to the agreement?

(c) If there was an agreement, is it now capable of being implemented in any event?

[25] He submits the evidence in favour of a concluded agreement is scant and there was only a 'headline' agreement as to the proportions in which the assets should be divided.

[26] In any event, he says, subsequent changes in circumstance in the intervening period of nearly 3 years mean that the wife should no longer be held to the agreement, and even if she should, those same changes mean that it is no longer possible to implement the agreement.

Is there an agreement?

[27] The issue as to whether or not there was an agreement will be decided by the judge hearing the case in whatever form it ultimately takes. Mr Pointer and Mr Posnansky agree that unless there is a strong arguable case that there was an agreement then the course proposed by Mr Posnansky is inappropriate.

[28] Whilst making no specific findings (and being conscious that the court has not had sight of all the complete files of documentation to which each party may wish to refer in due course), it is necessary for me to consider in broad terms the strength of the argument in favour of there having been an agreement by reference to the history of the agreement and the relevant law.

[29] The first significant event took place on 29 November 2005 when a round table meeting was convened. It is common ground that agreement was reached that the wife should have 45% of the assets and the husband 55%. The parties had a schedule of assets produced from information provided by their joint accountant. The assets were £78m.

[30] Of the £78m about £45m was held in the shelter of a trust called the Murray 1987 Settlement. Part of the 'agreement' in November 2005 was that a sub-fund would be created in the wife's name to be called the SS Fund. The wife was to be the principal beneficiary of this fund and the three children would be secondary beneficiaries. The husband was to have no entitlement under the sub-fund and was to be specifically excluded from being a beneficiary. In the event of the death of either party the funds would be merged again for the benefit of the surviving party.

[31] In this way the wife had access to substantial funds (£22m), from which the husband was excluded, but the important protection from inheritance tax provided by the trust would not be lost.

[32] The day after the meeting Mr Alexiou who then represented the husband, wrote to Mrs Sandra Mason who was then representing the wife, expressing 'pleasure that an agreement had been reached' and looking forward to receiving leading counsel's draft order.

[33] Those representing the wife sent through a draft order on 2 December 2005 describing it as 'Philip Moor's draft of the agreement reached at the meeting on Wednesday.' In the letter the wife's solicitor raised a number of minor issues expressing the hope that those 'loose ends' could be resolved promptly.

[34] A further meeting was held on 17 February 2006 where the draft order was discussed. Present were the parties' joint accountants, Messrs Saffrey Champness, and the husband's tax adviser from Wedlake Bell. At that meeting leading counsel for the wife referred to the agreement as being 'inviolable' with the only changes being in relation to tax matters. It was agreed that Wedlake Bell and the tax counsel already instructed would advise the parties jointly with regard to drafting and tax issues. The aim at the end of the meeting was to have a consent order to put before the court by 5 April 2006.

[35] In the ensuing months a letter of request was drafted on behalf of the husband and the wife by their jointly instructed advisers and was sent to the trustees of the Murray 1987 Settlement. The letter of request asked the trustees to take certain steps; this included carving out the SS Subfund for the wife with her as principal beneficiary and the husband being excluded, and also dealt with the parties' home in Bermuda. Mr Pointer takes the point that no signed letter has been produced. The documentation is, it seems to me, in

need of some organisation. I do not know whether a signed copy of the document will ultimately be produced but, in my judgment, the most significant point is that the wife agreed the document upon advice, it was sent to the trustees of the Murray 1987 Settlement who acted on it to the wife's benefit and in accordance with the terms 'agreed' at the meeting, that is to say a subfund called the SS Sub-fund was created with assets of £22m with the wife designated principal beneficiary and a deed of exclusion executed excluding the husband as a beneficiary of that fund.

[36] The Bermuda property, known as Tideway, as envisaged by the draft and the letter of request agreed by the parties. was then vested as to one third in the newly created SS Sub-fund and two thirds in the original Murray 1987 Settlement (which was now the husband's trust although the children continued to be beneficiaries of both).

[37] By about May 2006 the wife had received £3.425m, which according to a schedule of assets produced by the her solicitors, represented 45% of the assets less the pension transfers which could not be put into effect until there was an order.

[38] Unsurprisingly, in a case where the family's wealth had hitherto been held within tax efficient vehicles, much time was spent on the preparation of a tax indemnity and on the regulation of future tax issues as between the parties.

[39] On 13 June 2007 the wife's solicitors sent an amended draft consent order containing amendments proposed by the tax experts. They asked the husband's solicitors to 'confirm that you are satisfied on behalf of CS that this truly represents the terms of the Order agreed and the further agreement reached between us on advice from counsel.'

[40] That amended draft order was drafted on the basis that all the implementation of the 'agreement' was yet to take place.

[41] The husband's solicitors wrote back saying the amended draft order was 'in order' save for costs and in particular the costs of implementation.

[42] On 30 July 2007 it was agreed between the lawyers that the order should be revised so as to reflect the fact that all the significant transactions had already taken place. This meant that the final draft order prepared on behalf of the wife is largely a record of those transactions. In terms of proposed court orders that document made provision only for a pension share and the transfer of the benefit of a loan together with the usual clean break provisions, everything else that was necessary to put into effect the agreed division of assets as to 45% to the wife and 55% to the husband having already taken place.

[43] On 10 October the wife's solicitor sent a letter to those representing the husband it enclosed a number of documents all of which had been approved by the wife:

- Consent order
- Form M1 for the husband and the wife (the wife's unsigned)
- Schedule of assets to be annexed to the order
- The deed of indemnity
- Schedule of the wife's costs
- Pension Annexures (sic)

[44] With regard to the running sore about costs incurred to implement the 'agreement,' the wife's solicitor proposed to deal with the issue in the following way:

> 'My client is not prepared to concede a change to the terms agreed on 30 November 2005 in respect of her costs and will rely on this agreement being covered by the ruling in *Edgar v Edgar* … If necessary we may seek directions on this sole issue (incurring further costs) but I trust that your client will abide by his original agreement of 30 November 2005 and allow the matter to be concluded.'

[45] From the documents available to the court it would appear that, up to this point within the confines of the inevitable anxiety associated with the resolution of any ancillary relief proceedings great or small, the parties had managed to work co-operatively for what, may, (subject to the determination of the trial judge), seem to have been a common goal.

[46] In the letter of 10 October 2007 came the first hint that discord lay ahead with regard to the Bermuda property, Tideway. In accordance with the letter of request, Tideway, as mentioned above, was now held as to one third in the wife's SS Fund and two thirds in the husband's in the Murray 1987 Settlement. In the letter the wife's solicitor spoke of the possibility that the wife might wish to become non-resident from the UK and make Tideway her principal home. To this end Mrs Mason said:

> 'She would need to do so with the written reassurance of a written undertaking from your client not to enforce any provisions previously agreed enabling either to enforce a sale of the property or buy-out, unless at a time acceptable to her … I do not believe we need to refer to it in the consent order but simply lodge it with the trustees.'

[47] It is difficult to see why such a solution was being put forward unless the wife felt bound by an earlier agreement in relation to Tideway.

[48] In a letter of 12 November Mrs Mason wrote that she held the signed consent order subject to Tideway being resolved and the costs issue. For the first time there was a reference to the recently decided case of *Charman v Charman* (No 2) [2006] EWHC 1879 (Fam), [2007] 1 FLR 593 and the threat that if the husband did not pay the costs then perhaps there should be 'full disclosure and adjudication on the merits and recent decisions.'

[49] In a final letter from Mrs Mason the wife agrees to accept £20,000 towards costs but still seeks an undertaking to give the trustees of the two trusts in respect of Tideway saying 'this must be resolved by way of written undertaking, signed by your client before she will release the main settlement agreement'.

[50] The wife soon after this letter was sent, changed solicitors and returned to Withers who had previously represented her. On 4 February 2007 the husband's solicitors received a letter from Withers enclosing a Form A and saying that 'the previous proposals discussed have been rendered unworkable as a result of the draft Finance Bill' …

[51] The reference to the draft Finance Bill was in relation to the changes which were to take effect at the end of the tax year which would mean, put

simply, that capital gains tax (CGT) would become payable upon any capital advances made from trusts of the type which were sheltering the parties' wealth. Tax advisers around the country were advising beneficiaries and trustees and decisions were being made as to whether to retain the inheritance tax protection enjoyed by the trusts as they stood (on the basis that future capital advances would attract CGT) or conversely to transfer out substantial amounts of capital before the dead line – free of CGT but with the loss of the inheritance tax protection.

[52] The husband decided to do nothing. He took the view that his wealth was such that it was unlikely he would need to advance capital to himself and he wished to retain his inheritance tax protection for his children. The wife and her advisers decided exactly the opposite, to which end a request was made by her to the trustees to advance £11m to her out of the SS Fund. The figure of £11m represented the capital sum which, using the *Duxbury* model, would produce a lifetime income for her of £500,000 pa net.

[53] Investec, the trustees of the Trust, decided that they did not wish to advance such a significant sum but proposed a much smaller sum of £1m to £2m. The children as beneficiaries were consulted. R wrote to the trustees on behalf of himself and his two sisters; their collective view was that the interests of all the beneficiaries would be best served if the assets remained in trust rather than being advanced and that they felt that Tideway was not the right house for their mother given its size and the cost of running it and that, should their mother's trust buy out their father's trust's share, it would represent too great a proportion of the trust in one asset.

[54] As a result of the impasse that this created the matter went before the court in Jersey where the trusts are based. The children understandably took a neutral stance. Judgment was given on 3 April 2007. The commissioners in giving the history recorded

> '… they [the husband and wife] reached an agreement as to how their assets should be divided, namely 55% for CS and 45% for SS. Pursuant to this agreement they asked Investec (the trustees) to consider creating a new revocable subfund for the benefit of SS and their children and remoter issue to be known as the SS Fund appointing to it assets valued at just over £22m.'

[55] The Jersey court found in the wife's favour and ordered the funds sought to be advanced to her, expressing their view that the trustees' concern about these proceedings (ie the ancillary relief proceedings) and their potential impact on the husband lay at the heart of their refusal to act on the express wishes of the wife.

[56] The tax planning put in place by the wife's advisers necessitated the 'rump' of assets in the SS Fund (being about £8m and the 1/3 interest in Tideway) to be transferred out of the SS Fund and into a newly created SS 2008 Trust. The drafting of the new trust was in the hands of the wife's solicitors but necessitated discussion with the children. Whereas the wife had, pursuant to the implemented 'agreement', been the principal beneficiary of the SS Fund that is not the case so far as the SS 2008 Trust is concerned.

[57] The wife says (although no documentary evidence is as yet available to support it), that this is as a consequence of the children's refusal to agree

that their mother should be the principal beneficiary with the ability to request that the balance of the capital in the trust be advanced to her. Her case is that the children's decision was made as a consequence of pressure put on them by the husband.

[58] Looking at the history as set out above and the authorities it seems to me that the husband has a very strong case to support his assertion that there was a concluded agreement:

(i) the wife does not seek to go behind the 45/55 split agreed at the meeting in November 2005;
(ii) the agreement involving complex tax and trust provisions was implemented save for the minor issue of a pension share which could not be implemented prior to the making of an order;
(iii) the husband gave and the wife received £34m in reliance on the agreement;
(iv) the wife appeared to have regarded herself as bound by the 'agreement' certainly so far as Tideway was concerned;
(v) the wife subsequently took independent advice and decided to move on from the structure created under the terms of the agreement and thereafter litigated in the Jersey courts in order to achieve her fiscal goals.

Change of circumstances

[59] Mr Pointer argues that, where nearly 3 years has elapsed since what he described as the 'headline agreement' took place, that agreement can no longer be wholly determinative due to the inevitable changes in circumstances. This, he submits, means that there should be ancillary relief proceedings circumscribed by the extent of disclosure but not otherwise. I cannot agree with that proposition where the relevant time lapse should not, in my judgment, be November 2005 to date but rather should be calculated from the last occasion upon which the wife was seen to be relying on the terms of the 'agreement'. In this case that was as recently as 10 October 2007, only 4 months before a Form A was filed on her behalf.

[60] If it be found that there was an agreement, (agreed between the parties after a panoply of advice and which agreement has substantially been put into effect), then providing the s 25 factors have been considered, why should anything less than a change in circumstances comparable to that which would be necessary to launch a *Barder v Caluori* [1988] AC 20, [1987] 2 WLR 1350, [1987] 2 FLR 480 application be required?

[61] Mr Pointer has referred me to a first instance decision, *Beach v Beach* [1995] 2 FLR 160, in support of his submission that where there is a change in circumstances the case is no longer an *Edgar* case and that the agreement is merely part of the developing history. I do not find *Beach* of assistance. *Beach* was wholly different on its facts. *Beach* concerned a husband who went bankrupt after the agreement was made with his wife; this resulted in the family farm, the only significant asset, being sold by the trustee in bankruptcy for a fraction of the sum which it had been anticipated by both parties would be available for distribution.

[62] I do not therefore agree that there are changes of circumstances which would inevitably lead a court to conclude that the original 'agreement' cannot stand.

Ability to implement the agreement

[63] Mr Pointer raises a number matters which he submits mean that there are significant issues to be tried in any event and that there should therefore be one single ancillary relief trial rather than piecemeal litigation. Circumstances are such and issues have arisen, he says, that render it impossible to implement the 'agreement' even if the court finds there to have been one. It is therefore necessary for me to consider each issue briefly prior to making my decision as to how the case should be managed.

(a) Split of the Murray Trust

[64] Mr Pointer submits that there is a major issue as to whether the wife is to be regarded as the primary beneficiary of her new trust, the 2008 SS Trust, (representing the rump of £8m + 1/3 Tideway after the payment out of the £11m from the SS Fund). If she is not to have access to the capital as the principal beneficiary then, he suggests, there may need to be a nuptial variation to 'restore' the division of assets. The original objective, he suggests, has not been achieved as a consequence of the children refusing to agree to the new trust (drafted to set up the SS 2008 Trust) containing the same provision as the original SS Fund whereby the wife was to be regarded as the principal beneficiary.

[65] This is an argument which, if the court finds there to have been an agreement, Mr Pointer can, if he so wishes, advance as a reason for the court not to hold the wife to the agreement. I do not take the view that it is an argument which is likely to lead a court to conclude that the 'agreement' should be varied.

[66] The original objective was achieved: the SS Fund subtrust was carved out of the Murray 1987 Settlement, and made the wife the principal beneficiary. She thereafter utilised her position as principal beneficiary to obtain an advance out of the trust into her exclusive control of half the assets of £11m, thus putting that sum out of the reach of the other beneficiaries, her children. She would not have been able to accomplish this other than in reliance on the implemented 'agreement'.

[67] It was surely entirely foreseeable that one of the possible consequences of such an action on the part of the wife, (particularly in the light of R's letter) was that the children might say 'enough is enough'. This is not in any way to criticise the actions of the wife who acted on tax and legal advice and, post the implementation of the 'agreement', was entitled to act as she felt to be in her own best interests. There is however in my judgment, a strong argument that her loss of position as principal beneficiary was not as a consequence of the original agreement being incapable of being implemented by virtue of the children's attitude, but as a consequence of the action she took subsequent to the implementation of the 'agreement' to advance to herself a very substantial capital sum and to put in place, in lieu of the subfund created in 2006, the new 2008 trust.

[68] Had the wife chosen to keep the assets under the umbrella of the SS Fund she would have remained the principal beneficiary of that fund for her

lifetime, held the assets in an inheritance tax free vehicle and in the event of the husband predeceasing her, would have become principal beneficiary of the entire remerged settlement. The wife and her advisers, knowing the terms of the SS Fund and in reliance on her designation as principal beneficiary, decided that the assets should be transferred out of the SS Fund subtrust in order to achieve tax free gains and provide the wife with significant assets outside the trust. Whilst she may have hoped, or even presumed, that the other beneficiaries would agree to her again being designated principal beneficiary in the new trust, it is hard to see why their refusal would lead a court to say that she should now be compensated by the husband for that consequence any more than he should compensate her for any of the other consequences of obtaining the capital advance.

[69] In effect the trusts have moved beyond the agreement at the wife's instigation. She finds herself in the present situation as a consequence of her own actions carried out by her subsequent to and in reliance upon the implementation of the terms of the 'agreement'.

(b) Tideway

[70] Mr Pointer wishes to revisit the way in which Tideway is held. He says the letter of request was never executed and therefore there is no agreement about the property and further if the wife is not to be the principal beneficiary of her new trust the beneficial interest in Tideway may have to be varied to give W 45% of the 'free assets'. In her Form E she seeks the transfer of the two thirds held by the husband's settlement citing a breakdown in the arrangements for its shared use.

[71] However the letter of request was drafted on behalf of both parties and has been the backdrop for the implementation of the 'agreement' at every stage. It was in reliance on that document that the SS Fund was carved out and that one third of the beneficial interest in Tideway was allocated to the fund. In the muddle of documentation in this case it is not clear if the letter of request was formally executed. What is of more significance is that both sides have acted in accordance with its provisions since the early part of 2006.

[72] The letter of request makes specific arrangements to deal with any dispute about Tideway by either party being allowed to ask the trustees to sell the property.

[73] The wife herself seems to have regarded the 'agreement' and the letter of request as binding upon her as in October 2007 when she was contemplating going off shore.

Material non-disclosure

[74] This issue is raised by the wife in her Form E where she says in bald terms that she is '*not* sure' that the respondent has made full and frank disclosure of his financial circumstances.

[75] All the original disclosure was provided by the parties' joint accountant, David Watson. In addition the wife employed the international private inquiry agents, Kroll Associates, to investigate the husband and his financial affairs on her behalf.

[76] Mr Pointer does not advance non-disclosure with any enthusiasm saying there should be 'some investigation' and that the wife's team need to 'decide whether to proceed' with that aspect.

[77] The two matters the wife seems to rely upon are:

(a) An assertion that the husband told Mrs Mason (the wife's solicitor who was a personal friend of both parties) that he was worth £140m. The husband says through Mr Posnansky and in his statement that at the time of the dot.com boom he was worth such a sum but that he did not tell Mrs Mason that he was worth that in 2004. Even if the husband did say something to that effect to Mrs Mason she thereafter represented the wife with the benefit of that knowledge; she had disclosure from accountants and private investigators looking into the husband's business affairs; it was never suggested there was non-disclosure on his part and the round table meeting in November 2005 proceeded on the basis of an agreed, or largely agreed, schedule of assets.

(b) The husband, has on one occasion, used code names for himself and his wife. Mr Pointer says the motivation is 'obscure' but Mrs Mason raised a question about this and on 11 November 2005 Mr Alexiou replied explaining why. This was seemingly accepted by the wife at the time and has only been raised as an issue nearly 3 years later.

[78] At present there is scant, if any evidence of material non-disclosure on the husband's part.

Financial misconduct on the husband's part

[79] The wife seeks to assert that the husband has been guilty of financial misconduct in that he has in some way mismanaged the manner in which she gave up her US citizenship with the consequence that she is now liable to pay very significant sums by way of back tax. This, she says is financial misconduct which it would be inequitable to disregard and the husband should be wholly responsible for all the tax due together with the cost of her professional advisers. She says that the husband managed her financial affairs (which is unsurprising and undoubtedly true) and that he would not *allow* her to conduct her own affairs. In the time available at the directions hearing only the most superficial information was put before the court but it should be noted that tax was dealt with specifically in the draft order and also within a detailed tax indemnity prepared on joint instructions. The indemnity was presented as an agreed document by Mrs Mason in her letter of 10 October 2007.

[80] The wife now, it seems, wishes to go behind these documents and launch what would be a costly and extremely unpleasant financial misconduct case.

[81] Mr Pointer concedes that a court may well take the view that the tax should be split in the same proportions as the assets.

Kambalda

[82] Within the Murray Settlement is a range of private equity investments which for tax reasons are owned by the Murray 1987 Settlement via a separate limited company called Kambalda.

[83] The wife's case is that whilst shares in Kambalda were allocated as between the Murray 1987 Settlement and the SS Fund, no proper segregation has been achieved.

[84] Attempts to obtain information about this from the husband have failed which has no doubt caused frustration and created suspicion in the wife's camp. The wife, Mr Pointer says, therefore needs orders to obtain the information in order to see what would be a fair division of the Kambalda shares to achieve a 45/55 split.

[85] Mr Posnansky draws the court's attention to the wife's Form E where she refers to assets of £8m being transferred to the SS Trust on 5 April 2008 that seems to suggest that, even if the shares were not in fact divided whilst they were held in the Murray 1987 Trust and the wife's SS Fund, they were in fact divided on the creation of the SS Trust in April 2008.

[86] I cannot see how this issue is other than a matter for implementation where the wife is not seeking to upset the percentage to which each should be entitled. In the event that her advisers feel that the trustees are favouring the husband over the wife in the allocation of any shares she can go to the Jersey courts to achieve her objective, as she did successfully in April 2008.

Conclusion

(i) In my judgment there is a very strong case to suggest that there was a concluded agreement which has been implemented by both parties.

(ii) I think it unlikely that a court would find the unresolved issue as to how the costs of implementing that agreement were to be paid as going to the heart of the agreement; indeed those representing the wife clearly shared that view as evidenced in the letter of 10 October 2007 where they emphasised that the agreement was subject to the *Edgar* principles and that any issue of costs could be dealt with by the court as a discrete issue.

(iii) None of the issues raised by Mr Pointer strikes me at this stage as undermining the fundamental significance of the 'agreement,' if it exists. If the court finds there to have been an agreement upon which both parties have relied for nearly 3 years and which has been implemented in its entirety save for the pension share (which is stalled only until the making of an order), then the combination of those factors gives rise to a strong argument that a possible result of the s 25 exercise will be that the wife receives no further financial reward and that an order should be made in the terms sought by the husband.

(iv) I also bear in mind the following:

(a) That the assets are in excess of £75m and that the wife discloses assets in her name of £28m net which excludes her interest in the SS Trust which she puts at £8m excluding the one third interest in Tideway. She has the advantage of an income of in excess of £400,000 pa net and a high degree of liquidity; she has £4m in the bank

and £15m in two share portfolios; conversely the majority of the husband's substantial resources are held largely in trust.

(b) That the wife has incurred costs of £243,876 between November 2007 when the Form A was issued and August 2008 (to what is, in effect, an adjourned first appointment). This figure does not include the Jersey litigation, her immigration lawyers fees and has involved no extensive disclosure/investigation in the ancillary relief proceedings. The husband's costs for a similar period amount to £91,430.

(c) Mr Pointer suggests that the ancillary relief hearing can be completed in 5 days; Mr Posnansky takes issue with that time estimate. I agree with Mr Posnansky. In my opinion 5 days is a hopeless underestimate even if the wife does not seek to suggest there has been any non-disclosure. On the wife's case the trustees are to be joined as parties and she is seeking to suggest financial mismanagement on the part of the husband; such allegations inevitably take up significant court time.

(d) The litigation is taking a significant toll on this family: the adult children are distressed and feel they have been sucked into their parents' affairs. They, or some of them, have fallen out with their mother over the SS 2008 Trust issue. The wife feels that the husband is influencing her children against her. The husband for his part thinks the wife is being greedy, by contemplating further capital advances from the trust in which their children are beneficiaries. The wife says in her Form E that she is suffering from depression and, having seen her in court, I can well believe it; she looked tense and at times near to tears during the hearing.

[87] Looking at the fourth factor alone must, in the light of the judgment of Thorpe LJ in *Crossley*, surely give any court pause to consider whether it is proportionate to sanction an expensive and lengthy trial.

[88] In all the circumstances I have unhesitatingly concluded that this is one of that category of cases identified by Thorpe LJ in *Crossley v Crossley* where there is a factor of such magnetic importance that it must necessarily dominate the discretionary process. I do not stay or adjourn the ancillary relief proceedings as the agreement must be considered in the context of s 25 although I propose to order that the notice to show cause is to be determined at the next hearing and intend also to limit any additional disclosure as set out in my proposed directions.

Directions

[89] The matter is to be listed for final hearing of the wife's application for ancillary relief with a time estimate of 3 days on the first available date after 1 December 2008, subject to counsel's availability. There shall be no further disclosure save as provided by the order and the court at the hearing will

determine the husband's application for a notice to show cause why an order should not be made in the terms of the draft order submitted on his behalf.

[90] Neither side shall reply to the questionnaires filed herein.

[91] Solicitors for both parties will identify, agree, file and serve as a discrete bundle copies of the final versions (signed and/or executed where available) of each of the following:

(a) The draft order attached to Mrs Sandra Mason's letter of 10 October 2007;
(b) the letter of request;
(c) the tax indemnity;
(d) the parties' forms M1.

[92] The parties shall file and serve a report from Clare Cromwell and James Sykes of Saffrey Champness setting out how the investments in Kambalda held by the Murray 1987 Settlement as of November 2005 have been held from November 2005 to date, setting out in detail any transfers or apportionment between the Murray 1987 Settlement and either the SS Fund or SS Trust. In the event that transfers between the Murray 1987 Settlement and the SS Trust 2008 are anticipated details of the proposed transfers should be set out.

[93] For the avoidance of doubt the purpose of ordering the provision of this information is to ascertain whether there has been a separation as opposed to an apportionment of the Kambalda assets and it is not intended that the detailed information sought by the wife in her questionnaire should be provided.

[94] On or before 4 pm on 3 October 2008 the wife shall, if so advised, file and serve a *Scott* schedule setting out in detail each and every allegation made by her of the husband's alleged non-disclosure and financial misconduct together with the evidence in support of each allegation and in default be debarred from raising those issues at trial.

[95] The husband shall respond to the said Schedule on or before 4 pm 31 October 2008.

[96] Costs reserved to the final hearing.

Order accordingly.

Solicitors: *Withers and Co* for the applicant
Farrers &Co LLP for the respondent

PHILIPPA JOHNSON
Law Reporter

WC v HC (FINANCIAL REMEDIES AGREEMENTS) (REV 1) [2022] EWFC 22

Family Court

Peel J

22 March 2022

Financial remedies – Pre and post-marital agreements – Inter-vivos gifts – Prospective inheritance

The husband and wife were married for 17 years and had two children together. Prior to the marriage the parties entered into and fully executed an English pre-marital agreement concerning child maintenance, followed by a supplemental agreement and two Swiss agreements mirroring the English pre-marital agreement. During the course of the marriage, the parties enjoyed a very affluent standard of living, in large part funded by the generosity of the husband's wealthy father. The parties' combined net assets totalled over £12m. The children initially attended school in Switzerland, before the parents agreed that they should attend school in England. The wife and children were to live in England and travel to and from Switzerland where the husband would continue to be based. Following that decision, the husband suggested entering into a post-marital agreement setting out the terms of post-divorce custodial rights and division of assets. Both parties engaged lawyers and entered into negotiations. The wife ultimately declined to sign the post-marital agreement, primarily due to concerns about not seeing the Swiss mirror documents before signing. The parties separated in 2019 and the wife and children moved into rental accommodation in London. Shortly before separation, the husband's father had transferred assets worth about 23m Euros into a discretionary trust intended to benefit the husband, his siblings and their issue on the father's death. The wife served her divorce petition in January 2020 and the following month the assets were transferred out of the trust and back to the husband's father pursuant to an instrument of partial revocation. It was the husband's case that his father had ceased annual payments previously made to him and had side-lined him from his role in the family office.

When the financial remedy proceedings came before Peel J for final hearing, the total assets (excluding any future wealth potentially to be received by the husband from his father) were almost £12.5m. Almost the entirety originated from gifts and inheritance on the husband's side during the marriage or had been owned by him before the marriage. The husband had a limited earning capacity, having largely lived off his father's largesse; the wife had no meaningful earning capacity.

The main issues before the court were the pre-and post-marital agreements, whether previous inter-vivos gifts would be resumed, prospective inheritance and the wife's needs.

Held – awarding the wife £7.45m which was 60% of the total assets; the husband agreeing to make, in addition, a high financial commitment to the children –

(1) Both the husband and wife had been under pressure from the husband's father to sign the pre-marital agreement. However, none of the vitiating factors set out in *Radmacher (Formerly Granatino) v Granatino* [2010] UKSC 42, [2010] 2 FLR 1900 applied and there was no reason to discard or ignore ab initio the pre-marital agreement. The wife had not been under undue pressure to enter into it and the document had largely been overtaken by events (see paras [31], [32]). *Radmacher (Formerly Granatino) v Granatino* [2010] UKSC 42, [2010] 2 FLR 1900 applied.

(2) Although there was no doubt that the wife had been placed under pressure by the husband to sign the post-marital agreement, she had not been placed under undue pressure, let alone duress, to sign. The post-marital agreement was not a formally arrived at agreement in the *Radmacher* sense, whereby the presumption was that it

should be given effect to unless in the circumstances it would not be fair to hold the wife to its terms. It did not bind the wife unless she could demonstrate that it operated unfairly. But nor was the court willing to simply discard and ignore it. To do so ran contrary to the s 25 Matrimonial Causes Act 1973 requirement to take account of all the circumstances of the case. Although not strictly a *Radmacher* agreement, this had been an agreement reached by the parties, with the benefit of legal advice and upon full disclosure. The absence of the wife's signature to the post-marital agreement, in circumstances where she had consciously decided not to sign, took that agreement outside the *Radmacher* category of cases. It nevertheless fell to be considered as one of the factors in the case but it was not presumptively dispositive as would have been the case had it fallen into the *Radmacher* category. The terms agreed were relevant, albeit not determinative (see paras [35], [40], [41]). *Radmacher (Formerly Granatino) v Granatino* [2010] UKSC 42, [2010] 2 FLR 1900 applied.

(3) The approach governing the court's enquiry into the willingness of the wider family to assist one or both of the spouses financially, including the category of gratuitous donors, was set out in *M v M (Financial Remedies)* [2020] EWFC 41, [2020] 2 FLR 1048. Given the current disputes within the family, the court could not find that in the foreseeable future the husband's father would be likely to resurrect the previous level of payments or replace funds in the dynastic trust. The relationship between the husband and his father had broken down and the father could only be viewed as a safety net in the event of calamity.

(4) The principles pertaining to inherited wealth were reviewed in *Alireza v Radwan and Others* [2017] EWCA Civ 1545, [2018] 1 FLR 1333. In the instant case it was, on balance, likely that the husband would receive a sizeable inheritance, but such inheritance would be entirely non-matrimonial and received long after separation. Further, the parties had always understood, as the two agreements recorded, that future inheritances should be excluded from claims. Any inheritance could be several years away and was unlikely to be of immediate assistance to the husband (see paras [46], [47], [49]).

(5) The award was to be based principally on an assessment of the wife's needs. She needed a fund of £4m to purchase a property in London near the children's schools, plus £110,000 pa, for income, capitalized in accordance with the *Duxbury* tables at £3,319,000. The sum would be rounded up to £7.45m to allow for unforeseen contingencies. The award approximated to that which had been contained within the post-marital agreement but went beyond it so as to meet the wife's needs judged against all the relevant factors. The husband would also be paying a very high level of agreed expenditure for the children per annum including £44,000 child maintenance, £80,000 directly paid costs and £50,000 for school fees. The order would leave the husband able to meet his own needs (see paras [60], [61], [63], [64], [67]).

Statutory provisions considered

Matrimonial Causes Act 1973, ss 24, 25, (2), 25A
Family Procedure Rules 2010 (SI 2010/2955), PD 27A

Cases referred to in judgment

Alireza v Radwan and Others [2017] EWCA Civ 1545, [2017] 4 WLR 206, [2018] 1 FLR 1333, [2017] All ER (D) 74 (Oct), CA
BD v FD (Financial Remedies: Needs) [2016] EWHC 594 (Fam), [2017] 1 FLR 1420, FD
BN v MA [2014] EWHC 4250 (Fam), (unreported) 10 December 2013, FD
Charman v Charman (No 4) [2007] EWCA Civ 503, [2007] 1 FLR 1246, CA
FF v KF [2017] EWHC 1093 (Fam), [2017] All ER (D) 94 (May), FD
G v G (Financial Provision: Equal Division) [2002] EWHC 1339 (Fam), [2002] 2 FLR 1143, FD

G v G (Financial Remedies: Short Marriage: Trust Assets) [2012] EWHC 167 (Fam), [2012] 2 FLR 48, FD
Hart v Hart [2017] EWCA Civ 1306, [2018] 2 WLR 509, [2018] 1 FLR 1283, CA
K v L (Non-Matrimonial Property: Special Contribution) [2011] EWCA Civ 550, [2012] 1 WLR 306, [2011] 2 FLR 980, [2011] 3 All ER 733, CA
M v M (Financial Remedies) [2020] EWFC 41, [2020] 2 FLR 1048, FC
Miller v Miller; McFarlane v McFarlane [2006] UKHL 24, [2006] 2 AC 618, [2006] 2 WLR 1283, [2006] 1 FLR 1186, [2006] 3 All ER 1, HL
N v F (Financial Orders: Pre-Acquired Wealth) [2011] EWHC 586 (Fam), [2011] 2 FLR 533, [2011] All ER (D) 96 (Apr), FD
Radmacher (Formerly Granatino) v Granatino [2010] UKSC 42, [2011] 1 AC 534, [2010] 3 WLR 1367, [2010] 2 FLR 1900, [2011] 1 All ER 373, SC
RC v JC [2020] EWHC 466 (Fam), [2020] All ER (D) 196 (Feb), FC
Scatliffe v Scatliffe [2016] UKPC 36, [2017] AC 93, [2017] 2 WLR 106, [2017] 2 FLR 933, PC
White v White [2001] 1 AC 596, [2000] 3 WLR 1571, [2000] 2 FLR 981, [2001] 1 All ER 1, HL

Charles Howard QC and *Joshua Viney* (instructed by *Hughes Fowler Carruthers*) for the applicant
James Ewins QC and *Janine McGuigan* (instructed by *Stewarts Law*) for the respondent

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

Judgment was reserved.

PEEL J:

Introductory comments

[1] I feel obliged to make some comments about the preparation for trial of these financial remedy proceedings:

(i) By order made by me at the Pre-Trial Review, the parties' s 25 statements were limited to 20 pages of narrative. Para 5.2 of FPR PD 27A mandates that narrative statements, among other documents, shall be typed in 'a font no smaller than 12 point and with 1½ or double spacing'. H complied. W's statement purported to comply in that it consisted of 20 pages, but because it used smaller font and spacing it was, in fact, about 27 pages compressed within the 20-page limit provided for by me. The consequence is that her statement was about 33% longer than H's. This is completely unacceptable, and W's legal team should not have permitted it to happen. Court Orders, Practice Directions and Statements of Efficient Conduct are there to be complied with, not ignored. The purpose of the restriction on

statement length is partly to focus the parties' minds on relevant evidence, and partly to ensure a level playing field. Why is it fair for one party to follow the rules, but the other party to ignore them? Why is it fair for the complying party to be left with the feeling that the non-complying party has been able to adduce more evidence to his/her apparent advantage?

(ii) By para 11 of the High Court Statement of Efficient Conduct of Financial Remedy Proceedings, s 25 statements must only contain evidence, and 'on no account should contain argument or other rhetoric'. In this case, W's over long statement crossed the line and descended into a number of personal, and prejudicial matters, directed at H which, in my view, were irrelevant to the matters at hand. Parties, and their legal advisers, may be under the impression that to describe the other party in pejorative terms, and seek to paint an unfavourable picture, will assist their case. It is high time that parties and their lawyers disabuse themselves of this erroneous notion. Judges will deal with relevant evidence, and will not base decisions on alleged moral turpitude or what Coleridge J once famously described disapprovingly (albeit in a slightly different context) as a 'rummage through the attic' of the marriage in *G v G (Financial Provision: Equal Division)* [2002] EWHC 1339 (Fam), [2002] 2 FLR 1143, at [49].

(iii) Approximately one week before the trial, I was notified of a bundle issue. W, in putting together the first draft of the bundle index, included a 102 page section of narrative comments by W and fresh property particulars, directed towards the issue of her housing needs. No notice had been given to H, who objected. I was asked to rule on paper. I largely acceded to H's objections, concluding that this was an attempt to introduce fresh evidence, although I allowed the inclusion of W's comments on properties already produced in evidence.

(iv) After the parties had exchanged and lodged skeleton arguments, H served updating disclosure. W objected either to the updates being adduced in evidence, or to the updated figures appearing in the composite schedules. I therefore started the trial with competing composite schedules, which was thoroughly unsatisfactory and defeated the purpose of having composite schedules in the first place.

(v) The working day before the hearing, H served on W a financial analysis of matrimonial expenditure through the parties' joint account in 2018 and 2019. The itemised schedule consisted of thousands of entries. W's legal team unsurprisingly objected to late receipt of this analysis. Commendably, in short order, they responded with a schedule of their own in respect of sole accounts so as to give a more complete picture. I deprecate the practice, which appears to be prevalent, of lawyers producing at the eleventh hour spreadsheet analysis of expenditure during the marriage (and/or since separation) based on primary documents such as bank and credit card statements which have been in their

possession for many months. If an exercise such as this is to be relied upon, it must be provided well in advance of the final hearing (I suggest before the PTR or final directions hearing) so that the issues, and evidence, can be properly identified and case managed.

[2] It seemed to me at the start of the trial that far and away the most material aspect of the case was W's reasonable needs. By the end of the trial, my view on that had not altered. It is a moot point whether the wide-ranging, and at times bad-tempered, inquiry by the parties into a multiplicity of other issues achieved much of value.

Background

[3] H is 55 years old. He is a B national who grew up in Switzerland. He is from a very wealthy family which has a significant stake in a publicly quoted company, Company 2. W is 52. She is a UK national. They met in 2001, started living together in 2002 or 2003, and married on 3 September 2004. The marriage came to an end in 2019 so that the period of cohabitation and marriage was about 16 or 17 years.

[4] When they started their relationship, W was a PA at Goldman Sachs and H was working in the City. W stopped work when their first child was born. The two children, who are based primarily with W and will continue to be so, are now aged 16 and 13. Child A is diagnosed with 'A' syndrome and has only recently been able to undergo full school days; he sees a psychotherapist every fortnight and a consultant at 'A' institute. Child B experiences severe anxiety, including panic attacks, and has a history of self-harming issues; she sees a psychologist every fortnight. Both require particular care and attention, including attending frequent medical appointments. Both children attend independent day schools in London, respectively School X and School Y. Regrettably, the parties are locked in ongoing child arrangements litigation relating to Child B.

[5] Prior to marriage, on 12 August 2004 the parties entered into, and fully executed, a Pre-Marital Agreement, followed thereafter by a supplemental agreement dated 2 September 2004 concerning child maintenance, as well as two Swiss agreements also dated 2 September 2004 which mirrored the English Pre-Marital Agreement. Pursuant to the agreement, upon marriage H transferred into joint names his pre-owned property at 'X' Street, SW5, and transferred into a joint account £1.3m of his own resources. The Pre-Marital Agreement made sliding scale provision for W in the event of divorce up to 1 September 2014, but was silent as to provision thereafter. It provided for a review 'if requested by either party on ten years elapsing from the date of the marriage'. In the event, no such review was sought. There was some debate about whether the Pre-Marital Agreement had thereby lapsed or not, but it seems to me that on any view it has been overtaken by subsequent events and I do not need to grapple with that legal nicety. I will, however, need to consider the circumstances in which it was reached as (i) W says she signed it as a result of undue pressure, which H disputes and (ii) the contents of the Pre-Marital Agreement may inform later issues which I must examine. Of note, H's wealth at that time (all non-marital in nature) was put at £4,317,754 which, with RPI, is over £6m in today's terms.

[6] After marriage, the parties lived in London at the 'X' Street property. H left the City in 2005, and started to work in the family business, assisting in managing the wider family wealth (which essentially means his father's wealth) and sitting on the Company 2 board. He spent increasing amounts of time in Switzerland, from where the family office was run. In 2009, he bought a property in Y town. In 2010, W and the children moved to join H in Switzerland.

[7] The standard of living was very affluent, albeit not, it seems to me, of the extravagant super-rich variety. They have had the benefit of access to a fine property in the U area owned by H's father, as well as their own properties in London, Y town and Z town. But their expenditure was not of the eye-watering variety often seen at High Court level, and they did not enjoy expensive trappings such as high-end cars or valuable chattels. Their homes in London and Y town are comfortable, and in sought after areas, but not vastly expensive. The competing expenditure schedules demonstrated, broadly, that in 2019 the total family budget on everything (in England, Switzerland and elsewhere, and including all children's costs) exceeded £600,000 which, in my judgment, gives a helpful guide to the standard of living.

[8] The family lifestyle was largely funded by the generosity of H's very wealthy father albeit the provision of annual gifts was a tax efficient way of rewarding H for his work. Although the sums varied from year to year, H says in his Form E that 'Over the course of the last three years I have received from my father donations totalling £1.17m', which is about £370,000 pa. In the schedule attached to the Post-Marital Agreement referred to below, he said that he received gifts from his father of £500,000–£600,000 pa.

[9] From about 2015 onwards, the parties contemplated, and by 2017 agreed, that the children should attend school in England, feeling that both needed a more challenging academic environment than they were receiving in Switzerland. In March 2017, the children were offered places at London schools and in April 2017, notice was given on their Swiss schools. The intention was for W and the children to live in England, initially at 'X' Street, albeit there was an expectation of travel to and from Switzerland where H would continue to be based.

[10] On 24 June 2017, H raised with W the idea of entering into a Post-Marital Agreement, to which W was clearly opposed from the outset. Nevertheless, both parties engaged lawyers, a first draft was prepared by H's solicitors on 21 July 2017, and the parties, and their lawyers, attended a without prejudice meeting on 8 August 2017 at the offices of W's solicitors, Hughes Fowler Carruthers, in London, which lasted most of the day. Further correspondence ensued and on 22 August 2017 agreement was undoubtedly reached. Arrangements were made for the document to be signed on 29 August 2017. In the event, W declined to do so, although her solicitor signed the relevant Certificate Annexe.

[11] Broadly, the Post-Marital Agreement provided for W to receive a total of, in today's terms, about £7.1m plus child provision. It recorded the parties' assets as follows:

(i)	Husband	£12,444,101
		£2,230,000 mortgage liability
		£10,214,101 net

In addition, it recorded the receipt by H of £500,000–£600,000 pa from his father and his anticipated inheritance prospects exceeding €100m.

(ii) Wife **£2,360,191 net**

[12] Thus, of the combined net assets of £12,574,292 (excluding prospective inheritance), W's entitlement under the Post-Marital Agreement in the event of divorce was about 56% thereof.

[13] W, having decided not to sign on 29 August 2017, left Switzerland the next day to take Child A to a school induction day in London. They returned that weekend. A day or two later, W and the children travelled to England where they lived at 'X' Street. H lived at Y town but at weekends during term time flew to London. During holidays, W and the children joined H in Y town, Z town and the U area. All three properties were being used and it seems to me that they had two main family homes, in London and Y town. After the parties separated in 2019, W and the children moved into rented accommodation in late 2020 in London; the tenancy expires in November, with a break clause which has been exercisable since June 2021.

[14] In circumstances to which I will return, H says that his father has now ceased the previous annual payments to him, and has side-lined H from his role in the family office.

[15] On or about 21 January 2019, before the parties separated, H's father transferred assets worth about €23m into a trust of which the father is the principal beneficiary and H is a discretionary beneficiary; these monies were intended to benefit H, his siblings and their issue in due course on his father's death. In January 2020, W's petition was served. On 21 February 2020, the assets were transferred out of the trust and back to H's father pursuant to an instrument of partial revocation. I will need to consider these transactions in more detail.

Computation

[16] Inevitably, the attrition of litigation has dented the parties' resources. Putting to one side the disputed territory of potential future wealth accretion by H from his father, the net assets are:

Joint property ('X' Street)	£2,045,791
H property: Y town	£640,564
H property: Z town	£2,546,530
H properties: B property (ignoring usufruct)	£2,818,489
Joint bank accounts	£21,634
H bank accounts	£285,334
H investments	£3,519,065
H personal assets/cash	£21,890
H Company 3 liquidation	-£18,018
H pension	£80,011
H liabilities	-£204,621
W bank accounts	£990,103
W investments	£15,343
W liabilities	-£399,847
W pension	£117,036

GRAND TOTAL £12,479,304

This schedule is based on figures which are largely agreed. I have taken H's updated figures for his own resources, notwithstanding W's objections, because it seems to me, they give a more accurate picture. The total of H's assets is reduced by about £461,000 since the previous round of disclosure because of legal fees and general living expenses, as well as the recent decline in stock market values. A detailed explanation has been given by counsel for the reduction which I am willing to accept. I make clear that the outcome of my decision, based as it is on W's needs, would be the same whether allowing for these reduced figures or not.

[17] H's earned income is modest; his non-executive director salary at Company 2 is €49,000 pa net, and last year his dividend share was €15,600 net. In reality, he, and by extension W and the children, have lived off the very significant largesse of his father. I am satisfied that his earning capacity at his age, and outside his work for the family office which has now reduced, is not particularly high; for nearly 20 years he has depended on his father's munificence. I am also satisfied that W has no meaningful earning capacity.

Sharing principle

[18] Almost the entirety of the wealth available to the parties originates from gifts and inheritances on H's side during the marriage and/or was owned by H before the marriage:

(i) 'X' Street was bought by H in 1999 with monies gifted to him by his father. It was subsequently transferred from H's sole name into the parties' joint names pursuant to the Pre-Marital Agreement.

(ii) The B properties came to H as a result of inheritances and family transfers in his favour between 1987 and 2011.

(iii) The Z town flat was bought by H in 1992, long before the marriage.

(iv) H received an inheritance of CHF 500,000 in 2009 which was used to renovate his property in Y town, and his father subsidised the purchase in the sum of about CHF 1m.

(v) The bulk of the liquid investments (and I do not consider I need to be absolutely precise) were gifted to H by his father and grandfather.

[19] The sharp delineation between marital and non-marital assets at the time of gift or inheritance has blurred over time as a result of (i) the length of the marriage, and (ii) the fact that the funds have been used to fund the family's needs and lifestyle, and (iii) the use of some of the properties as matrimonial homes. Since both parties approach this case principally by reference to needs, I do not therefore need to embark on an attempt to delineate between marital and non-marital property. However, the general background of non-marital wealth sourced on H's side is separately relevant in two ways:

(i) first, it informs, or may inform, the circumstances surrounding the Pre-Marital and Post-Martial Agreements; and

(ii) second, it is, or may be, relevant to an assessment of W's needs.

The Issues

[20] The main issues before me are:

(i) The circumstances surrounding the Pre-Marital Agreement, and whether any weight should be attached to it.
(ii) The circumstances surrounding the unsigned Post-Marital Agreement, and whether any weight should be attached to it.
(iii) Whether H can anticipate a resumption of the inter vivos gifts previously received from his father.
(iv) Whether prospective inheritance from H's father is a relevant factor.
(v) W's needs.

The Law

[21] The general law which I apply is as follows:

(i) As a matter of practice, the court will usually embark on a two-stage exercise, (i) computation and (ii) distribution; *Charman v Charman (No 4)* [2007] EWCA Civ 503, [2007] 1 FLR 1246.
(ii) The objective of the court is to achieve an outcome which ought to be 'as fair as is possible in all the circumstances'; per Lord Nicholls of Birkenhead in *White v White* [2001] 1 AC 596, [2000] 2 FLR 981, at 599 and 983H respectively.
(iii) There is no place for discrimination between husband and wife and their respective roles; *White v White* at [2001] 1 AC 596, [2000] 2 FLR 981, at 605 and 989C respectively.
(iv) In an evaluation of fairness, the court is required to have regard to the s 25 criteria, first consideration being given to any child of the family.
(v) Section 25A of the Matrimonial Causes Act 1973 (MCA 1973) is a powerful encouragement towards a clean break, as explained by Baroness Hale of Richmond in *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24, [2006] 2 AC 618, [2006] 1 FLR 1186, at para [133] (*Miller; McFarlane*).
(vi) The three essential principles at play are needs, compensation and sharing: *Miller; McFarlane*.
(vii) In practice, compensation is a very rare creature indeed. Since *Miller; McFarlane* it has only been applied in one first instance reported case at a final hearing of financial remedies, a decision of Moor J in *RC v JC* [2020] EWHC 466 (Fam), [2020] All ER (D) 196 (Feb) (although there are one or two examples of its use on variation applications).
(viii) Where the result suggested by the needs principle is an award greater than the result suggested by the sharing principle, the former shall in principle prevail: *Charman v Charman (No 4)*.
(ix) In the vast majority of cases the inquiry will begin and end with the parties' needs. It is only in those cases where there is a surplus of assets over needs that the sharing principle is engaged.

(x) Pursuant to the sharing principle, (i) the parties ordinarily are entitled to an equal division of the marital assets and (ii) non-marital assets are ordinarily to be retained by the party to whom they belong absent good reason to the contrary: *Scatliffe v Scatliffe* [2016] UKPC 36, [2017] AC 93, [2017] 2 FLR 933, at para [25]. In practice, needs will generally be the only justification for a spouse pursuing a claim against non-marital assets. As was famously pointed out by Wilson LJ in *K v L (Non-Matrimonial Property: Special Contribution)* [2011] EWCA Civ 550, [2012] 1 WLR 306, [2011] 2 FLR 980, at para [22] there was at that time no reported case in which the applicant had secured an award against non-matrimonial assets in excess of her needs. As far as I am aware, that holds true to this day.

(xi) The evaluation by the court of the demarcation between marital and non-marital assets is not always easy. It must be carried out with the degree of particularity or generality appropriate in each case: *Hart v Hart* [2017] EWCA Civ 1306, [2018] 2 WLR 509, [2018] 1 FLR 1283. Usually, non-marital wealth has one or more of three origins, namely (i) property brought into the marriage by one or other party, (ii) property generated by one or other party after separation (for example by significant earnings) and/or (iii) inheritances or gifts received by one or other party. Difficult questions can arise as to whether and to what extent property which starts out as non-marital acquires a marital character requiring it to be divided under the sharing principle. It will all depend on the circumstances, and the court will look at when the property was acquired, how it has been used, whether it has been mingled with the family finances and what the parties intended.

(xii) Needs are an elastic concept. They cannot be looked at in isolation. In *Charman v Charman (No 4)* [2007] EWCA Civ 503, [2007] 1 FLR 1246, at para [70] the court said:

> 'The principle of need requires consideration of the financial needs, obligations and responsibilities of the parties (s 25(2)(b)); of the standard of living enjoyed by the family before the breakdown of the marriage (s 25(2)(c)); of the age of each party (half of s 25(2)(d)); and of any physical or mental disability of either of them (s 25(2)(e)).'

(xiii) The Family Justice Council *Guidance on Financial Needs on Divorce* (April 2018) stated that:

> '27. In an appropriate case, typically a long marriage, and subject to sufficient financial resources being available, courts have taken the view that the lifestyle (ie "standard of living") the couple had together should be reflected, as far as possible, in the sort of level of income and housing each should have as a single person afterwards. So too it is

> generally accepted that it is not appropriate for the divorce to entail a sudden and dramatic disparity in the parties' lifestyle.'

(xiv) In *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24, [2006] 2 AC 618, [2006] 1 FLR 1186, at para [138], Baroness Hale of Richmond referred to setting needs 'at a level as close as possible to the standard of living which they enjoyed during the marriage'. A number of other cases have endorsed the utility of setting the standard of living as a benchmark which is relevant to the assessment of needs: for example, *G v G (Financial Remedies: Short Marriage: Trust Assets)* [2012] EWHC 167 (Fam), [2012] 2 FLR 48 and *BD v FD (Financial Remedies: Needs)* [2016] EWHC 594 (Fam), [2017] 1 FLR 1420.

(xv) That said, standard of living is not an immutable guide. Each case is fact-specific. As Mostyn J said in *FF v KF* [2017] EWHC 1093 (Fam), [2017] All ER (D) 94 (May), at para [18]:

> 'The main drivers in the discretionary exercise are the scale of the payer's wealth, the length of the marriage, the applicant's age and health, and the standard of living, although the latter factor cannot be allowed to dominate the exercise.'

(xvi) I would add that the source of the wealth is also relevant to needs. If it is substantially non-marital, then in my judgment it would be unfair not to weigh that factor in the balance. Mostyn J made a similar observation in *N v F (Financial Orders: Pre-Acquired Wealth)* [2011] EWHC 586 (Fam), [2011] 2 FLR 533, at paras [17]–[19].

The Law: Pre-Marital and Post-Marital Agreements

[22] I do not need to look beyond *Radmacher (Formerly Granatino) v Granatino* [2010] UKSC 42, [2011] 1 AC 534, [2010] 2 FLR 1900 from which the following essential propositions can be drawn:

(i) There is no material distinction between an ante-nuptial agreement and a post-nuptial agreement (para [57]).

(ii) If an ante-nuptial agreement, or indeed a post-nuptial agreement, is to carry full weight, 'what is important is that each party should have all the information that is material to his or her decision, and that each party should intend that the agreement should govern the financial consequences of the marriage coming to an end' (para [69]).

(iii) It is to be assumed that each party to a properly negotiated agreement is a grown up and able to look after himself or herself (para [51]).

(iv) The first question will be whether any of the standard vitiating factors, duress, fraud or misrepresentation, is present. Even if the agreement does not have contractual force, those factors will negate any effect the agreement might otherwise have. But unconscionable conduct such as undue pressure (falling short of

duress) will also be likely to eliminate the weight to be attached to the agreement, and other unworthy conduct, such as exploitation of a dominant position to secure an unfair advantage, would reduce or eliminate it (para [71]). The court may take into account a party's emotional state, and what pressures he or she was under to agree. But that again cannot be considered in isolation from what would have happened had he or she not been under those pressures (para [72]).

(v) The court should give effect to a nuptial agreement that is freely entered into by each party with a full appreciation of its implications unless in the circumstances prevailing it would not be fair to hold the parties to their agreement (para [75]).

The Law: inter vivos subvention

[23] I addressed this topic in *M v M (Financial Remedies)* [2020] EWFC 41, [2020] 2 FLR 1048 where I said as follows:

> '[65] Should a court inquire into the willingness of the wider family to assist one or both spouses?
>
> [66] To my mind there are two main categories of cases:
>
> (i) Where a spouse has an interest in an asset together with other family members, and the court frames its order so as to "judiciously encourage" the other family members to assist in extraction by the spouse of value referable to his or her interest. The court should not cross the boundary of improper pressure in so doing. This is the so-called *Thomas v Thomas* doctrine (*Thomas v Thomas* [1995] 2 FLR 668). Importantly, it applies when the spouse has an actual interest in an asset shared with third parties (e g family) but is confronted by liquidity difficulties.
>
> (ii) Where family members, who are gratuitous donors, are willing to make funds available by gift or loan to the relevant spouse. In this instance, the spouse has no legal or beneficial interest; it is a pure act of generosity for a person under no obligation to do so.
>
> [67] …
>
> [68] [In respect of the second category] I apply the following principles:
>
> (i) The starting point is that there is absolutely no obligation on a third-party family member to provide funds from his or her personal resources. As Holman J vividly said in *Luckwell v Limata* [2014] EWHC 502 (Fam), [2014] 2 FLR 168, at para [6]: "I wish to stress with the utmost clarity that neither the wife's father nor her mother are under the slightest legal obligation whatsoever to pay a single penny to, or for, their daughter, nor their grandchildren, nor, still less, their son-in-law." This statement is wholly consistent with law and fairness. The court's function is to distribute the parties' resources, not the resources of wider families; see paras [66] and [67] of *Alireza v Radwan and Others* [2017] EWCA Civ 1545, [2017] 4 WLR 206, [2018] 1 FLR 1333.

(ii) That said, on occasions wider family members may show themselves prepared to assist, willingly and under no pressure from the court to do so. Two distinct scenarios spring to mind:

(a) Whether a spouse's family will be likely, if requested, to come to his or her aid in meeting specific needs personal to the spouse in question and;

(b) Whether a spouse's family will be likely, if requested, to come to his or her aid in making a payment to the other spouse to assist in bringing financial remedy proceedings to a conclusion.

(iii) The first scenario is not uncommon. If means are available, the wider family, although under no legal obligation to do so, may willingly help with buying a house or meeting income needs if the alternative is homelessness and penury. But the evidence of willingness to do so must be clear. Mere speculation, or optimistic assumption, is insufficient.

(iv) The second scenario is rarer, for obvious reasons, although it can unlock cases and bring about settlement. For example, the family of a spouse may offer to pay the receiving spouse a lump sum to avoid sale of the marital home. Again, in my judgment, there must be clear evidence to justify such a finding. Speculation and optimistic assumption will not suffice.

(v) The court should not place pressure on the third party who is perfectly entitled to decline to provide support. As Deputy High Court Judge Nicholas Mostyn QC (as he was then) said in *TL v ML (Ancillary Relief: Claim Against Assets of Extended Family)* [2005] EWHC 2860 (Fam), [2006] 1 FLR 1263, at para [101]:

> " The correct view must be this. If the court is satisfied on the balance of probabilities that an outsider will provide money to meet an award that a party cannot meet from his absolute property then the court can, if it is fair to do so, make an award on that footing. But if it is clear that the outsider, being a person who has only historically supplied bounty, will not, reasonably or unreasonably, come to the aid of the payer then there is precious little the court can do about it."

The judge was there addressing the second of my suggested two scenarios, but in my view his remarks apply with equal force to the first scenario.

(vi) In either scenario, where the evidence shows, to the requisite standard of proof, that third party family members will likely provide financial support to one or other of the spouses, that, in my judgment, constitutes a resource that a court is entitled to take into account. To do otherwise would be artificial. As to the sort of evidence which the court will evaluate when deciding upon the likelihood of future assistance:

(a) Usually the court will look to see whether bounty has been provided in the past, in what quantity and over what amounts of time, as evidence of a pattern.

(b) Additionally, the court can look at specific offers of long-term future financial support made to a spouse before or after marital breakdown.

(c) Offers of interim provision to tide the spouse over with assistance towards legal fees and income needs during the period of litigation will be of very limited evidential relevance to the question of whether long-term future support will be forthcoming. Usually such payments are transitory in nature, designed to assist the recipient spouse with the demands of the litigation.

(d) Absent clear evidence establishing (i) a track record of historic payment and/or (ii) reliable representations of future subvention, the court will be hard pressed to be satisfied of this class of resource.'

The Law: inheritance

[24] In *Alireza v Radwan and Others* [2017] EWCA Civ 1545, [2017] 4 WLR 206, [2018] 1 FLR 1333 King LJ reviewed the principles pertaining to inherited wealth, including where forced heirship applies:

'[32] The first question therefore is "does the wife's father's wealth/the wife's inheritance prospects constitute a financial resource which she has or is likely to have in the foreseeable future?"

[33] Mr Peel says not and reminds the court that in the ordinary course of events a party's inheritance prospects are disregarded by the court. In *Michael v Michael* [1986] 2 FLR 389, 395 Nourse LJ said:

> "I am of the clear opinion that section 25(20)(a) of the Act of 1973 as amended, whilst it is primarily concerned with property and financial resources in which there is a vested or contingent interest, is not exclusively so concerned. Indeed, its broad and somewhat informal language demonstrates that it was intended to operate at large and not in some strait-jacket tailored to the sober uniforms of property law. Thus, there can be no doubt that it could in certain circumstances extend to something which in the language of the law is a mere expectancy or spes successionis, for example an interest which might be taken under the will of a living person."

[34] Nourse LJ went on to give an example of a case where there was clear evidence that a person had a terminal illness, that property was left to the respondent in his will and that it was highly improbable the testator would revoke the will. Having given such an example he went on, at p 396:

> "… However those facts, being extremely special demonstrate that the occasions on which such an interest will fall within section 25(2)(a) [of the Act of 1973 as amended], are likely to be

> rare. In the normal case uncertainties both as to the fact of inheritance and as to the time at which it will occur will make it impossible to hold that the property is property which is likely to be had in the foreseeable future."

[35] Mr Todd for his part relies on the decision of Munby J (as he then was) in *C v C (Ancillary Relief: Trust Fund)* [2009] EWHC 1491 (Fam), [2010] 1 FLR 337.

[36] In *C v C* the husband had a vested interest in property in that, upon the death of his widowed step mother, he and his three siblings would inherit an estate as tenants in common in equal shares. This was not a discretionary trust. The trustees had no power to appoint "even a farthing" to the husband except with the written consent of the widow who could give it or withhold at her "unfettered and uncontrolled" discretion. As Munby J said, at para [19]:

> "… and the husband and the court have to take the widow as they find her. As against the widow there can be no question of exerting any "judicious encouragement" (see *Thomas v Thomas* [1995] 2 FLR 668, at 670), as there might be if what was in issue was the exercise by the trustees of their powers if they had any that were relevant."

[37] Given that the husband's interest was vested and the likelihood was that the reversion would fall in about 15 years (that being the actuarial life expectancy of the widow), Munby J concluded, at para [63]:

> "I confess that on this crucial issue my mind has wavered. On any view, as it seems to me, this case is at or very close to the outer extremity of what can properly be considered a 'financial resource' which a spouse is 'likely to have in the foreseeable future'. At best it is, to adopt Cumming-Bruce LJ's metaphor, only dimly visible. But on balance I have concluded that … the husband's interest under the trust is indeed such a resource. In other words, I am persuaded though I have to say without much enthusiasm, that the question posed … is to be answered in the affirmative."

[38] Munby J said that his decision would have been different had the likelihood been of the husband receiving substantially less than the current value of the estate on the death of the widow, or had the widow's life expectancy been greater than he found it to be. Munby J went on to put his decision that the husband's vested interest was a resource in context, at para [66]:

> "[66] I must emphasise that, consistently with the terms of the preliminary issue, all I have decided is that the husband's interest in the trust fund is a "financial resource" which he is 'likely to have in the foreseeable future'. I have not decided that it would in fact be appropriate to make an order of the kind made in *Priest v Priest* (1980) 1 FLR 189 and *Milne v Milne* (1981) 2 FLR 286 or, indeed, appropriate to make any order at all in relation to his interest in the trust fund. All I have decided is that his interest in

the trust fund is, within the meaning of section 25(2)(a), a 'financial resource' which he is 'likely to have in the foreseeable future', and, accordingly, something which section 25(2) requires the judge at the final hearing to 'have regard to'. Having had regard to it, the judge may decide to make some order in relation to the husband's interest under the trust. On the other hand, the judge, having had regard to it, may decide not to make any order at all in relation to the husband's interest under the trust. It is entirely a matter for the judge who is called upon, as I have not been, to exercise the discretion conferred by sections 24 and 25."

[39] In my judgment the words of Nourse LJ in *Michael* [1986] 2 FLR 389 hold good 30 years on and in the ordinary course of events uncertainties both as to the fact of inheritance and as to the times at which it will occur, will make it impossible to hold that an inheritance prospect is property which is "likely to be had in the foreseeable future".

[40] The present case is different. The wife's inheritance prospects do not have the inherent uncertainty found where a will is made in a country such as England where there is no concept of forced heirship. In my view, a prospective inheritance which has the certainty brought to it by the laws of forced heirship, is capable of being a "financial resource" which the wife "has or is likely to have in the foreseeable future".

[41] Mr Peel sought to persuade the court that there remained uncertainties which should mean that, notwithstanding the forced heirship laws, the court should disregard the wife's inheritance prospects. He suggested by way of example that the father could give all his money away to charity or there could be some sort of cataclysmic political event which would mean he would lose his wealth. There was no evidence before the court to that effect and the wife chose not to call her father to give evidence. In those circumstances a court would be entitled to conclude, as the judge did, that a portion of the father's estate would indeed come to the wife in 16+ years.

[42] Having said that, as Munby J explained in *C v C*, all that such a finding does is to conclude that the prospective inheritance is a section 25(2)(a) resource; it does not mean that it is inevitably appropriate for the court to make an order whereby the meeting of the needs of the wife is in any way dependant on the prospective inheritance.'

My findings and the parties' evidence

[25] I turn to my conclusions on the primary issues. In so doing I have considered the totality of the written and oral material before me, weighing it up holistically and assessing how it interlocks.

[26] Each party was robustly cross-examined for a full day. Both, I am confident, did their best to tell the truth; occasional confusing, or apparently inconsistent, sentences in narrative statements did not undermine their overall credibility. In particular, I reject the submission that H was dishonest on a number of matters, including colluding with his father (a 'charade' as was

submitted on W's behalf) about the current unavailability of support from that quarter. On the contrary, I thought he was candid and frank, for example in acknowledging the pressure which W was under in respect of the Post-Marital Agreement. W was notably more anxious in the witness box, and H more composed. I felt that W is, underneath her undoubted nervousness, determined and resolute, particularly with regard to the children. Where there were disputes of evidence, they were, in my judgment, the product of different perspectives, or misunderstandings.

[27] Both, I am sure, have been placed under enormous strain by these proceedings. The emotional toll on them, their relationship and, indirectly, the children cannot be underestimated.

The Pre-Marital Agreement

[28] This Agreement was the product of discussions which lasted a number of months (the parties first discussed it in January 2004, their lawyers started corresponding in June 2004, and the first draft was prepared on 23 June 2004). Both parties had the benefit of English and Swiss legal advice; in W's case her English lawyers were Macfarlanes. It is dated 12 August 2004, about 3 weeks before the marriage, and signed by the parties. The marriage had been delayed to enable a 3-week cooling off period after signing. Equivalent Swiss documents were entered into. It is clear that the impetus for the agreement, as with so many pre-marital agreements, came from extended family, in this case H's father, who required its execution and made it plain that he would 'take measures' if it was not signed. Both parties' evidence was that had they not signed, the marriage would not have taken place. As W's solicitors of the time said in correspondence, it was 'always under the shadow of what [H's] father was prepared to agree'. I was told that H's sister had disagreed with H's father about her own pre-marital agreement, and H's father refused to see her for years thereafter, such was his anger.

[29] The agreement itself contains certificates signed by each party's solicitor. The certificate of W's solicitor states: '[W] stated to me, and it appeared to me, that she entered into the said agreement willingly and without any pressure, duress, undue influence or deception on the part of any other person, including [H]'.

[30] A letter dated 18 August 2004 from her solicitors stated that '[W] confirmed to us … that she was signing the agreement of her own free will. However, she also made clear that she had felt extremely stressed during the preceding weeks …', and for that reason the word 'stress' had been removed from the solicitor's certificate. To my mind, this shows the care taken by W's solicitor to be satisfied of W's instructions when entering into the agreement.

[31] I am confident that both H and W were under pressure from H's father. That is hardly surprising given that H's father was a man of immense wealth who saw it as his duty to ensure that the family wealth passed through the generations in a dynastic manner. Moreover, coming from a Swiss and B background, where such agreements were commonplace, it is likely that H's father was more comfortable with the notion of a pre-marital agreement than W, from an English background where, certainly at the time, such agreements were rare indeed. I am equally confident that W felt under stress and was uncomfortable with the process. The intended agreement was a source of

tension for both W and H. However, in my judgment, none of the vitiating factors set out in *Radmacher* apply and I see no reason to discard, or ignore ab initio, the Pre-Marital Agreement:

(i) I am satisfied that although W and H were under pressure, W was not under *undue* pressure to enter into it. In almost every Pre or Post Marital Agreement one or other, or both, parties are under a degree of pressure, and emotions may run high. The collision of the excitement engendered by prospective marriage, and the hard realities of negotiating for the breakdown of such a marriage, can be acutely difficult for parties. Tension and disagreement may ensue. If, as here, one side of the family is applying pressure, the difficulties are accentuated. But in the end, each party has to make a choice and unless undue pressure can be demonstrated, the court will ordinarily uphold the agreement. In my judgment, W cannot so demonstrate here.

(ii) It included clauses that the agreement was entered into 'of their own free will without undue influence or duress' and that 'they would not be getting married unless they had entered into the agreement'. I have already commented that their solicitors signed certificates to similar effect, and W's solicitor corresponded to H's solicitor saying that W was freely entering into the agreement.

(iii) It was considered, discussed and negotiated over a period measured in months. W had the benefit of lawyers in both England and Switzerland.

(iv) Immediately after the marriage, and in accordance with the agreement, 'X' Street and £1.3m were placed in joint names in accordance with the Pre-Marital Agreement. W thereby benefited from its immediate implementation.

[32] I have already indicated that this document has largely been overtaken by events. Nevertheless, of relevance is the exposition within the agreement of why the parties were entering into a Pre-Marital Agreement. It expressly recorded at Clause I that all dynastic property already acquired by H or acquired during the marriage should be free of claims by W save as necessary to implement the agreement, and that each should retain their own separate property. The section 'Genesis of the Agreement' at Clause K(i) specifically refers to the past receipt by H of family monies, and the anticipated future receipt of dynastic assets which are intended to be excluded. Self-evidently, the agreement had one eye on the future wealth which was expected to cascade down to H.

The Post-Marital Agreement

[33] There are two main issues:

(i) Whether W was placed under undue pressure such that it should be disregarded.

(ii) Further, or alternatively, whether the fact that it was not signed by W, dictates that it should be disregarded.

[34] The factual background, and circumstances, as I find them, are as follows:

(i) By March/April 2017 the parties' plan for the children to be educated in England was settled, and the children were being prepared for the move.

(ii) There was some dispute about whether W told H on one occasion that if he did not let her and the children go to London, she would divorce him. I suspect this was a product of misunderstanding. Probably W made unguarded comments which were misinterpreted by H. However it came about, I am confident that H was concerned about the possibility of the marriage coming to an end, even if that was not part of W's thinking at the time.

(iii) H first raised with W the subject of a Post-Marital Agreement on 24 June 2017, ie after the children's move to be educated in England had been agreed. Her opposition is clear from an email to H that very day: '[H], just to confirm in writing what you have repeated to me verbally tonight; that unless I sign the documents you wish, namely a financial post-nup and post divorce custodial rights, you will not allow the children to attend school in the UK this autumn. Terrible we have come to this!'. H told me, and I accept, that the motivation for a Post-Marital Agreement came entirely from him. His father was not involved, beyond saying that he thought H was naïve to let W go to London, and expressing annoyance with W.

(iv) I am satisfied that H told W she could not go to London without signing a Post-Marital Agreement. In so doing, he threw into doubt the London schooling arrangements which were in place. He also told W that he would only agree to her having a bigger house in London if she signed the agreement.

(v) W, on or about 5 July 2017, instructed English solicitors, Hughes Fowler Carruthers. She also instructed Swiss lawyers. H likewise instructed lawyers in England and Switzerland. Despite W's reservations, they entered into negotiations.

(vi) The first draft of a Post-Marital Agreement was supplied by H's solicitors on 21 July 2017.

(vii) On 8 August 2017 the parties and their lawyers attended a without prejudice meeting which lasted the full day. No heads of agreement were signed. I was not made privy to the course of the discussions, although it appears that significant progress was made, and W seemed to be under the impression in her evidence that agreement had been reached on headline numbers.

(viii) According to W (and a WhatsApp communication with a close friend to whom she unburdened refers to this), on 16 Aug 2017 H told her that if she tried to leave the country without signing the documents, he would call the police. Having heard the parties I am confident that H told W he could go to the police, not that he would do so. This was a misunderstanding during overwrought and emotional conversations. In any event, even though W did not sign the document, she left unimpeded on

30 August 2017 to attend a school induction day with Child A, returned to Switzerland immediately afterwards and, a day or two later flew to London permanently with the children. H saw them off at the airport and did not call the police or attempt to stop them.

(ix) During this period there were some exchanges by WhatsApp between W and a close friend which, it is said, are corroborative of the pressure W felt under. For example, on 4 August 2017 W said that the pressure was unbearable, on 17 August 2017 she referred to her 'head spinning', on 20 August 2017 she said, 'this has been traumatic' and on 28 August 2017 she told her friend of feeling 'blackmailed … powerless … cornered and tired and abused'. I regard these communications from W as being secondary, rather than primary material. They are indicative of her state of mind but do not really add to that which is apparent from what I have read, and W's own oral evidence, that (a) she wanted to leave Switzerland with the children, (b) she felt under real pressure to sign the agreement to achieve her aim, (c) she was anxious, and (d) relations between her and H were low.

(x) On 21 August 2017 H's solicitors sent a revised draft agreement.

(xi) On 22 August 2017 W's solicitors wrote saying 'Thank you for your letter of yesterday's date and for providing a final version of the agreement, the terms of which are approved'. In my judgment, an agreement was reached at that point, notwithstanding W in evidence being a little reluctant to so concede; she told me that 'I did not approve the terms, but if the letter was sent in my name, I stand by it'. The document was comprehensive, clear and detailed. The reasoning from W's perspective, as the letter stated, was that '[W's] primary goal is to ensure the children are able to settle in England for the start of the school year' which, I note, she subsequently achieved.

(xii) On 23 August 2017, H's solicitors replied acknowledging the agreement which had been reached.

(xiii) The intention was, as before, for mirror agreements in Switzerland to be drawn up.

(xiv) Arrangements were made for the agreement to be signed by the parties before a notary in Switzerland on 29 August 2017 at 4 pm. That morning W saw a different Swiss lawyer. At about lunchtime W, apparently on the advice of the Swiss lawyer, but not mentioned to H, went to see a GP who wrote a letter (curiously not disclosed until April 2021) in which he certified that W was showing 'true mental distress' with a 'major anxiety component' and as a result the mental attitude required for calm decision-making 'is not currently fulfilled'. I do not doubt that W felt anxious and worried at that time; she was about to sign an important document, and wanted to leave forthwith to England. But agreement had been reached on 22 August 2017 (a week before) and I am not persuaded that this medical note undermines the agreement reached one week previously.

(xv) At about 1.30 pm (possibly after she had seen the GP), W told H by email that she would not attend to sign, referring in particular to being worried about signing mirror Swiss documents which she had not yet seen:

> 'I really am unhappy about signing the English documents today without even seeing the Swiss documents …'

(xvi) She sent a follow-up email saying that she had no intention of renegotiating, and that she planned to sign the document, although she did not in fact do so:

> 'I am not looking to change the English documents, or re-negotiate them, I just want to be able to sign them as a package whenever all the documents are ready, and without the time pressures of having to do so before the children are allowed to begin school.'
> 'I want to reassure you that I have no intention of getting to London to start renegotiating the post nup … There is no tactic …'

(xvii) W did not sign, although her solicitor signed a certificate confirming that she had given W independent legal advice on the agreement.

(xviii) It is of note, in my judgment, that nowhere during these events of 29 August 2017 did W complain about the circumstances in which agreement had been reached on 22 August 2017, or the terms thereof. Her concern was not being able to see the Swiss mirror documents before signing.

(xix) As I have indicated, on 30 August 2017 W flew to London with Child A for his school induction day; H travelled to the airport to see them off just as they were going through the departure gates. They returned that weekend. A day or two later W and the children travelled permanently to England; H accompanied them to the airport.

(xx) In a sense, W achieved her goal. She was able to leave for London with the children. She was not prevented from doing so by H. And, ultimately, she did not sign the agreement.

[35] Although there is no doubt W was placed under pressure by H to sign (as he fairly acknowledged in his oral evidence) I reject the contention that W was placed under *undue* (my emphasis) pressure, let alone duress, to sign, as was urged upon me by her counsel in closing submissions. Both parties were under pressure for different reasons. It cannot have been an easy process for either. W wanted to move to London and start afresh with the children. From her point of view the Post-Marital Agreement represented a significant potential block; either she signed, or H would not agree to the planned move. H raised the need for a Post-Marital Agreement only after the plans had been laid, and school places secured; W did not want to let the children down. For H, there were concerns about W and the children leaving their home in Switzerland, the impact on their relationship as a couple and the possible impact on the family as a whole. As he saw it, there were other available

options in Switzerland, and he was uncomfortable about the move to London; his father's attitude probably contributed.

[36] I readily accept that each party was under pressure. I readily accept that both parties (particularly W) were tense and anxious. I reject the contention (raised in W's statement but not really pursued in oral evidence) that this was part of a long-standing pattern of controlling and domineering behaviour by H which in some way overbore her will, and I reject W's case that the agreement was reached as a result of undue pressure. The parties were in communication, through their lawyers, about the Post-Marital Agreement for some 2 months. The document (to which W assented in correspondence) explicitly records at clause 8.8 that each party enters into the agreement 'of their own free will without undue influence or duress and without any promise or representation other than as set out in the Agreement, and neither has suffered inequality of bargaining power'. W's solicitor signed it. At no time did her solicitors say that the agreement was being conducted under undue pressure. I have not seen or heard anything to suggest that she thought at the time that the terms were unfair; rather, her concern seems to have been the lack of mirror Swiss documents. In the end, W elected not to sign, as was her right.

[37] W says (and it does not seem to be disputed) that thereafter there were continuing discussions (which she describes as negotiations) between the parties in respect of the Post-Marital Agreement. During this period, she was provided with the Swiss mirror documents about which she had previously been exercised. Thus, she says, no agreement can in fact have been reached because otherwise why would they have been in ongoing discussions? I reject that submission:

(i) The post agreement discussions were privileged, and the parties have not waived privilege to permit me to see them. I have no idea what they contain and whether they do, as W says, represent an ongoing chain of negotiations which did not achieve consensus on a final version of the Post-Marital Agreement.

(ii) Far from undermining the agreement, in my view the fact that some form of without prejudice discussion took place after the agreement was reached demonstrates vividly that agreement had in fact been reached; otherwise, why attempt to renegotiate it?

(iii) In any event, the correspondence to which I have referred explicitly confirms that agreement was reached on 22 August 2017. If there was an attempt to renegotiate, nothing before me suggests that a supplemental agreement, or variation of agreement, was entered into.

[38] A more powerful argument for W, in my judgment, is that the agreement was not in fact signed by the parties. Article 1 provides that 'This Agreement shall come into force on the date upon which the last of [H] and [W] signed the Agreement', and the preamble to the Post-Marital Agreement contains the usual notice 'Do not sign this agreement unless you intend to be bound by its terms'.

[39] Normally, an agreement will take effect as a result of both parties signing. The principle of autonomy, articulated by Mostyn J in *BN v MA*

[2014] EWHC 4250 (Fam), (unreported) 10 December 2013 when emphasising the importance of a party signing (and, I suggest, by corollary, not signing) is relevant. I would not want, however, to lay down an immutable law. Each case is fact specific. It may be, for example, that parties agree in correspondence that agreement has been reached, and signatures are not required. It may be that parties do not sign, but clearly consider themselves bound and act accordingly. But in this case, it seems to me to be unreasonable for an agreement to be formally binding upon W in the absence of her signature when that very same agreement expressly, and in terms, only takes effect upon both parties signing. The purpose of such agreements is to achieve as much certainty as possible, and it strikes me as unfair for W to be strictly held to a document which was carefully drawn up to require, as an express clause of the agreement, both parties' signatures.

[40] I am satisfied therefore that it is not a formally arrived at agreement in the *Radmacher* sense, whereby the presumption is that it should be given effect to unless in the circumstances it would not be fair to hold W to its terms. In other words, I decline to find that it binds W unless she can demonstrate it operates unfairly.

[41] But nor am I willing simply to discard and ignore it, as W submits. To do so runs contrary to the s 25 requirement to take account of all the circumstances of the case. Although not a strict *Radmacher* agreement, this was an agreement reached by the parties, with the benefit of legal advice, and upon full disclosure. Even though W did not sign it, in my judgment I am entitled to take it into account and attach such weight to it as I think fit. It is one of the factors, to be considered in the mix. The terms agreed in 2017 are relevant, albeit not determinative.

[42] I therefore conclude that:

(i) The Post-Marital Agreement is not vitiated or tainted by undue pressure or duress.

(ii) The absence of W's signature, in circumstances where she consciously decided not to sign, takes the agreement outside the *Radmacher* category of cases.

(iii) The agreement falls to be considered as one of the factors in this case, but it is not presumptively dispositive as would be the case if it fell into the *Radmacher* category.

Inter vivos subventions by H's father

[43] Despite the very handsome provision made by H's father over the years, that has now ceased entirely since these divorce proceedings. H has been, I find, marginalised by his father from his wealth management role in the family office, where he used to work full-time but now goes only once or twice a week.

[44] Separately, but linked, H's father has taken steps in relation to a dynastic trust to remove from H the possibility of benefiting from €23m of dynastic money:

(i) On 3 June 2014 H's father settled a trust known as the X Trust, governed by Guernsey law:

(a) H's father was the settlor and is the protector.
(b) H's father is the named principal beneficiary.

(c) H is one of the discretionary beneficiaries.
(d) It is fully discretionary.

(ii) H has received no distributions or loans from the trust.
(iii) On or about 21 January 2019, before the separation, H's father transferred 170,300 shares in a company known as Company 1, which in turn owns about 30% of the shareholding in Company 2, into the trust pursuant to a trust resolution dated 6 September 2018. The value of the introduced shares was about €23m.
(iv) In January 2020 W's petition was served.
(v) On 21 February 2020 the shares were transferred out of the trust and back to H's father pursuant to an instrument of partial revocation executed by him as settlor.
(vi) I assume that the original intention was to place monies in the trust by way of potential advance inheritance. The monies never became H's, and it was never suggested that the monies would have been distributed during H's father's lifetime; rather, they were intended to pass down on death. H, I accept, was not party to the discussions at the time, but simply made aware of the transactions after they had taken place. Everything was done by, and at the behest of H's father who is clearly a domineering and controlling character, and ignored H.
(vii) By an instrument of amendment, clearly instigated by H's father, dated 24 April 2020, the trust terms were amended irrevocably to ensure that no monies may be paid or lent to anybody who is not an 'eligible beneficiary'. At the risk of speculating, it seems likely that this was designed to prevent trust monies being used for the benefit of W.
(viii) Currently the trust has assets of no more than about £1,000.

[45] I am confident (and nobody disputes) that these events (the annual payments ceasing, and the reversal of the funding of the trust) were principally caused by the divorce proceedings brought by W. Contrary to W's case, this was instigated by H's father, and is not the product of collusion between H and his father.

[46] There is an additional factor which H says makes the prospect of monies once more being gifted to him by his father much less certain. His father has formed a relationship with a woman who is 38 years younger, to whom he has given about £8m. H says that he and his sisters are now barely on speaking terms with his father, and told me about a very difficult conversation between them all in January this year when they told their father they were contemplating taking proceedings against their father and his partner. They had also commissioned a Private Investigator report which angered their father. H and his siblings believe that their father is incapacitous when with his partner, manipulated and controlled by her. They believe that he might jeopardise the family wealth and their future inheritances. Since that conversation, they have now instituted legal proceedings in France and Switzerland; the claim against their father is akin to a Court of Protection action. Having heard the evidence, I accept that there is a major family breakdown underway between H, his sisters and his father. H's father has

ceased any support for H's sisters as well as for H. H told me, and I accept, that his father sees them as the enemy.

[47] Given the current disputes within the family, I do not find that in the foreseeable future H's father is likely to resurrect the previous level of payments. The ongoing Swiss litigation suggests to me that any such payments are some way off, and, if made, could well be at a lower level than before. I doubt whether H's father will, as W suggests, immediately replace in the dynastic trust the sums previously removed, or anything like it. I am not satisfied that I can or should take this prospective resource (ie ongoing support provided by H's father) into account in any meaningful way, save that I doubt he would want to see his son destitute; in other words, I view the father, in the background, as a safety net in the event of calamity rather than in the foreground as a foreseeable ongoing resource. I remind myself that this is entirely in the gift of H's father. It is not for me to try and encourage him to restore the inter vivos payments; to do so would be to trespass on his autonomy. I make it clear, however, that even had I concluded that monies of up to c£600,000 pa will shortly be made over to H once again, my conclusions on the appropriate order would be the same.

Prospective inheritance

[48] H's father is 89 years old and in good health. His life expectancy according to *At A Glance* (FLBA) is 4½ years, although of course he may well live appreciably longer. In cross-examination, H indicated that his father is worth not less than €400m, all of which appears to be in his name rather than held via trust arrangements. The generational approach of the family is to preserve wealth dynastically, not to squander it, and H's father has made no direct threat to disinherit H.

[49] W submits that H will likely receive by inheritance vast sums from his father. H in his Form E said that:

> 'I anticipate I will benefit at some point in the future (whether outright or as a beneficiary of trusts, or otherwise) from his estate or inter vivos gifts. I do not know the exact amount by which I may benefit although I anticipate it will be substantial wealth in excess of €100m. There is an expectation I will preserve this wealth for future generations just as my father and ancestors have done. If my father dies in Switzerland then forced heirship provisions will apply. However my father is not Swiss and he may well move to another country before his death.'

Unlike in *Alireza* there is some evidence here that H's father may seek to disestablish himself from forced heirship. The current family dispute, and his severance of funds for any of his children, no doubt causes them disquiet. The general proposition of law, per *Michael*, is that the fact and timing of inheritance are ordinarily so uncertain that it cannot be viewed as a resource. The dicta in *Alireza* move the dial a little in the direction of greater certainty as to *fact* although not as to *timing*, in cases of forced heirship. It seems to me, on the facts of this case, that although I cannot ignore the possibility that a family meltdown of such magnitude will take place that H's father will take

active steps to avoid forced heirship and disentitle his children, it is, on balance, more likely that at some point H will indeed receive a significant inheritance. However:

(i) Such inheritance would be entirely non-matrimonial, received long after separation.
(ii) It has always been understood by the parties, as recorded in the two agreements, that future inheritances should be excluded from claims by the other party.
(iii) In terms of foreseeability of resource, it may be several years away, and is unlikely to be of immediate assistance to H. At best, it gives me confidence that H will not want for money in the long term.

The parties' proposals

[50] The figures have been affected as time has passed by legal fees and the costs involved in maintaining two households on an interim basis.

[51] The net effect of H's proposal is that W would have total net assets (after payment of all her outstanding legal costs), of about £7.15m. That sum, on his proposal, is entirely liquid, apart from £117,000 of pension provision, and incorporates 'X' Street at £2.045m and the balance in cash. Broadly, this is consistent with the unsigned Post Marital Agreement, to which H has adhered since his first proposal in July 2020, although it was worth more to W then, before the corrosive effect of costs.

[52] W's position has altered over time:

(i) In her first proposal of July 2021, she sought a net effect total of about £10m.
(ii) In November 2021, she repeated the substance of her proposal, seeking £10m.
(iii) By her most recent proposal dated 3 February 2022, she seeks about £10.6m.

Needs and outcome

[53] I finally turn to the appropriate award which is based principally on an assessment of W's needs, although I emphasise that I have considered all the material before me in the round. I have had in mind in particular the length of the relationship, the primacy of the children's needs, the available resources, the standard of living and the origins of the wealth. I also factor in the Post-Marital Agreement in circumstances where, although W did not sign it, agreement was reached and there is nothing to suggest she was discontented with the terms at the time.

[54] W seeks an appropriate central London property with 4 bedrooms and of an appropriate size. She puts forward two examples in SW3; 'A' Street (2,213 sq ft) at £4m and 'B' Street (2,322 sq ft) at £4.5m, although neither, as she told me, are perfectly configured. H, by contrast, suggests SW6/SW10, putting forward a number of well-appointed properties ranging between 1,913 sq ft and 3,047 sq ft, all in a price bracket between £3m and £3.75m. As usual, it is the location which accounts for the main variable element.

[55] I accept that 'X' Street (valued at about £2.175m gross) is not a realistic benchmark. It is cramped at 1,302 square feet and seems to me to be too small

for family living. In fairness, H does not press for a housing fund at that level. It is, however, notable that this property, which W lived in for some years, is in X area whereas W now has her sights set on more expensive A/B area.

[56] I note that in her Form E, W did not fill in her capital needs requirement. I ordered her to do so, and she put forward a London house need at £6m–£6.5m which seems to me to have always been on the ambitious side.

[57] I bear in mind that H proposes to carry on living at his home in Y town which is worth about £2.9m, albeit subject to a large mortgage.

[58] Given that the children are at School X and School Y, each round trip to the schools from SW3 would be about 1½ hours, compared to a much shorter trip from H's proposed areas of G area or F area.

[59] Essentially, what W seeks is a familiar trade-off in terms of location and space. She does not want to start all over again, and move to SW6 where she would have to resettle herself and the family. She told me that she prefers the location of SW3, as do the children, although I am confident that the children would adapt well to any reasonable area in a nice house with the love and support of their mother.

[60] On balance, having listened very carefully to W, and having considered the various property particulars, I have reached the conclusion that G area/F area are appropriate areas. In my judgment, greater space would be of benefit to the children, and these are comfortable areas near to the schools. I conclude that an appropriate housing sum for W is £3.5m. To that should be added stamp duty which I calculate at £333,750. W needs funds to complete the purchase, move and renovate a new property. I will therefore round up this sum to *£4m.* That said, W will be able to spend more on a property if she so chooses, whether in SW3 or elsewhere, but would have to tailor her income fund accordingly.

[61] I reject W's case that she reasonably requires a second home in Switzerland costing £1.8m–£2m. True, she and the children are used to spending time in London and Switzerland, although it was only between 2017 and 2019 that they spent substantial time during the marriage in both countries. But the children will be able to see H in Switzerland at his home (which is also their home), and in any event their needs do not as a matter of law extend for more than perhaps another 10 years. I was told that when the children go to stay with H, W also travels to Switzerland in case of an emergency; I sincerely hope and expect that she will not need to make these trips for much longer, and do not regard this aspect of the case as supporting W's request for a second home. W will have ample funds to travel there, stay in hotels and/or rent if she chooses. Given that the children are based in London, one is only talking about holiday time (18 weeks a year), of which about half is likely to be spent by the children with H; the time spent by W, and particularly the children, in a second home would be limited. Provision for a second home in Switzerland was not included in the Post-Marital Agreement and, in my judgment, would be an unreasonable need. W would, as it happens, have enough funds to purchase a second property if she wishes, particularly if she scales back her London aspirations, but that must be a matter of choice for her rather than an expense attributable solely to H. Further, on my findings, I am unconvinced that H has liquidity to pay for a second home as sought by W and, moreover, were he to do so his ability to meet his own needs would be severely affected.

[62] As for income needs, W's claimed budget for herself (excluding costs directly referable to the children) is £251,010 pa, a sum which includes the cost of running properties in both London and Switzerland; deducting the cost of running a second home in Switzerland brings the budget down to about £224,000 pa. As a comparison H's budget (similarly excluding costs directly referable to the children) is £233,215 pa, albeit including £43,225 pa of mortgage costs on the Y town property; excluding mortgage costs brings his budget down to £189,990 pa, although H told me he will have to reconsider certain items depending on affordability, such as retaining a boat and membership fees for a club in the U area.

[63] In the Post-Marital Agreement, and indeed referenced in her earlier open proposals, the budget deemed appropriate for W was £110,000 pa (uprated for inflation). In her most recent proposal, W seeks a *Duxbury* capitalisation of £3.4m which equates to about £155,000 pa. It does seem to me that £110,000 pa (uprated with inflation), would be inadequate in the light of the standard of living, the historic expenditure by the parties, and H's own budget. It seems to me that an appropriate sum is £150,000 per year which, in accordance with the *Duxbury* tables, is capitalised at *£3,319,000* (UK state pension, for which W has minimal provision, is ignored for the purpose of the calculation). True, at times W's budget may be higher, but at other times it may be lower and in the long term she will have a valuable property which she can trade down to release money if she so chooses. She will not, however, have to do so. In reaching this conclusion, I have also taken into account that such a sum would be referable to W's personal costs alone, and H will, in addition, be paying a very high level of agreed expenditure for the children.

(i) £44,000 pa child maintenance (£22,000 per child).
(ii) £80,000 of directly paid costs.
(iii) £50,000 school fees.

That is a total of about £174,000 pa. Added to £150,000 pa for W gives a total figure for W and the children of £324,000 per year.

[64] The total needs based on the above is *£7,319,000*. I propose to increase that sum to a total of *£7.45m* to allow for unforeseen contingencies.

[65] The structure of the award shall include a transfer of 'X' Street to W, as the Post-Marital Agreement envisaged. It is more logical for her to have the property, and sell it how and when she wants. In any event, I do not consider that H can pay the entire award in liquid cash. Thus, the award shall comprise:

(i)	'X' Street	£2,045,791
(ii)	W bank accounts	£990,103
(iii)	W investments	£15,343
(iv)	W pension	£117,036
(v)	W liabilities	-£399,847
(vi)	Balance to be paid by H	£4,681,574

Such sum shall be payable by H as follows, within a timeframe which he accepted he could comply with:

(i) £3.5m by 14 June 2022.
(ii) The balance of £1,181,574 by 14 September 2022.

This will enable W to buy a London property, without needing to sell 'X' Street until such time as it suits her.

[66] Other matters:

(i) I reject the claim by W that H should meet her projected costs of the Children Act proceedings which are said to be £173,000. I know nothing about those proceedings, including how proportionately or reasonably each party is conducting the litigation. In my judgment, each must bear responsibility for their own costs. It will be a matter for the judge hearing those proceedings to decide if a cost order one way or the other is warranted.

(ii) I shall order child maintenance in accordance with W's proposal, together with the agreed extra items. H shall pay the school fees and, when applicable, university tuition fees.

(iii) Chattels shall be divided by agreement.

(iv) The interim arrangements shall continue until payment of the first lump sum of £3.5m.

(v) The joint bank account ending … 6196 (containing £17,269) shall be transferred to H for administrative purposes, with W receiving/retaining the monies in the account. Strictly, this takes W a touch above my determination of her needs requirement, but it is a modest sum.

(vi) The rental deposit is to be repaid by W to H.

(vii) I shall not provide for the additional miscellaneous costs sought by W.

(viii) Airmiles to be divided equally.

(ix) There shall be a clean break.

Conclusion

[67] This award provides W with £7.45m net which is about 60% of the present total of £12.47m. H will make a very high level of financial commitment for the children. Stepping back and looking at it in the round, in the light of all the s 25 criteria, with the children as my first consideration, I am confident that this is a fair outcome for both parties. It approximates to that which was contained within the Post-Marital Agreement, but goes beyond it so as to meet what I consider to be W's needs judged against all the relevant factors. I am confident that H will be able to meet his own needs under this order.

Costs

[68] The combined costs are just over £1.6m (W's £917,000 and H's £709,000), which is about 13% of the assets and more or less comprises the difference between the parties in their open proposals. I will deal with any costs application separately.

Order accordingly.

AMARJIT ATWAL
Law Reporter

Neutral Citation Number: [2023] EWFC 229

Case No: ZZ22D00703

IN THE FAMILY COURT
SITTING AT
THE ROYAL COURTS OF JUSTICE

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/12/2023

Before :

SIR JONATHAN COHEN

- -

Between :

BL

Applicant

- and –

OR

Respondent

- -

Jonathan Southgate KC (instructed by **Hughes Fowler Carruthers**) for the **Applicant wife**
Stephen Trowell KC (instructed by **Osbornes**) for the **Respondent husband**

Hearing dates: 4 – 7 December 2023

- -

Approved Judgment

This judgment was handed down at 14.30pm on 7 December 2023 by circulation to the parties or their representatives by e-mail and by subsequent release to the National Archives.

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SIR JONATHAN COHEN

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

SIR JONATHAN COHEN:

1. I am dealing with the wife's ("W) application for financial remedy orders following the breakdown of her marriage to her husband ("H").

Background

2. W is aged 63 and H is aged 67. This is a second marriage for each of them. At the time of the marriage in September 2012 W was then 52 and H was 56. They had been friends for many years and the parties and their former spouses often socialised with one another. Each party has two grown-up children.

3. W and H started their relationship in 2000. By that time each was either going through a divorce or had already been divorced. It was at H's instigation that W instructed for her divorce the same solicitor as he had instructed.

4. Although the parties did not marry until 2012, they spent a lot of time together as a couple from 2000. It is however agreed that there was no pre-marital cohabitation that could be properly described as relevant to the issues that I have to determine. H remained based in his former matrimonial home in Hampstead and W was based in her flat in St John's Wood, overlooking Regent's Park.

5. The parties became engaged in 2009 but as a result of family illness the wedding was delayed until 2012.

6. H was a wealthy man, and it was important to him that there should be a pre-nuptial agreement (PNA) so that he could preserve his assets. The core issues of law that I have to determine are:

   i) The effect and weight to be given to the PNA; and

   ii) The impact upon the award that W receives of her giving to her daughters during the marriage her main asset, namely the St John's Wood flat and her failure to enforce a large order for costs and interest payable to her by her former husband.

The PNA

7. The PNA was made by deed dated 7 September 2012. That was exactly 3 weeks before the date of the celebration of the marriage. The agreement was in a familiar form and contained the following provisions which are particularly material:

   "H. [H and W] each acknowledge that they are entering into this Agreement of their own free will and without any undue influence or duress whether from the other or any third party and not in reliance on any collateral promise or representation.

   I. [H and W] have each received separate and independent legal advice upon the matters referred to in this Agreement prior to its execution and are both fully aware of the rights and responsibilities he or she may be acquiring or surrendering pursuant to this Agreement. [H] has been advised by [a partner] of Messrs Gordon Dadds of 80 Brook Street, London W l K 5DD and [W] by [a partner] of Messrs Alexiou Fisher Philipps of l 06-108 Wigmore Street, London WIU 3LR.

J. [H and W] have fully and frankly disclosed to each other their means which are set out in summary form in Schedules 2 and 3 to this Agreement and also their other relevant circumstances.

M. This Deed is intended to bind the parties wherever they may be resident or domiciled and wherever they may be resident at the time of permanent breakdown of the marriage.

N. The matrimonial home shall be defined as any property which is the family residence and which is agreed by the parties to be the matrimonial home in writing and in a document signed by both parties from time to time. Such document will set out the respective shares of the parties in such property in the event of it being in joint names. Such property can either be the Separate Property of one party or owned by the parties jointly. There shall be only one matrimonial home at any one time and the parties need not have their main residence at such property.

2. Prior Agreement

[H and W] have entered into no prior Agreement with each other.

3. Separate Property 3.1 'Separate Property' means in respect of each party:

(e) the matrimonial home of [H and W] shall be Separate Property insofar as any share thereof derives from Separate Property, and for the avoidance of doubt all the present property of H, which includes 6 IA and Flat 5 / 25 OS, shall remain his Separate Property, unless otherwise agreed in writing and signed by both parties, although in due course any matrimonial home may become Joint Property on the terms set out in paragraph N hereof;

3.2 [H and W] agree that neither party shall make a claim against the other's Separate Property save where such a claim is made to enforce the terms of this Agreement.

7. General provisions

7.1 This Agreement, with its Schedules constitutes the entire Agreement and understanding between [H and W]. There are or have been no representations, promises, covenants or undertakings, whether written or oral, other than those expressly set out in this Agreement.

7.4 [H and W] hereby specifically and expressly acknowledge, declare, accept and agree that he and she, respectively:

(a) have carefully read each provision of this Agreement (including the Schedules) prior to its execution;

(b) have each retained separate legal advisers to advise him or her in respect of this Agreement and to assist him or her in the negotiation of this Agreement as referred to in recital I;

(c) have had all the provisions, related questions and implications satisfactorily explained to him/her and have been fully advised as to its terms and effect by his/her respective separate legal advisers;

(d) is fully informed as to:

(1) the facts relating to the subject matter of this Agreement,

(2) the assets, Property and financial obligations of each party, and (3) the rights and obligations of both of them;

(e) have been provided with disclosure of the property and financial obligations of the other party to his or her mutual satisfaction."

8. By schedule 1 of the agreement it was provided that on the permanent breakdown of the marriage between 7-10 years of its separation W would receive £650k index linked plus four payments of £12.5k described as "rehabiliatory periodical payments". The sum value of this provision to W when paid, as it has been, by H was £738,341.

9. H's assets are set out on a closely typed template which show an aggregate of £48m net, mainly in his business assets. He gave the value of his home at just under £8m.

10. W's assets totalled £2.2m of which £1.36m was comprised of her St John's Wood flat and £545k was the value of the costs orders made against her former husband but which had not been paid; the balance was largely in various savings accounts.

11. Each party produced a statement signed by well-known solicitors confirming that she/he had received advice about the effect of the agreement, the wisdom of it and whether the provisions were fair and reasonable.

12. W argues that it was always intended that H would sell his home so that they could set out on their new life together in a new joint property. H accepts that W was not happy living in what had been his former matrimonial home but that he was only prepared to move if a new property was bought on the terms set out in the PNA, which would have required W to pay her way. In consequence, the couple lived in H's former matrimonial home and never purchased elsewhere. I do not regard this issue as one that is relevant to the outcome.

13. In 2013 W's former husband died suddenly, aged 56. His estate was not straightforward, but for the purposes of this trial it was broadly agreed that about £2.5m, perhaps less tax, became payable to his two daughters who were the beneficiaries of his will. This included the still unpaid costs order in favour of W.

14. Towards the end of 2014 W, worried about her health, was tested for HPV. The report that came back was that she was negative for the two most common high-risk types of HPV, but was positive for other HPV. Following an examination on 31 March 2015 a biopsy took place to investigate two breast lumps. About 3 weeks later the welcome news came that they were benign.

15. W says that the effect of the death of her former husband and her own health anxieties meant that she felt that she needed to think carefully about the future. She says that she told her husband that they needed to look at their priorities which were to sort out their health, sort out their wills and make sure that they had properly provided for their respective children.

16. I agree with Mr Trowell KC that W's health worry cannot have been the impetus for the transaction as the timing does not fit.

17. W says that she had always made it clear that her flat, which I shall abbreviate to VC, would go to her girls. She took advice from her accountants who recommended solicitors whom she believes she met on several occasions and on 25 March 2015 she transferred VC as a gift to her daughters. She says that this was an unconditional transfer and she retained no rights in the property and that from that date onwards the rental income (the property being rented out), went to her daughters.

18. It is clear that W did not tell H of the intended transfer at any stage before its completion. She says that it was to be inferred from her repeatedly telling him that the property was going to her daughters and by her discussion following her first husband's death that it was important to look after the next generation.

19. W's case on this issue has not been consistent. At one stage it was her written case that H had known of the possibility of the transaction in 2014. She now says that she did not tell him in advance because he was away so much and it was necessary to inform him at the right time. The opportunity, she says, never arose until after the event.

20. I do not accept her evidence on this and I far prefer H's evidence which was to the effect that he only discovered when HMRC commenced an investigation into his tax affairs which necessarily brought in W. He says that it was when W had to reply to a HMRC requirement for information about various matters for which H's involvement was necessary, and which included details of the transfer, that he discovered from W's draft reply to HMRC in late February 2017 that W had disposed of VC.

21. I accept H's evidence on this. I do so because:

    i) I cannot accept that W did not have the opportunity to inform H in advance of the proposed transaction. She had instructed accountants and solicitors. If the marriage was happy, as both say it was, there could be no reason not to tell him in advance;

    ii) The changes in W's case are concerning;

    iii) In her oral evidence for the first time W said that she had found an old diary which confirmed that H was away playing golf in the far East in March 2015 and therefore she must have told him soon after his return several weeks after the transaction. There had been no mention of this before;

    iv) This transaction amounted to W parting with the bulk of her assets. It was not a transaction that took place overnight. A valuation had to be arranged for the purposes of the transfer and the various professionals instructed. It could not have been undertaken without considerable forethought. On her case, there was no reason not to tell him of the transaction well in advance of its completion.

22. Although I accept that H was not told until early 2017, I do not understand why it was that W kept him in ignorance. She says that when she did tell him his reaction was

simply that she should have told him in advance as he would have been able to assist her in saving CGT. H denies any such reaction and I accept that. W has not put before the court any information what if any CGT she paid.

23. My conclusion is that the likely reason for keeping him in ignorance was that she did not consider that it was any of H's business. H is not a man to be taken lightly. His evidence showed him to be particular and strong-willed. I suspect that W did not want him involved in what was a family transaction between her and her daughters. She described it as inheritance tax planning. I accept that she was rattled by the death of her first husband and wanted to make provision for her daughters.

24. She said that she gave no thought to the PNA at the time of the transfer. The marriage was happy. I have no reason not to accept this evidence. I likewise accept her evidence that W never said to H that she retained control of the flat after she gave it to her daughters.

25. In November 2020 H was sentenced to 3 years in prison for the offence of cheating the Public Revenue. This conviction arose out of the way that H had conducted the tax affairs of his business. He was released on licence in December 2021 having served 13 months of his sentence.

26. The marriage broke down in early 2022 and a decree nisi was pronounced on 20 January 2023. It has not yet been made final. The parties remain living under the same roof in Hampstead.

27. H is on any account a wealthy man. His business has been marketed and indicative offers received. Exactly what H will receive is uncertain because the tax payable is so speculative. I have been given a bracket of £16-£73m net. I suspect that it is very unlikely to be at the lower end of the estimate. His other personal assets total some £20m.

28. At an earlier stage in these proceedings W was seeking an award of £9.2m on what she described as a full needs basis. H has accepted that this is a sum that he is able to pay, albeit that he says that it would be far too much for W to receive in the circumstances. H, having run what is colloquially called the millionaires defence, has therefore not been obliged to make significant discovery. His assets include the matrimonial home which he has put as now worth £9-£11m. It is a very substantial property which is in good condition. It amounts to about 8,000 sq. ft. It has the benefit of staff accommodation in which there is a live-in housekeeper.

29. The argument in this case has revolved around the two traditional assessments of what comprises a reasonable housing fund and what comprises a reasonable capitalised income fund.

30. The parties strongly disagree as to the impact of the PNA upon the assessment of W's needs.

<u>The parties' open positions</u>

W

31. She seeks an order of £5.6m. She says that she has factored in to her claim the impact of the PNA by the reduction from £9.2m to £6m which she has then further reduced by £400k to reflect the fact that she has recently managed successfully to defend a claim against a property in Malta which she owns. The value of that property is some £400k and she has other assets totalling £155k.

32. H was obliged to and has paid W the sum of £738,341 under the terms of the PNA. That sum has largely been expended upon her costs of these proceedings, namely £447k.

33. She puts her housing need at between £3-£3.5m plus the costs of purchase and she seeks a Duxbury award of £3m which she calculates as producing an income of £175k pa.

34. She says that the sums that she is claiming are very much reduced from what she would have received if there had been no PNA, namely a housing fund of £4.7m and an amortised Duxbury award of £4.55m reflecting her budget of £260k pa - hence the figure of £9.2m seen at paragraph 31 above.

H

35. H offers to pay the sum of £4m. This is in addition to the £738,341 he has already paid.

36. H has provided housing particulars in the bracket between £1.65-£1.8m plus SDLT and other purchase costs, so as to produce a figure of £2m all in for W's housing. It is his case that if any provision is made above the sum that he offers, then it should be on a basis that the entire sum will be held on trust for him or his sons to be repaid on W's death.

37. He argues that a Duxbury figure of some £2m would enable W to live at the rate of approximately £125k pa. He does not discount this by her own assets of £555k but says that this sum should be regarded as available for her to meet the costs of furnishing and doing any necessary works to her new home and to meet various other expenses. If however my total exceeds £4m, he says that I should adjust the figure downwards by the amount of her available resources.

Property particulars

38. It will readily be seen that there was a substantial gap between H's top figure of £1.8m and W's bottom figure of £3m. I asked the parties to fill this gap and I was presented with some further particulars, all of which fall within the bracket of £2.5-£2.65m. When I queried this, I was told that there was little on the market. Thus it is that I have H's particulars in the bracket of £1.65-£1.8m; W's at £3m-£3.5m and 5 sets of particulars all in the small bracket in the middle.

39. H's particulars are mainly at the north end of St John's Wood as it approaches Swiss Cottage or in Maida Vale, while W's particulars are in prime St John's Wood. Those in the middle are mainly in good parts of St John's Wood but offer less than what W seeks.

40. It is common ground that W's needs are properly met by the provision of a 3 bedroom flat.

The law

41. It is unnecessary to set out the law at length as it has been clearly laid down in Granatino v Radmacher [2010] UKSC 42:

"Fairness

75 White v White [2001] 1 AC 596 and McFarlane v McFarlane [2006] 2 AC 618 establish that the overriding criterion to be applied in ancillary relief proceedings is that of fairness and identify the three strands of need, compensation and sharing that are relevant to the question of what is fair. If an ante-nuptial agreement deals with those matters in a way that the court might adopt absent such an agreement, there is no problem about giving effect to the agreement. The problem arises where the agreement makes provisions that conflict with what the court would otherwise consider to be the requirements of fairness. The fact of the agreement is capable of altering what is fair. It is an important factor to be weighed in the balance. We would advance the following proposition, to be applied in the case of both ante- and post-nuptial agreements, in preference to that suggested by the Board in MacLeod v MacLeod [2010] 1 AC 298:

"The court should give effect to a nuptial agreement that is freely entered into by each party with a full appreciation of its implications unless in the circumstances prevailing it would not be fair to hold the parties to their agreement."

Autonomy

78 The reason why the court should give weight to a nuptial agreement is that there should be respect for individual autonomy. The court should accord respect to the decision of a married couple as to the manner in which their financial affairs should be regulated. It would be paternalistic and patronising to override their agreement simply on the basis that the court knows best. This is particularly true where the parties agreement addresses existing circumstances and not merely the contingencies of an uncertain future.

Non-matrimonial property

79 Often parties to a marriage will be motivated in concluding a nuptial Agreement by a wish to make provision for existing property owned by one or other, or property that one or other anticipates receiving from a third party. The House of Lords in White v White [2001] 1 AC 596 and McFarlane v McFarlane [2006] 2 AC 618 drew a distinction between such property and matrimonial property accumulated in the course of the marriage. That distinction is particularly significant where the parties make express agreement as to the disposal of such property in the event of the termination of the marriage. There is nothing inherently unfair in such an agreement and there may be good objective justification for it, such as obligations towards existing family members. As Rix LJ put it, at para 73:

"if the parties to a prospective marriage have something important to agree with one another, then it is often much better, and more honest, for that agreement to be made at the outset, before the marriage, rather than left to become a source of disappointment or acrimony within marriage."

Future circumstances

80 Where the ante-nuptial agreement attempts to address the contingencies, unknown and often unforeseen, of the couple's future relationship there is more scope for what happens to them over the years to make it unfair to hold them to their agreement. The circumstances of the parties often change over time in ways or to an extent which either cannot be or simply was not envisaged. The longer the marriage has lasted, the more likely it is that this will be the case. Once again we quote from the judgment of Rix LJ, at para 73:

"... I have in mind (and in this respect there is no real difference between an agreement made just before or just after a marriage) that a pre-nuptial agreement is intended to look forward over the whole period of a marriage to the possibility of its ultimate failure and divorce: and thus it is potentially a longer lasting agreement than almost any other (apart from a lease, and those are becoming shorter and subject to optional break clauses). Over the potential many decades of a marriage it is impossible to cater for the myriad different circumstances which may await its parties. Thorpe LJ has mentioned the very relevant case of a second marriage between mature adults perhaps each with children of their own by their first marriages. However, equally or more typical will be the marriage of young persons, perhaps not yet adults, for whom the future is an entirely open book. If in such a case a pre-nuptial agreement should provide for no recovery by each spouse from the other in the event of divorce, and the marriage should see the formation of a fortune which each spouse had played an equal role in their different ways in creating, but the fortune was in the hands for the most part of one spouse rather than the other, would it be right to give the same weight to their early agreement as in another perhaps very different example?"

The answer to this question is, in the individual case, likely to be "no".

81 Of the three strands identified in White v White [2001] 1 AC 596 and McFarlane v McFarlane [2006] 2 AC 618, it is the first two, needs and compensation, which can most readily render it unfair to hold the parties to an ante-nuptial agreement. The parties are unlikely to have intended that their ante-nuptial agreement should result, in the event of the marriage breaking up, in one partner being left in a predicament of real need, while the other enjoys a sufficiency or more, and such a result is likely to render it unfair to hold the parties to their agreement. Equally if the devotion of one partner to looking after the family and the home has left the other free to accumulate wealth, it is likely to be unfair to hold the parties to an agreement that entitles the latter to retain all that he or she has earned.

82 Where, however, these considerations do not apply and each party is in a position to meet his or her needs, fairness may well not require a departure from their agreement as to the regulation of their financial affairs in the circumstances that have come to pass. Thus it is in relation to the third strand, sharing, that the court will be most likely to make an order in the terms of the nuptial agreement in place of the order that it would otherwise have made."

The impact of the PNA

42. The parties in their different ways both mount arguments that I regard as unsustainable.

43. H in my judgment is right to say that W's alienation of her home is a material factor. If she chooses to give away what would have been an entirely reasonable home for her, she cannot expect it to be without consequences. She has the autonomy to do with her assets as she wishes, but that exercise carries consequences.

44. W's needs still have to be met but the self-directed loss of VC means that she has to accept that (i) her needs might be met at a lower level than if she had retained the property and (ii) consideration has to be given to the purchase of her new home being subject to H having an interest in it. Precisely what form the interest takes is to be determined but for these purposes I shall call it a charge or an interest.

45. I refer to HD v WB [2023] EWFC 2 at paragraphs 54-55 where Peel J says:

> 54. Thus, in the right case, a minimal award to meet basic needs may be appropriate, but it must depend on all the factors including the PNA, resources, length of marriage, contributions and lifestyle. The courts have shown themselves to be flexible on these matters, consistent with the discretionary exercise. By way of examples of meeting needs, and respecting the limitations intended by a PNA, courts have been willing to make housing provision on a trust basis, rather than outright. That was the solution in Radmacher itself, WW v HW (supra) and Luckwell v Limata [2014] 2 FLR 168, whereas in Ipecki v McConnell (supra) and AH v PH [2013] EWHC 3873 the housing provision was made outright. The term of such a trust basis has generally been for life, but sometimes with a step down in quantum at the conclusion of the children's tertiary education; in Radmacher itself, occupancy of a property for life was not in fact coupled with a step down.
>
> 55. As for an income fund, by definition (unlike housing) that is usually a dwindling sum because monies are spent on living expenses. Courts have not shied away from a capitalised maintenance sum. To reflect a PNA, that sum can be limited by the level of maintenance (the multiplicand) or the length of term (the multiplier). Thus, in Radmacher the capitalised maintenance sum was intended to last to the end of the children's minority but not beyond. By contrast, in KA v MA (supra) the capitalised fund was on a whole life basis.

46. It will thus be seen that the court has a wide discretion as to what is appropriate on the facts of any given case.

47. Guidance is also to be found in the judgment of King LJ in Brack v Brack [2018] EWCA Civ 2862):

> 103. In my judgment, in the ordinary course of events, where there is a valid prenuptial agreement, the terms of which amount to the wife having contracted out of a division of the assets based on sharing, a court is likely to regard fairness as demanding that she receives a settlement that is limited to that which provides for her needs. But whilst such an outcome may be considered to be more likely than not, that does not prescribe the outcome in every case. Even where there is an effective

prenuptial agreement, the court remains under an obligation to take into account all the factors found in s25(2) MCA 1973, together with a proper consideration of all the circumstances, the first consideration being the welfare of any children. Such an approach may, albeit unusually, lead the court in its search for a fair outcome, to make an order which, contrary to the terms of an agreement, provides a settlement for the wife in excess of her needs. It should also be recognised that even in a case where the court considers a needs-based approach to be fair, the court will as in *KA v MA,* retain a degree of latitude when it comes to deciding on the level of generosity or frugality which should appropriately be brought to the assessment of those needs.

48. I reject W's submissions that in considering the matter, what W did with VC was irrelevant. Mr Southgate KC contends that unless what W did in handing over the property is pleaded as conduct which would be inequitable to disregard or unless H succeeds in showing that this was wanton dissipation which would lead to an addback, it cannot be taken into account in the assessment of her needs.

49. I regard these arguments as unsustainable. Handing over her flat, done without H's consent or knowledge, is plainly a material circumstance. That it has not been pleaded as conduct or wanton dissipation leading to an addback is immaterial. It is an important part of the factual scene in measuring what is a fair way of meeting W's needs. To ignore it in the circumstances of the PNA would plainly lead to unfairness.

Housing

50. There is a significant measure of disagreement between the parties as to how I should treat W's housing needs in the circumstances where she owned a flat in St John's Wood, her chosen location, which says H would be perfectly adequate for her own occupation had she not chosen to give it away.

51. It is instructive to look at the value of the flat. When transferred to the children in 2015 it was given an estimated value of either £2.6m (according to the Office Copy Entries) or £2.7m (according to a somewhat ambiguous email sent by W's daughter in which this figure is given without it being clear whether it refers to 2015 or 2017). Its value may not have changed significantly since then.

52. Within the bundle with which I have been provided is a set of particulars for a similar sized flat in the same block. This was being marketed with a reduced price of £1.75m in 2022. It is likely to have been of lesser value to the flat that W owned, being on the ground floor and next to the porter's desk. Photographs show that it appears to be old fashioned in appearance. I note the service charge is just under £11k pa, which is a useful guide to her future need.

53. H says that W should live in Maida Vale, where she could rehouse comfortably for £1.8m without having to spend any significant sum on refurbishment.

54. I regard W's wish to live in St John's Wood as being reasonable. It was where she was living before the marriage. It is close to her daughters and to her many friends. It is the centre of many of her activities.

55. I accept H's argument that she could rehouse at a cheaper price in the near neighbourhood in Swiss Cottage, Maida Vale or elsewhere. In my judgment there is a

trade off between size, condition and location. If W wishes to live in the more expensive environs of St John's Wood, she must accept that her home is likely to be either smaller or in less modern condition than she will achieve elsewhere, and it will come subject to a charge.

56. I have examined all the particulars and I do not think it helpful or necessary for me to go through each one individually. The properties chosen by H for W's occupation are all in slightly less desirable areas than W has chosen. They all, in her eyes, have some deficiencies: they are closer to Swiss Cottage or Maida Vale; they have mixed but external parking provisions; they face onto busy roads; several are ground floor or basement flats which raise security issues. Several are in good condition internally but have less attractive communal parts.

57. H in closing plumped for the two Maida Vale flats which W could buy for a costs inclusive figure of £2m. They are nice flats but I can understand why W does not want to live in a ground floor or lower ground floor flat and would feel insecure there.

58. W's first round of property particulars consisted of 4 top notch flats with between 1,500-1,800 sq ft of accommodation. They are all of the highest standard.

59. I regard them as being excessive to W's reasonable needs and the one that does quote a service charge states that it is in excess of £21k pa.

60. The two new sets of particulars provided by W at my request are both of substantial flats of around 1,800 sq ft, at £2.6-£2.65m and each described as in need of modernisation. H's additional particulars are all in a very similar bracket of £2.5-£2.6m, but without the need for remedial works.

61. This bracket seems to me to be a reasonable sum bearing in mind that it is also similar to the anticipated current value of VC. I am not inclined to add on a sum for modernisation on the basis that no doubt a reduction can be negotiated from the asking price and/or W can pay for the works herself. If W wishes to choose these locations, she must pay the costs of any necessary works from her capitalised income award or the value of her own assets, to which I shall return. I therefore award a housing sum of up to £2.6m. This will attract SDLT which is added to the award of up to £223k-£300k depending on whether the second property provisions bite. If they do and a rebate is subsequently obtained, that will be paid to H. In choosing the upper end of this small bracket, the appropriateness of a charge is strengthened.

62. It is in my view clear that W's new purchase should be subject to H having a share in the equity in the new property. Having given one home to her children, it cannot be right that W should be provided with another home to pass on to them absolutely upon her demise.

63. I regard H's proposal that if the property costs him less than £2m there should be no charge in his favour, but that if it costs more there should be a charge for the entirety of its value as without logic.

64. The extent of the charge is not straight-forward. I do not think that it should be near to 100%. W will be investing her own time and money in making it a comfortable

home, probably by a combination of spending her own money and through improvements done via the service charge.

65. I see the force of the point made by W that it might be that she will need to raise funds on the property if she needs to pay for a carer in her old age. I agree that she must have the ability to substitute an alternative property and that she must be entitled to occupation for the rest of her life or until she no longer has need of a property as her main residence.

66. I do not accept her argument that it offends the principle of the clean break, although I accept that this might be the case if the equity in her new home was wholly owned by H.

67. The charge should not be for a negligible percentage. The facts of the case would not justify that result.

68. I have selected a property of a higher value than the frugal, and having wavered between 33-50%, I have concluded that the proper percentage interest that H should have is 40%.

69. W will need a fund for furnishing the property. She has provided very recently a list of proposed expenditure on furniture totalling some £197k plus design fee and commission. She will have some chattels, but not very many, to take from the matrimonial home. I regard the list that W has provided as substantially inflated in some respects, but it also excludes many items. I assume the figure of about £150k.

70. I do not take into account in assessing W's needs the sum that she has foregone in respect of the unpaid costs orders in her favour. H accepts that she chased for a decade the payment from her former husband to which she was entitled. Notwithstanding H's assistance, nothing was obtained.

71. It is invidious to say that W should, following the unforeseen death of her children's father, then have sought to recover from the girls the costs award. At the time W was happily married and being well looked after by H. H never suggested to W, and nor would it have been his place to do so, that she should pursue her daughters for repayment. I do not accept that out of the blue upon their father's death one or both of the children said, as H avers, that they would ensure that their mother received the money. If they did, then that was a one-off comment that was never repeated.

Standard of living

72. The standard of living was plainly high. The parties would eat out in expensive restaurants. They would take on average two foreign holidays a year staying in top-notch hotels, albeit that many of these were tagged on to H's business trips. They had live-in staff.

73. In his Form E, H put his expenditure, exclusive of what he was able to put through the business at £178k pa. I accept that this included the payment of mortgage instalments on the home. W says this was significant understatement and I suspect this is correct. The housekeeper, for example, was an employee of H's company and I was left unclear as to how this was treated.

Income need

74. The parties agree that the income provision made in the PNA is not adequate. Even if the £738,341 paid had not been mostly expended on costs, it would never have been likely to have been sufficient to meet W's income needs which it is agreed will need to be covered for the rest of her life expectancy.

75. The bracket in which I am being asked to choose a figure range from £125k pa, requiring a capitalised sum of £1.993m and £175k pa which would require £2.915m

76. I have considered carefully the schedules provided by the parties. They could not be further apart. W claims an income need of £260k pa. H says that the amount that was expended on meeting her needs, stripping out those items that will not apply when she leaves the matrimonial home, totals some £55k.

77. H accepts rightly that the schedule that he has prepared contains certain deficiencies and omissions. He accepts in particular the following:

    i) That nearly all the parties expenditure during the marriage was met directly by him;

    ii) That there were various items of cash purchases which an analysis of the bank statements will not assist in quantifying;

    iii) That the schedule excludes various items including some significant ones such as private medical insurance and car insurance;

    iv) That some of the items are simply unrealistically downrated by H. In particular W points to the service charge of a 3 bedroomed flat, which H has written down to £960 pa. I have already referred to the service charge on VC and his own particulars put forward in response to my request show service charges of approaching £10k. Secondly, H has removed from W's schedule any form of staff costs. There is a live in housekeeper at the family home. When I asked W why she needed a housekeeper, her response was that she had always had one. My view on this is that she has no need of a housekeeper if she is to go into an apartment which has a concierge but that her request for having a daily to come in on two days per week was not unreasonable and I have allocated to that the sum of £20k pa, which is an inclusive figure for all staff costs including any gardening and cleaning;

    v) H has downrated her personal expenditure on major items such as holidays and entertainment to minimal sums.

78. I have looked at W's expenditure headings and have come to the following conclusions:

    Property expenses - £35k, the biggest deduction from W's figure of £51k being the removal of £13k of her requested £24k service charge.

    Utilities - £5k

Household expenses - £30k, the biggest deduction being £15k of W's £50k for the reduced cost of the housekeeper.

Car expenses - £10k. I note that W has given her car to one of her daughters but it is available for her when she wishes and she says that she still pays for its maintenance. If I have been over-generous to W in this item, I have compensated elsewhere.

Personal expenses - £30k, the biggest reduction from W's claim of £64k being the removal of £10k of her clothing allowance and a general reduction of costs across the board.

Leisure - £30k, the biggest reduction being £12k on holidays and a general reduction across the board.

79. This produces a total of £140k pa.

80. I do not allow any sum for life insurance or additional sums for the small figures for accountancy and bank charges which can be subsumed within her budget.

81. The parties have provided a schedule from which I have drawn the appropriate figure. Capitalisation of £140k requites payment of £2.269m.

82. I then have to consider what sums W has available to her to put towards her income fund.

83. I regard H's suggestion that I should deduct her assets of £555k if I select a figure for capitalised maintenance of over £2m but ignore it if less than £2m as without logic. Whether the figure is just above or below £2m should not lead to such a dramatic consequence. I do however agree with Mr Trowell KC that there is an attraction in saying that these funds should be left intact for her to use to buy furniture for her new home, pay the small sum (a bit over £10k) required to obtain a full state pension, and meet the incidental expenses of moving.

84. In deciding not to reduce the award by any part of this figure, I also bear in mind that the vast bulk of it represents the small property in Malta which W owns and which I am told needs work being done to it (for which I have not made provision) before it can be sold. I do not know how long it might take to sell. It may not be speedy.

85. The parties have agreed that H should have up to three months to raise the necessary funds and that W should have three months from the date of receipt of her lump sum to move out. Plainly, she must be kept comfortable in the matrimonial home until she vacates. I do not intend to go further than that in this judgment despite the parties' disagreements.

86. The parties have run many other arguments before me. It is clear that there is significant bad feeling between them. This is most unfortunate. I have attempted to limit the ambit of this judgment to what is important to the outcome.

87. My search must be to find a fair solution. I have to apply all the section 25(2) MCA factors in my search for a fair outcome. Fairness is done to the parties by looking at all the circumstances of the case, including the terms that the parties had agreed.

What I have provided is intended to provide fairness between them in those circumstances.

HD v WB
[2023] EWFC 2

Family Court

Peel J

13 January 2023

Financial remedies – Whether husband's interest in family business a financial resource available in foreseeable future – Extent to which valid pre-nuptial agreement should be departed from to meet husband's needs – Assessment of needs

The wife was British and the husband was from Northern Europe. Both were 46 years old and pursued sporting careers. The parties first met in 1996, cohabited until 1999 when they split up, resumed cohabitation in 2001 and finally married in 2014. They entered into a prenuptial agreement (the 'PNA'), negotiated almost entirely by the husband and the wife's mother, on behalf of the wife. The PNA provided for each party to retain their separate property and, among other things, entitled the husband to a payment on a sliding scale referable to the number of years of marriage and, under clause 24.1, to a percentage of the net sale profits of the then family home, CD House. Following their separation in December 2020 the wife initiated financial remedy proceedings. At the time the parties shared the care of their three minor children, all of whom were being privately educated. The husband vacated the matrimonial home and was living in rented accommodation. Throughout the relationship the family enjoyed a very comfortable standard of living, with the wife meeting the great bulk of the family's high level of expenditure using monies from her external family business and trust interests. Between 2006 and 2014, the wife received about £8m from a family trust (including £4m used for the purchase of CD House) and, in 2017, she received a total of about £47m gross in cash and loan notes following the sale of her father's business. Both before and after the parties married, all assets were held in separate names. There was no joint account and no jointly owned matrimonial home. The family lived first in CD House, which was sold by the wife for £13.75m, and then EF Park, which she bought for £7m. At the same time the wife bought GH for £1,430,000 to be used as the parties' business centre. Both the purchase and development of EF Park and GH were entirely funded by the wife's resources. Five further properties were brought by the wife for investment purposes. The husband was largely responsible for managing the development of the family homes and, at least partly responsible for the renovation of the investment properties. Both parties were said to have made a full contribution, in their different ways, to the family life during the period of cohabitation and marriage. The husband and his brothers each held a 30% shareholding in a business founded by their father, MM Company. The father held the majority of voting shares, his brothers were directors and H was a silent partner. An aborted sale of the business in 2019/2020 would have seen the husband receive approximately £12.8m gross (£7m net). At that time he was given a one-off dividend of £1.895m gross. The husband had debts of £349,000, including unpaid legal fees. The wife's assets were valued at a figure in excess of £43m. The husband's assets were valued at -£64,680 plus his interest in MM. The main issues in the financial remedy proceedings were: (i) whether H's interest in his family's company was a financial resource available to him to which a value could be ascribed; and (ii) how the PNA was to be treated.

By her open proposal, the wife offered the husband a total sum of £362,500, the sum she contended he was entitled to under the PNA. She subsequently offered a further £2m for a housing fund for the husband lasting 4 years. By his open proposal, the husband sought £8m advanced on a needs basis. He contended that the PNA should be

disregarded. Consideration was given, inter alia, to the value and accessibility of the husband's interest in MM, and the circumstances surrounding the PNA, and the weight, if any, to be attached to it. Both parties sought a costs order against the other.

Held – awarding the husband approximately £1.9m which was 4% of the liquid wealth, plus a housing fund subject to the wife's reversionary interest; ordering the husband to pay £120,000 towards the wife's costs, such sum to be netted off against the lump sum provision –

(1) In respect of the husband's interest in MM, it was reasonable to take a figure which was 50% of the agreed sale price in 2019. That reflected trading difficulties since then and lack of prospective purchasers. The husband's gross interest was assessed at £6.4m or £3.7m net. More significant than the notional value of the husband's interest was its accessibility or liquidity. The question in respect of financial resources under MCA 1973, s 25(2)(a) is that of access to them: *Whaley v Whaley* [2011] EWCA Civ 617, [2012] 1 FLR 735, *Thomas v Thomas* [1995] 2 FLR 668. What is required is a two-stage process: (i) A finding as to the likelihood of the third party assisting the spouse in accessing funds belonging to him/her within a structure where there are issues of (a) liquidity and (b) respect for the interests of the third party. That finding will depend on the facts of the case, to be judged by all relevant evidence including any pattern of previous such assistance. (ii) Having reached the relevant finding, the court will then have the evidential platform to make an order, if thought fit, which might amount to judicious encouragement to the third party, whilst staying alert to make sure that it does not cross the boundary into improper pressure on the third party. However, on the evidence, that interest was not a 'foreseeable' resource nor was it 'accessible' to him, nor was it open to the court on the facts of the case to put pressure on the husband's father and brothers to enable a release of funds to him. Only a sale of the whole at some indeterminate point in the future would enable the husband to realise his share. It was impossible to know when, or at what price, that would be. Nor were dividends a sustainable route for the husband to extract significant value. Accordingly, the value of the husband's interest in MM would be treated as a potential, but somewhat speculative, long-term resource which was not available or accessible in the foreseeable future to meet his needs (see paras [33], [36], [38], [39]).

(2) Sound legal advice on a PNA is desirable (*Granatino v Radmacher (formerly Granatino)* [2010] UKSC 42, sub nom *Radmacher (Formerly Granatino) v Granatino* [2010] 2 FLR 1900) but not essential: absence of legal advice is not in itself a vitiating factor. When considering the absence of legal advice, the court should look at all the circumstances, including whether the party had the opportunity to take legal advice and whether the party had a sufficient understanding of the meaning and consequences of the PNA: *V v V (Prenuptial Agreement)* [2011] EWHC 3230 (Fam), [2012] 1 FLR 1315, *Versteegh v Versteegh* [2018] EWCA Civ 1050, [2018] 2 FLR 1417. Ultimately the court remains under an obligation to consider all the s 25 factors*: Brack v Brack* [2018] EWCA Civ 2862, [2019] 2 FLR 234. In the right case, a minimal award to meet basic needs may be appropriate, but it must depend on all the factors including the PNA, resources, length of marriage, contributions and lifestyle. Respecting the limitations intended by a PNA, courts have been willing to make housing provision on a trust basis, rather than outright.

The husband did not formally take legal advice on the PNA but he was told he should, was aware of the importance of doing so and had every opportunity of obtaining advice. This was a PNA freely entered into by each party, with a full appreciation of its meaning and consequences. However, it was not determinative of the outcome. The court had an obligation to look at all the circumstances and there were circumstances which rendered it sufficiently unfair to justify a degree of court intervention. The financial landscape had changed significantly. Most importantly, the provision for the husband in the PNA did not address his needs fairly. After 6 years of marriage, the husband was entitled under the PNA merely to £112,000, repayment of £250,000 and a modest sum of about £76,000 under clause 24.1. On such sums he could not reasonably be expected to meet his housing needs, or income needs, in a way

which bore at least some relation to the marital lifestyle enjoyed over some 20 years. There had been no legal advice about needs, nor any inquiry into what fair provision for needs would be. Accordingly, the instant case was one where the court could, and should, depart from the PNA so as to meet the husband's needs fairly. In so doing, account was taken of all the circumstances, including the parties' respective resources, the husband's earning capacity, the needs of the children, the marital lifestyle, the duration of cohabitation, the husband's full contribution to the welfare of the family during the relationship, his future contribution to the welfare of the children, and the terms of the PNA which operated as a limiting factor upon considering the husband's requirements (see paras [45]–[46], [54], [85], [87], [89], [96]–[97], [98]–[99]).

(3) (i) The husband's reasonable needs in terms of housing were accommodation to a maximum price of £2.5m which would allow him, if he chose, to run an on-site sports and business facility. To balance fairly the husband's needs and the terms of the PNA, the housing fund should be on the basis that it was held on trust for the wife, or that the husband had an irrevocable tenancy. He would not own it outright; it would belong to the wife and revert to her in due course. The property would revert to the wife on the first to occur of the husband's death, or his permanently leaving the property. Further supplemental orders made provision for, inter alia, the wife to pay the stamp duty and the costs of purchase and for liberty to apply in respect of the arrangement if the husband's shares in the business were at some point sold. In addition, the wife was to pay the husband a lump sum of £50,000 for house furnishing/refurbishment. As for capital costs associated with setting up a business, the wife would pay the husband outright a sum of £200,000 which reflected the figure suggested by the wife of £50,000–£100,000 plus additional set-up costs. (ii) The wife should pay the husband's debts, since he had no means of meeting them by himself. (iii) The husband should receive a capitalised lump sum of £1.2m. That would meet his personal income needs of £235,000 for about 5 years. Alternatively, it would provide the husband with approximately £100,000 pa for 12 years, by which time all the children would be through, or nearly through, university. The above payments, which were required to be made by the wife were higher than the sums due to the husband under the PNA. Accordingly, those sums were not to be paid in addition (see paras [106]–[108], [110], [111], [112], [115]).

(4) By FPR 2010, r 28.3(6) the court may depart from the starting point of no order for costs in financial remedy proceedings and make a costs order. An order may be made against a party who is guilty of litigation misconduct notwithstanding that such order will cause the payee to dip into (and thereby reduce) a needs based award: *Traharne v Limb* [2022] EWFC 27, *WG v HG* [2018] EWFC 84, *WC v HC* [2022] EWFC 40 and *VV v VV (No 2)* [2022] EWFC 46, [2023] 1 FLR 194. In this case, each party's open offers had missed the target by a considerable margin. However, most significant was the husband's attempts throughout the proceedings to persuade the court that the PNA should be completely disregarded: the court had found against him and he had to bear some of the wife's costs. A discount of 30% on £170,000 would reflect a notional deduction for the standard basis of assessment. To that extent it was reasonable and proportionate to invade the husband's needs-based award. He could not be entirely insulated from the consequences of litigation (see paras [117]–[119], [121]–[122]).

Statutory provisions considered

Matrimonial Causes Act 1973, s 25, (2)(a)
Family Procedure Rules 2010 (SI 2010/2955), r 28.3(6), (7), PD 28A

Cases referred to in judgment

AH v PH (Scandinavian Marriage Settlement) [2013] EWHC 3873 (Fam), [2014] 2 FLR 251, FD

Brack v Brack [2018] EWCA Civ 2862, [2019] 1 WLR 3438, [2019] 2 FLR 234, [2019] 3 All ER 664, CA
Charman v Charman (No 4) [2007] EWCA Civ 503, [2007] 1 FLR 1246, CA
Gestmin SGPS SA v Credit Suisse (UK) Ltd and Another [2013] EWHC 3560 (Comm), [2013] All ER (D) 191 (Nov), QBD
Granatino v Radmacher (formerly Granatino) [2010] UKSC 42, [2011] 1 AC 534, [2010] 3 WLR 1367, sub nom *Radmacher (Formerly Granatino) v Granatino* [2010] 2 FLR 1900, [2011] 1 All ER 373, SC
Ipekçi v McConnell [2019] EWFC 19, [2019] 2 FLR 667, [2019] All ER (D) 51 (Apr), FC
KA v MA (Prenuptial Agreement: Needs) [2018] EWHC 499 (Fam), [2018] 2 FLR 1285, FD
Kremen v Agrest (Financial Remedy: Non-Disclosure: Postnuptial Agreement) [2012] EWHC 45 (Fam), [2012] 2 FLR 414, [2012] All ER (D) 146 (Jan), FD
Lachaux v Lachaux [2017] EWHC 385 (Fam), [2017] 4 WLR 57, [2018] 1 FLR 380, FD
Luckwell v Limata [2014] EWHC 502 (Fam), [2014] 2 FLR 168, FD
Thomas v Thomas [1995] 2 FLR 668, CA
Traharne v Limb [2022] EWFC 27, [2022] All ER (D) 33 (Apr), FC
TT v CDS [2020] EWCA Civ 1215, [2021] 1 FLR 996, CA
V v V (Prenuptial Agreement) [2011] EWHC 3230 (Fam), [2012] 1 FLR 1315, [2012] All ER (D) 18 (Jan), FD
Vaughan v Vaughan [2007] EWCA Civ 1085, [2008] 1 FLR 1108, [2007] All ER (D) 43 (Nov), CA
Versteegh v Versteegh [2018] EWCA Civ 1050, [2019] 2 WLR 399, [2018] 2 FLR 1417, CA
VV v VV (No 2) [2022] EWFC 46, [2023] 1 FLR 194, [2022] Costs LR 929, FC
WC v HC [2022] EWFC 40, FC
WG v HG [2018] EWFC 84, FC
Whaley v Whaley [2011] EWCA Civ 617, [2012] 1 FLR 735, [2011] All ER (D) 240 (May), CA
WW v HW (Prenuptial Agreement: Needs: Conduct) [2015] EWHC 1844 (Fam), [2016] 2 FLR 299, FD

Sally Harrison KC and *Eleanor Harris* (instructed by *Vardags*) for the applicant
Patrick Chamberlayne KC and *Petra Teacher* (instructed by *Payne Hicks Beach*) for the respondent

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so may be a contempt of court.

Judgment was reserved.

PEEL J:

Introduction

[1] In conventional manner, I shall refer to the parties as 'W' (Wife) and 'H' (Husband). In these financial remedy proceedings, where the realisable assets, almost entirely in W's name, exceed £43m, the principal issues are:

(i) In terms of computation, in addition to the £43m, (a) the value and accessibility of H's interest in a family business, and (b) the value and accessibility of W's remaining consideration due from the sale of her family business in 2017.

(ii) The circumstances surrounding a Pre-Nuptial Agreement ('PNA') dated 26 July 2014, the day of the parties' wedding, and the weight, if any, to be attached to it.

(iii) The amounts due to H under clause 24 of the PNA.

(iv) The exercise of the s 25 discretion, taking into account (i)–(iii).

Open offers

[2] By her open proposal of 28 January 2022, W offered H a total sum of £362,500, the sum to which she says he is entitled under the PNA, represented by £112,000 referable to the length of the marriage and £250,000 referable to a loan repayable by her to H. That was modified in her s 25 statement, and at trial, by offering a further £2m for a housing fund for H lasting 4 years, at which point the housing monies will revert to her.

[3] By his open proposal dated 3 May 2022, H sought £8m, advanced on a needs basis, and broadly represented by a housing fund of £2m–£3m and an income fund of £5m–£6m. That offer was repeated on 20 September 2022, and again at trial, save that H sought payment of all his legal costs after the May offer.

The essential background

[4] Both parties are 46 years old. W is British and H is from Northern Europe. Both excel in their chosen sporting field. They have three minor children, whose care is shared by the parents. All are in fee paid education in southern England.

[5] In 1996, when she was 20 years old, W moved to H's home country to train. She and H met and lived together until 1999 when W moved to another country and the relationship broke down. H was then offered a job by W's mother ('BC'). He remained in the employment of BC until 2017 on a modest salary. H and W resumed living together in 2001/2002. H proposed marriage to W in 2003, which she accepted, although neither was in a hurry to have a swift wedding. In the event, they waited over 10 years before finally marrying.

[6] It is obvious that the financial support of W's parents, coupled with wealth derived from W's family business, enabled W, and by extension H, to pursue their shared sporting career.

[7] In 2006, contemplating a move to England, W bought CD House for £3,597,500, and 150 acres of land nearby for a further £590,000. The monies were provided by a loan of £4m from a family trust, which was subsequently forgiven. Upon their move to England in 2008, the family lived in a cottage on

the grounds while major development, overseen and managed largely by H, was carried out. The total renovation cost was £7.7m. Once completed, the parties moved into the house as their family home, and ran a business.

[8] From the 1997 family settlement, W received in total about £8m (including the sums deployed for the purchase of CD House) between 2006 and 2014, whereupon the trust was wound up.

[9] In late 2012/early 2013, H and W decided to marry in 2014.

[10] In April 2014, W had a serious accident, causing head injuries from which fortunately she has made a good recovery.

[11] On 26 July 2014, H and W married. I will return to the PNA which bears the same date as the marriage.

[12] In December 2016, W sold CD House and the land for £13.75m plus £250,000 for contents. She bought EF Park, a Grade II listed mansion, for £7m, which became the next family home. Millions of pounds were spent on renovation. Again, H was largely responsible for managing the development which involved demolition of the existing house, and a brand new rebuild. It now consists of 3,500 sqm, 13 bedrooms, a swimming pool, gym and spa, cinema and tennis court, all set in 81 acres. There are 12 houses on the estate available for rental or staff use. H says that the extent of his involvement can be seen by the fact that he received over 10,000 emails on the project. The work is not yet complete. There are some snagging issues and a potential issue with listed building consent. At the same time, W bought nearby GH for £1,430,000 to be used as the parties' business centre, and major conversion into a top of the range sports and training facility was undertaken. There is a 2/3 bedroom bungalow on the land. Both properties, and their development, were entirely funded by W's resources.

[13] Five further properties were bought by W, one just before the marriage and four during the marriage, for investment purposes. H was at least partly responsible for overseeing development and refurbishment work. Two of them are owned by corporate vehicles set up for that purpose, the shares of which are held equally by H and W. However, for each company W is owed by way of director's loans the sums advanced for the property purchases and renovation costs, such that the value of the jointly owned companies is effectively zero.

[14] JK Ltd, was founded by a forebear of W in 1935. In 1980, W's father assumed leadership of the business as CEO. W played no active role in it, but held shares, initially via another family trust and outright from 2008 onwards, the trust having been wound up. In 2017, the business was sold. W received a total of about £47m gross in cash and loan notes which she was able to realise. She was, until recently, entitled to a further £8m of loan notes issued to the purchasers. As a result of a restructure the loan notes have been cancelled and she holds instead shares in the purchasing company.

[15] Throughout the parties' relationship, both before and after the marriage, all assets were held in separate names. Nothing of any significance was held in joint names. There was no joint account and no jointly owned matrimonial home; CD House, EF Park and GH were bought in W's name from monies provided by W. She retained her liquid cash and investments in her sole name. The two property investment holding companies are structured in joint names, but subject to DLAs to W. The only exception of any significance was the sale of a valuable chattel in 2012 for €1,325,000, the proceeds of which were

divided equally. It had been bought by W, but H's contribution to its improvement was such as to merit, in W's eyes, equal division. Strictly, this was a gift by W of one half of an asset owned by her. The very fact that this was the only occasion during the marriage when an asset was treated in this way is indicative to my mind of the very clear division between each's party's finances. I am satisfied also that each had general knowledge during the relationship that the other's wider family had wealth, but barely discussed it. For example, W thought H had inheritance prospects from his family business, but, I accept, did not know he had shares in it; nor did W's mother, a fact which is of relevance to the PNA.

[16] The parties separated in December 2020, so that the period of continuous cohabitation and marriage was some 18 or 19 years, with a further 3 years living together between 1996 and 1999. H moved out of the family home and, having initially lived in a house on the estate, has now moved into rented accommodation nearby.

[17] There is some dispute between the parties about the standard of living enjoyed by them and their children. H describes it as 'extremely luxurious' and W refers to aspects of it as 'modest'. To my mind it was self-evidently very comfortable indeed. The type and value of the family homes, and the monies spent on them, speak for themselves. The children are educated privately. Each party puts in an income budget of about £450,000 pa. They travelled the world pursuing their sporting careers. My sense is that some (but not all) of their holidays were of the luxury variety, and they had staff for their homes. I do not discern that they were profligate, but nor was money really an issue.

[18] A further satellite issue is the extent to which H was able to meet his personal outgoings from his own sources of income which were, I am satisfied, relatively modest. He says that after he ceased being employed by W's mother, he was able with W's permission to access her bank account to meet family expenditure, and his personal expenses. In total, he withdrew over £800,000 from W's account between 2017 and 2021. W was aware of these withdrawals which were part of the way the family finances were run. Where she differs with H is that she was, so she says, unaware that he used the monies in part for his personal expenses. I regard this as a sterile issue. It is abundantly clear that one way or another W has met the great bulk of the family's high level of expenditure throughout their relationship, using monies sourced from her external family business and trust interests. She provided the wealth to enable properties and training facilities to be bought and upgraded. She provided the financial structure to enable the parties to pursue their shared sporting career, and to fund their family lifestyle. I do not consider that any more inquiry is required into this aspect of the case.

[19] I accept that both parties made a full contribution, in their different ways, to the family life during the period of cohabitation and marriage. H did all he could as a partner, husband and father, as did W as partner, wife and mother.

Witnesses

[20] Much of the evidence in this case was directed to events which took place 8 years ago. The fallibility of memory, and evidence, was powerfully articulated by Leggatt J (as he then was) in *Gestmin SGPS SA v Credit Suisse (UK) Ltd and Another* [2013] EWHC 3560 (Comm), [2013] All ER (D) 191

(Nov), and repeated in a family context by, for example, Mostyn J in *Lachaux v Lachaux* [2017] EWHC 385 (Fam), [2017] 4 WLR 57, [2018] 1 FLR 380. Contemporaneous email evidence in this case was particularly helpful, not least in reinforcing, or undermining, the oral presentations. Understandably, not every detail could be recalled by the witnesses.

[21] Both H and W were courteous and calm in their evidence. H was at times a little defensive, and could be reluctant to acknowledge what was obvious from documents. His explanation for some of his financial disclosure was thin, although the financial picture is clear and there is no question of concealed assets. In respect of the circumstances surrounding the PNA, he was unsatisfactory. I accept that several years have passed, but he seemed to me to be less than forthcoming, and relied too frequently on lack of recollection. His assertion that English is not his first language, upon which he relied to claim minimal understanding of the events of 2014, was, in my view, overstated as his English is excellent. W seemed to me to be angry with H, feeling a sense of betrayal possibly as a result of the manner of the breakdown of the marriage.

[22] I heard from H's father and one of his brothers, both of whom were patently telling the truth. I heard also from BC, who was an impressive witness. She was clear, careful not to say things unless she recalled them, and, I thought, transparently honest.

[23] When it comes to disputes about the PNA, which was almost entirely negotiated by H and BC (on W's behalf), I unhesitatingly prefer BC's account over H's account. Insofar as there were evidential disputes between H and W on the PNA, I generally preferred W. I shall record my specific findings in the course of this judgment.

Computation

[24] The first stage of the financial remedies inquiry is usually to compute the assets, before moving on to distribution: *Charman v Charman (No 4)* [2007] EWCA Civ 503, [2007] 1 FLR 1246.

[25] I have touched on the remaining loan notes with a face value of £8m due to W from the sale of her shares in JK Ltd. They were subject to lengthy tail-off conditions over a 7-year period, but have now been converted into shares. A valuation in June ascribed a nil value to the loan notes, prior to conversion into shares. There has been no expert evidence on the value of W's interest. The evidence which I have read and heard satisfies me that it is almost impossible to ascribe a value to the shares at present, but it seems likely that they are probably no more than hope value. That said, the extent of W's wealth is such that the absence of any sum ascribed to these shares is immaterial to outcome.

[26] I resolve some relatively minor issues as follows:

(i) I will take W's figures for the loan from her father (he having met expenses on her behalf relating to some tribunal proceedings) and two Barclays overdrafts.

(ii) I take W's figure for the DLAs on the property holding companies; the difference between the parties is trivial.

(iii) W includes a possible liability of £750,000 consequential upon any deficiency in obtaining listed property consent for EF Park. Whether a liability will arise, and if so what the extent of that

liability would be, is a matter of conjecture and I do not include it on the schedule. In any event, I do not consider it affects the outcome of this case.

(iv) There was some debate about loans owed by H to a friend to assist with legal fees. He owes £269,000. W is deeply suspicious of this arrangement, but I am satisfied that he did indeed receive the loans, and is obliged to repay them.

[27] That brings me to the final, and most significant, computational issue. MM Company ('MM'), a company operated in H's home country, was founded by H's father in 1978. The shares are held via a holding company. In 2010, H's father decided to restructure the business for inheritance tax purposes, passing down shares in the business to H and his two brothers. Pursuant to a formalised ownership agreement dated 22 December 2011, the structure since then has been:

(i) H's father holds 40,000 A shares, each of which has a voting power of 10 which equates to 400,000 shares.

(ii) H and each of his brothers hold 120,000 B shares ie 30% of the whole via their own corporate vehicles.

(iii) H's father thereby has the majority of the voting shares.

(iv) H's brothers are directors of MM Company, but since 2014 H has not been so. He has been a silent partner.

[28] In 2018, a potential purchaser approached the business, and a sale was agreed in 2019. One of the attractions for H's family was that H's two brothers would be able to continue in executive roles. The evidence is that H's father did not want to sell, but was persuaded to go down that route by H's brothers because it was an outstanding offer. The agreed sale price was £46m gross, of which H would have been entitled to £12.8m gross. The net figure might have been (depending on the success of a tax mitigation scheme) £10.2m although it was a term of the proposal that H would reinvest £2.9m so that the amount in his hands would have been closer to £7m. In the end, however, the sale was blocked by the relevant competition authorities, because of concerns about the impact on the market in the niche area within which MM operates. After the aborted sale, and under some pressure from H's brothers at the time, H's father agreed to a one-off dividend in 2020; H received into his holding company from the umbrella company £1.895m gross. I accept that both W and BC were aware of the proposed sale, but not the dividend.

[29] The question is what value to ascribe to H's interest now. There has been no expert evidence. H's written presentation has shifted, and was, at least initially, unrealistic.

[30] By clause 8 of the 2011 ownership agreement, each son must enter into a marriage contract so that their business interests become fully separate property. If such marriage contract is not entered into, or subsequently becomes cancelled, then the value of the interest of the relevant party is fixed at par (about £14,000), rather than at market value. The reduced value would apply to an internal sale to H's brothers or father. The aim of all of this was to try and protect the company from the effects of any of its members divorcing; the clause was inserted at the instigation of the company's lawyers. On the sale of a whole, as H explains in Replies to Questionnaire, full market value

would be applicable. H's father and brothers described this as a standard, boilerplate clause in their home country's corporate documents to which they all attached little importance, although H's brothers did in fact enter into post-nuptial agreements. In his Form E, H sought to attribute a value of £14,000 to his interest, which I regard as having been little short of fanciful. For a start, H's business interest *was* included in the PNA, so that clause 8 did not apply. Further, it completely ignored the near sale in the previous year. It is also irrelevant in the event of a sale of the whole, as H himself said in his later Replies.

[31] Thereafter, different figures were advanced by H. In Replies to Questionnaire, H referred to the 2020 aborted sale, ie £12.8m gross. In his s 25 statement, he suggested £1.857m gross which assumed a large minority discount when no such discount would apply in the event of a sale of the whole. In his presentation for trial, he suggested £6.12m gross, or £3.2m net, based on the balance sheet valuation which again, ignored the reality of a p/e sale price from 2 years ago. H also relies on a tax liability of 42%. That is challenged by W who says 27% seemed achievable in 2020. However, the lesser rate of tax was not definitively tested, and at the time H was not a UK passport holder as he is now. Moreover, Brexit has reduced the potential for the proposed favourable tax route.

[32] H's father told me, and I accept, that trading conditions have been very difficult and for the past 2 years there has been no profit. He thought the business might be worth only about 25% of the figure offered in 2019, although he seemed to treat valuation as different from surplus capital which would be in addition.

[33] On balance, I consider it reasonable to take a figure which is 50% of the agreed sale price in 2019. This reflects trading difficulties since then and lack of prospective purchasers, Thus, I assess H's gross interest at £6.4m from which I am prepared to deduct tax at the rate now applicable according to H, 42%. Accordingly, the net interest I take at about £3.7m net. I regard this figure, or indeed any figure, as speculative and in my judgment the prospects of a sale in the foreseeable future are remote. Nor can I begin to know what conditions might attach to a sale, such as reinvestment into the business as was agreed in 2019, or a deferred payment structure.

[34] Perhaps more significant than the value is the accessibility or liquidity of H's interest. The Matrimonial Causes Act 1973 ('MCA 1973') at s 25(2)(a) refers to 'the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future'. In the context of treatment of trust resources (which have some similarities to private companies with family shareholders, although I would not want to stretch the analogy too far, and each case must turn on its own facts) the position was put thus by Lewison LJ in *Whaley v Whaley* [2011] EWCA Civ 617, [2012] 1 FLR 735 (at para [113]): 'the question is not one of control of resources: it is one of access to them'.

[35] I also bear in mind the *Thomas v Thomas* [1995] 2 FLR 668 approach which remains part of mainstream judicial thinking. In that case, the issue centred on H's shares in a private company. Waite LJ said this at 670–671:

> 'The discretionary powers conferred on the court by the amended ss 23–25A of the Matrimonial Causes Act 1973 to redistribute the assets

of spouses are almost limitless. That represents an acknowledgement by Parliament that if justice is to be achieved between spouses at divorce the court must be equipped, in a society where the forms of wealth-holding are diverse and often sophisticated, to penetrate outer forms and get to the heart of ownership. For their part, the judges who administer this jurisdiction have traditionally accepted the Shakespearean principle that "it is excellent to have a giant's strength but tyrannous to use it like a giant". The precise boundaries of that judicial self-restraint have never been rigidly defined – nor could they be, if the jurisdiction is to retain its flexibility. But certain principles emerge from the authorities. One is that 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.'

[36] It seems to me that what is required is a two stage process:

(i) A finding as to the likelihood of the third party assisting the spouse in accessing funds belonging to him/her within a structure where there are issues of (a) liquidity and (b) respect for the interests of the third party. That finding will depend on the facts of the case, to be judged by all relevant evidence including any pattern of previous such assistance.

(ii) Having reached the relevant finding, the court will then have the evidential platform to make an order, if thought fit, which might amount to judicious encouragement to the third party, whilst staying alert to make sure that it does not cross the boundary into improper pressure on the third party.

[37] It is W's case that in the 'short term' (as her counsel put in in their opening note), H will be able to realise his interest, at which point any suggestion that he requires W to meet his needs melts away.

[38] Having listened carefully to the evidence and submissions, I am not prepared to find that H's business interest is a 'foreseeable' resource, or that it is 'accessible' to him, or that it is open to me on the facts of this case to put pressure on his father and brothers to enable a release of funds to him:

(i) There is nothing to suggest that H's father is presently contemplating a sale, and in my judgment to assume that a sale of the whole would take place within a defined period (4 years is suggested by W) would be pure speculation. H's father was reluctant to sell previously, and does not appear to have changed his mind. It is unrealistic to envisage anything other than a sale of the whole business, and unrealistic to attempt any reasoned assessment of a timeframe for such sale, let alone the likely value at that undefined point in the future. The father is 74 and still, on my assessment of him, enthused by the business; there is no indication he seeks an early exit strategy.

(ii) If the past is a guide, any potential future sale would again be carefully scrutinised by the regulators, and I am not prepared to find that such a sale would necessarily be approved.

(iii) There is no history of sale of shares by family members, either internally or to the open market. All of the family want to keep it as a family business. They want H to continue as a shareholder.

(iv) H's father's voting power is such that he effectively has a veto, and I am not persuaded that he would be likely to sanction sale of the business, or major restructuring, to assist H.

(v) There are strict pre-emption rights to H's father and then brothers in that order. Neither H's father nor his brothers have any willingness, or, they told me (slightly hesitantly in the father's case, who was faced with questions on this for the first time during evidence), the financial wherewithal, to acquire H's shares, and none of them would countenance sale to a third party, not least because such a sale would likely impact upon the value of the business and the ability of all members to work together. Moreover, sale to a third party would inevitably be subject to such a large discount for minority ownership as not to be remotely worthwhile. Counsel for W accepted that in reality a sale to a non-family member third party is not a viable route, but contended that family members (particularly the father) would purchase H's shares. I reject that proposition. In my judgment, only a sale of the whole at some indeterminate point in the future would enable H to realise his share. It is impossible to know when, or at what price, that would be.

(vi) Nor do I view dividends as a sustainable route for H to extract significant value. Any dividend to H's holding company would have to be replicated for his brothers' holding companies. H's father would, in my view reasonably, not countenance such a course, and the business is in no position to do so. Before the events surrounding the aborted sale, no dividend approaching the magnitude of the one declared in 2020 had been received by H. From 2012 to 2019, dividends were declared on only four occasions, the highest received by H being £19,800. I am

confident that H cannot rely on substantial dividends in the future. Trading conditions have deteriorated. Borrowings have doubled in the past year. There is no evidence of substantial cash funds which in some way could be made available to H, and which are surplus to business requirements. H's father considers that future dividend payments are unlikely, not least because the creditor banks have stated that dividends cannot be paid out unless shareholders all give personal guarantees for company debts; I accept this evidence and am satisfied that H's father would not permit a very high level of dividend to be declared.

(vii) The only route realistically proposed on behalf of W is that H should be expected to sell his shares to his father, and his father should be expected to buy them. I cannot order H's father to buy H's shares. To frame an order on the basis that unless H's father comes to the financial aid of H, by buying his shares, H would be effectively penniless and unable to meet even his most basic needs, would be to place improper pressure on him. On the evidence it is not made out that the father would buy them, and in any event, I regard that as almost the definition of improper pressure by the court. To require H's father to pay millions of pounds to come to H's aid crosses the line, particularly in circumstances where he long ago divested himself of his shares to his sons and devised a careful business structure which would be completely upturned. It would not be proper to oblige him to re-acquire that which he parted with all those years ago, let alone at enormous cost.

[39] I therefore propose to treat the value of H's MM interest as a potential, but somewhat speculative, long-term resource which is not available or accessible in the foreseeable future to meet his needs.

[40] Before leaving H's business interest, one further matter falls to be considered. Again, H was less than satisfactory on this, but the full picture emerged during the course of the proceedings, and certainly well before trial.

[41] In October 2020, about 6 months before his Form E, H's holding company had received the £1.895m dividend which was sitting in a company bank account. After tax (payable by H and the company), the net figure was about £1.1m. Having heard both parties' evidence on this, I am satisfied W was not aware of this payment until after the proceedings were well underway; there is no email evidence to confirm that she was aware, and given the way they had constructed their finances I am not particularly surprised H did not tell her. H did not in his Form E disclose this large sum of money sitting in his company bank account; he should have done. He did reveal that he had taken a dividend of about £422,000 from his holding company in November 2020, but without explaining the remaining sums available to him. Worse, he described it in his Form E as a one off when in fact he subsequently paid himself dividends in February and July 2022. He had ample opportunity in Form E, Replies to Questionnaire and correspondence to set the position straight, but did not do so. I cannot accept his reliance upon a technical distinction between dividends from the umbrella company to his holding company, and dividends from his holding company to himself. He was represented by expert solicitors and simply failed to produce

a clear explanation which would have enabled W to understand his true wealth. He did not produce 2021 year end accounts to W or her lawyers which would have shown the position. It was not until W herself obtained the accounts in or about January 2022 that the receipt into H's holding company of the dividend declared by the overall holding company was finally established, along with the cash sitting in a bank account. In oral evidence he accepted this was a mistake, although I did not sense any real acknowledgment of what I regard as having been an unacceptable failing on his part.

[42] I directed H at an earlier hearing to explain what happened to the dividend monies. Having read his evidence, and heard from him, I accept that they have been expended properly on the enormous legal fees in this case, tax, rent and general living expenses. He has not received interim maintenance from W and has had to rely on this dividend. This is not a case for a *Vaughan v Vaughan* addback.

[43] I attach a composite asset schedule. I tabulate the assets thus:

(i) Wife: £43,747,008 plus the shares in the company that acquired her loan notes.
(ii) Husband: (-£63,680) plus his interest in MM.

Law on Pre-Marital Agreements

[44] The starting point for my purposes is *Granatino v Radmacher (formerly Granatino)* [2010] UKSC 42, [2011] 1 AC 534, [2010] 2 FLR 1900 (*Radmacher)* from which the following propositions can be drawn:

(i) There is no material distinction between an ante-nuptial agreement and a post-nuptial agreement (para [57]).
(ii) If an ante-nuptial agreement, or a post-nuptial agreement, is to carry full weight, 'what is important is that each party should have all the information that is material to his or her decision, and that each party should intend that the agreement should govern the financial consequences of the marriage coming to an end' (para [69]).
(iii) It is to be assumed that each party to a properly negotiated agreement is a grown up and able to look after himself or herself (para [51]).
(iv) 'The reason why the court should give weight to a nuptial agreement is that there should be respect for individual autonomy. The court should accord respect to the decision of a married couple as to the manner in which their financial affairs should be regulated. It would be paternalistic and patronising to override their agreement simply on the basis that the court knows best. This is particularly true where the parties' agreement addresses existing circumstances and not merely the contingencies of an uncertain future.' (para [78]).
(v) 'The first question will be whether any of the standard vitiating factors: duress, fraud or misrepresentation, is present. Even if the agreement does not have contractual force, those factors will negate any effect the agreement might otherwise have. But unconscionable conduct such as undue pressure (falling short of

duress) will also be likely to eliminate the weight to be attached to the agreement, and other unworthy conduct, such as exploitation of a dominant position to secure an unfair advantage, would reduce or eliminate it.' (para [71]). 'The court may take into account a party's emotional state, and what pressures he or she was under to agree. But that again cannot be considered in isolation from what would have happened had he or she not been under those pressures.' (para [72])

(vi) 'The court should give effect to a nuptial agreement that is freely entered into by each party with a full appreciation of its implications unless in the circumstances prevailing it would not be fair to hold the parties to their agreement [*MacLeod v MacLeod* [2010] 1 AC 298].' (para [75]).

(vii) 'Of the three strands identified in *White v White* and *McFarlane v McFarlane*, it is the first two, needs and compensation, which can most readily render it unfair to hold the parties to an ante-nuptial agreement. The parties are unlikely to have intended that their ante-nuptial agreement should result, in the event of the marriage breaking up, in one partner being left in a predicament of real need, while the other enjoys a sufficiency or more, and such a result is likely to render it unfair to hold the parties to their agreement. Equally if the devotion of one partner to looking after the family and the home has left the other free to accumulate wealth, it is likely to be unfair to hold the parties to an agreement that entitles the latter to retain all that he or she has earned.' (para [81])

(viii) 'Where, however, these considerations do not apply and each party is in a position to meet his or her needs, fairness may well not require a departure from their agreement as to the regulation of their financial affairs in the circumstances that have come to pass. Thus it is in relation to the third strand, sharing, that the court will be most likely to make an order in the terms of the nuptial agreement in place of the order that it would otherwise have made.' (para [82])

(ix) It is the court that determines the result after applying the Act (para [83]).

[45] Sound legal advice is 'desirable' (*Radmacher* (at para [69])), but not essential. In *V v V (Prenuptial Agreement)* [2011] EWHC 3230 (Fam), [2012] 1 FLR 1315 Charles J held that the agreement should be upheld notwithstanding lack of legal advice or disclosure because it was readily understood by an intelligent (but legally unadvised) reader (para [50]), and both parties intended the marriage settlement to be effective and were aware of its obvious purpose. In *Versteegh v Versteegh* [2018] EWCA Civ 1050, [2019] 2 WLR 399, [2018] 2 FLR 1417, a similar approach was adopted. When considering the absence of legal advice, the court should, in my view, look at all the circumstances, including whether the party had the opportunity to take legal advice, and whether the party had a sufficient understanding of the meaning and consequences of the PNA. I cannot accept that absence of legal advice is, by itself, a vitiating factor, or 'fatal' to W's case, as H suggests in his counsels' opening note, such that no weight can be attributed to it.

[46] Ultimately, the court remains under an obligation to consider all the s 25 factors: *Brack v Brack* [2018] EWCA Civ 2862, [2019] 3 All ER 664 (at para [103]).

[47] An interesting question is what 'predicament of real need' means. Counsel for W submit that any order should be confined to ensuring that the supplicant party (in this case H) has sufficient to be kept from 'destitution' (the word used by Mostyn J in *Kremen v Agrest (Financial Remedy: Non-Disclosure: Postnuptial Agreement)* [2012] EWHC 45 (Fam), [2012] 2 FLR 414 (at para [72](iv)(c)). Or does it mean, as counsel for H submit, that if the PNA entered into by the parties leaves one of them in a predicament of real need on divorce, the court then moves on to consider needs in accordance with all the s 25 criteria, and is not confined to alleviating a predicament of real need; in other words, the 'predicament of real need' is a gateway through which the supplicant party must go before s 25 is fully engaged.

[48] In *V v V (Prenuptial Agreement)* [2011] EWHC 3230 (Fam), [2012] 1 FLR 1315 (at paras [81] and [82]) Charles J did not restrict the interpretation of needs in the way suggested by W in this case.

[49] In *WW v HW (Prenuptial Agreement: Needs: Conduct)* [2015] EWHC 1844 (Fam), [2016] 2 FLR 299 Deputy High Court Judge Nicholas Cusworth QC (as he was) said:

> '[53] So, should H's need here necessarily be interpreted as the minimum amount that is required to keep him from destitution? This will not invariably be the case, even where an agreement would otherwise produce such an extreme situation. As Lord Phillips confirmed in *Granatino v Radmacher (Formerly Granatino)* [2010] UKSC 42, [2011] 1 AC 534, [2010] 2 FLR 1900, at [75]: "The fact of the agreement is capable of altering what is fair". However, even where there is an agreement, fairness will not necessarily equate to near destitution. The level at which a party's needs should be assessed, if they are not met by an agreement which might otherwise be binding upon them, must surely depend upon all of the circumstances of the case, amongst which the fact of the agreement may feature prominently as a depressing factor. But each case will be different.'
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> [54] In *Radmacher* itself, having rejected the view adopted by Wilson LJ in the Court of Appeal that the agreement should be binding irrespective of need, the Supreme Court went on to find that in that case the husband's needs were in fact met by the award made, albeit not at the level he might have expected absent the agreement. Given the earning capacity which they were inferentially able to attribute to him, this could hardly be equated to "destitution". In *Luckwell v Limata* [2014] EWHC 502 (Fam), [2014] 2 FLR 168, Holman J found of the husband in that case at para [143] that: "He has no home, no current income, no capital, considerable debts and absolutely no further borrowing capacity". He justified further provision on the basis at para [148] that: "the need to provide an adequate home in which the children can visit and stay with their father is very important".
>
> [55] Unlike *Luckwell*, and more closely like *Radmacher*, this is a case where any provision which W makes will not have a significant effect

on the quality of the children's lives whilst they are with her. There is thus no need to balance the effect on the children of losing their home with one parent to provide adequate accommodation in which they can stay with the other. However, it should be borne in mind that any award to meet need, even absent the agreement in this case, is being made from non-matrimonial assets; and here those assets were specifically protected by the agreement which H willingly entered into. There is consequently no obvious basis for any generosity in the interpretation of these needs.'

[50] Roberts J at para [100] of *KA v MA (Prenuptial Agreement: Needs)* [2018] EWHC 499 (Fam), [2018] 2 FLR 1285 agreed with those observations.

[51] In *Ipekçi v McConnell* [2019] EWFC 19, [2019] 2 FLR 667 (at para [27](iv)) Mostyn J said:

'The agreement does not meet any needs of the husband. I do not take the language used by the Supreme Court, namely "predicament of real need" as signifying that needs when assessed in circumstances where there is a valid prenuptial agreement in play should be markedly less than needs assessed in ordinary circumstances. If you have reasonable needs which you cannot meet from your own resources, then you are in a predicament. Those needs are real needs.'

[52] In *Brack v Brack* [2018] EWCA Civ 2862, [2019] 1 WLR 3438, [2019] 2 FLR 234 (at para [131]) King LJ said:

'… It should also be recognised that even in a case where the court considers a needs-based approach to be fair, the court will as in *KA v MA*, retain a degree of latitude when it comes to deciding on the level of generosity or frugality which should appropriately be brought to the assessment of those needs.'

[53] I take the view that whether a party should be confined to needs at the minimum level required to meet a 'predicament of real need' will depend on the circumstances of the case. There is a world of difference between, say: (i) a childless couple whose marriage lasts for 2 years, enjoying only a modest lifestyle, at the end of which one party might need no more than short-term maintenance or a highly attenuated housing budget (perhaps restricted to time limited rental); and (ii) as here, a couple with three children, who have been together 20 years, who each contributed to the welfare of the family in different ways, and who enjoyed a high standard of living. I adopt the words of King LJ which seem to me to describe accurately the flexibility of the discretionary exercise. Of course, the court will always, in conducting the s 25 evaluation, have regard to the fact of a PNA and its terms. I would not, therefore, adopt the approach of W's counsel, which seemed to me to be too straitjacketing. Nor do I consider that the two stage gateway process suggested by H's counsel is made out on the authorities.

[54] Thus, in the right case, a minimal award to meet basic needs may be appropriate, but it must depend on all the factors including the PNA, resources, length of marriage, contributions and lifestyle. The courts have

shown themselves to be flexible on these matters, consistent with the discretionary exercise. By way of examples of meeting needs, and respecting the limitations intended by a PNA, courts have been willing to make housing provision on a trust basis, rather than outright. That was the solution in *Radmacher* itself, *WW v HW (supra)* and *Luckwell v Limata* [2014] EWHC 502 (Fam), [2014] 2 FLR 168, whereas in *Ipekçi v McConnell (supra)* and *AH v PH (Scandinavian Marriage Settlement)* [2013] EWHC 3873 (Fam), [2014] 2 FLR 251 the housing provision was made outright. The term of such a trust basis has generally been for life, but sometimes with a step down in quantum at the conclusion of the children's tertiary education; in *Radmacher* itself, occupancy of a property for life was not in fact coupled with a step down.

[55] As for an income fund, by definition (unlike housing) that is usually a dwindling sum because monies are spent on living expenses. Courts have not shied away from a capitalised maintenance sum. To reflect a PNA, that sum can be limited by the level of maintenance (the multiplicand) or the length of term (the multiplier). Thus, in *Radmacher* the capitalised maintenance sum was intended to last to the end of the children's minority but not beyond. By contrast, in *KA v MA (supra)* the capitalised fund was on a whole life basis.

The PNA

[56] The essential terms of the PNA are as follows:

(i) Each party wishes to retain their separate property (clause 5).

(ii) W relies upon advice given to her sister by her sister's solicitors on her marriage, because their financial situation is 'virtually identical' (clause 8).

(iii) The parties have given full and frank disclosure of their means and other relevant circumstances (clause 9).

(iv) Upon separation, property held in their respective ownership prior to marriage and property acquired during the marriage by way of gift or inheritance shall remain in their beneficial ownership (clauses 15 and 16).

(v) Neither will claim against the property of the other during the marriage (clause 17).

(vi) All property over £750 acquired during the marriage shall belong to them in the shares in which the purchase monies were contributed and no presumption of advancement shall apply (clause 19).

(vii) H has, and can acquire, no beneficial interest in the (then) matrimonial home at CD House or any new property subsequently purchased with the proceeds thereof (clause 21).

(viii) In the event of divorce, property in the separate ownership of each property shall remain theirs beneficially (clause 22) and any joint property shall be distributed equally (clause 23).

(ix) In the event of divorce, in respect of CD House 'H shall receive 25% of any net profit after all costs which have been index linked in accordance with the Retail Prices index from the date they were incurred to the date of the sale …' (clause 24.1). There is a dispute about H's entitlement under this clause; W says it is nil, H says £2.538m.

(x) On a sliding scale referable to the number of years of marriage, H is entitled to between £100,000 and £750,000 plus, after 10 years of marriage, a £500,000 housing trust fund (clauses 24.2–24.7 and 25). In the circumstances of this 6 year marriage, H's entitlement is limited to £112,000.

(xi) W will be responsible for the financial support of the children (clause 26).

[57] The assets recorded in the Appendices to the PNA are:

(i) Wife:

(a)	CD House	£8m
(b)	Cash	£1m–£2m
(c)	Business	37% of JK Ltd
(d)	Liabilities	£250,000 owed to H

(ii) Husband:

(a)	Property	Nil
	Cash £100,000 XX 100,000	
(b)	Loan to W	£250,000
(c)	Business	33.3% of MM
(d)	Salary	£21,252

[58] Accordingly, on a strict application of the PNA, H is entitled to the following:

(i) £112,000; and

(ii) repayment of the £250,000 loan to W set out in the Appendices; and

(iii) a sum due under clause 24.1 which on W's case is nil, but on H's case is £2.538m.

The parties' rival contentions on the PNA

[59] H says that the PNA should effectively be disregarded. He says it was entered into in undue haste, with no legal advice and insufficient disclosure. He says he did not fully understand it. In any event, he says that it does not fairly meet his needs.

[60] W says that H entered into the PNA willingly, was an active participant in the process leading up to signing, fully understood its contents and meaning, and should be bound by it. She says that his needs can fairly be met by realisation of his business interest, but for a strict period of 4 years she will loan him a sum of money to enable him to rehouse pending receipt of the proceeds of that interest.

The circumstances under which the PNA was entered into

[61] When considering how the PNA came to be signed, the key background features are:

(i) Before marriage, the parties had kept their finances strictly separate.

(ii) Both parties had family business interests headed by their respective fathers, and both wanted those business interests to be protected. At the time, neither knew the quantum of those potential interests.

(iii) Putting to one side their respective business interests, W was at the time of marriage a woman of substantial liquid wealth (property and cash of c£10m) whereas H had almost no liquid wealth. W's assets all emanated from family monies.

[62] Although the early background is a little hazy, I am satisfied that in 2014, before W's accident in April, H and W had a handful of discussions about protecting each other's wealth, which both felt important given the success of their respective father's businesses. W was keen for a PNA to be drawn up (perhaps prompted by BC), and it was she who first mentioned it to H. She also, I find, made it clear to H that she would not marry without a PNA.

[63] After the accident, W was hardly involved in discussions about the PNA, which took place between H and BC.

[64] W's sister and her husband had entered into a PNA in 2005, with legal advice provided to W's sister by solicitors, who undertook the drafting. W's sister's husband had independent legal advice. In 2014, BC thought it would be sensible for W to instruct the same solicitors as her sister to carry out a similar exercise, but because W was struggling with her health after the accident, it was decided not to put her through the exertion of travelling to London for meetings, or speaking directly to H; BC took the lead on behalf of W.

[65] On 2 June 2014, W's sister sent a copy of her 2005 PNA to W and her parents. BC was asked why they did not send it to a lawyer to update it for this marriage, which BC acknowledged was a mistake with hindsight; that said, I remind myself that it is not W who is challenging the PNA, but H. The 2005 PNA between W's sister and her husband is, in structure and format, very similar to the PNA ultimately signed by W and H in 2014. The provisions in W's sister's PNA are replicated almost word for word in the PNA between H and W, save for (i) change of names, (ii) change of references to legal advice, and (iii) change of financial disclosure. The only dispositive clause of any difference is that H and W included a potential entitlement to a proportion of the proceeds of CD House under clause 24.1.

[66] On 2 July 2014 at 13.27, W's sister's agreement was forwarded to H by W. H did not speak to W about it. He told me that he and BC spoke about the PNA regularly, although BC could only recall two conversations in early July 2014, and a face-to-face meeting on 19 July 2014. I suspect BC is right about this. H accepted that at the beginning of the process (which I take to be early July 2014), BC said to him he should take legal advice. She did not mention the name of a solicitor, nor did she introduce one to H; that was for him to decide. As it happens, H knew of B Solicitors LLP because of their assistance in a construction dispute. Thereafter, BC did not press or hurry H because she assumed he would be taking legal advice.

[67] The same day, ie 2 July 2014, at 16.08 KW of B Solicitors emailed H saying 'Dear [H], please feel free to call me tomorrow …'. H was reluctant to accept in his evidence that she would only have emailed him in this way if he had already made contact with her. There is no evidence that she was

approached by W or BC on H's behalf. I find that it was H who instigated the contact, in order to discuss the PNA document which he had received.

[68] KW has stated in writing that she recalls speaking to H once or twice in 2014 but did not see the PNA or advise on it. I accept that H did not receive advice on the PNA. Equally, however, I accept that W and BC at all times believed that he was taking legal advice from KW, not least because, as I shall explain, H amended the PNA to so state.

[69] On 3 July 2014, H and KW exchanged emails about speaking the following day.

[70] On 7 July 2014, H emailed KW saying 'I still have not received anything from [W]. She is now saying that she will not use her sisters. I will contact you as soon as I receive something from her'. W told me that at no time did she intend to use a different PNA, and could not explain this email. I think it is possible that H briefly misunderstood the position, but it must have quickly become clear what W intended because there was no further mention of a different PNA, and all subsequent discussions used W's sister's PNA as a template.

[71] On 14 July 2014, H emailed KW asking if it would be possible to do a PNA after the wedding, saying 'I thought this might be the best way forward as we are running out of time and [W] is still not 100% after her head injury'.

[72] On 16 July 2014, H started to make amendments to W's sister's PNA, a task which he completed the next day. An edit search shows that he spent 37 minutes on editing the document, although I consider it likely he will have spent much more time than that between 2 July 2014 and 17 July 2014 reading what was obviously an important document.

[73] On 17 July 2014, H forwarded to BC an amended PNA. I accept her evidence, and that of W, that they assumed it had been amended by H's lawyers (not H personally), and that he had received legal advice, not least because it identified KW of B Solicitors on the title page and expressly referred to H having taken legal advice from B Solicitors at clause 8. At no time did H tell either W or BC that he had in fact not received legal advice; there was, therefore, no reason for them to doubt what was stated in the document. It was colour coded by H to show areas of proposed amendment, or discussion. Relevant alterations made by H included:

(i) The two references to B Solicitors.

(ii) He included a payment by W to him of £250,000 plus 25% of the net profit of CD House. This, H told me, was something agreed between himself and W months before. I preferred W's evidence that they had not previously discussed this provision.

(iii) In the disclosure appendices, it referred only to CD House (estimated at £10m) in W's disclosure, shading in red the disclosure in W's sister's PNA which needed to be amended. It included H's financial disclosure, but no mention was made of his business interest.

[74] In his written statement about the PNA dated October 2021, H said that some amendments were made to the document sent by him to BC on 17 July 2014, but he was 'not sure which were made by me'. Implicitly, he was saying that someone else had carried out at least some of the amendments, casting doubt on the provenance of the document. In Replies to Questionnaire dated

April 2022, he was presented with the edit search which showed that he had carried out the amendments. He replied that his computer at CD House had one Word licence, was not password protected, was used by W and could have been accessed by W or BC. However, he acknowledged that it was indeed him who had carried out all the amendments to the document sent on 17 July 2014.

[75] On 18 July 2014, BC replied to H with an amended version. It included some financial disclosure for W to replace that given by her sister 9 years before. It included a reference to W relying upon the advice given to her sister as their positions were almost identical. It did not amend the substantive provision at clause 24.1 in respect of £250,000 and 25% net profit of CD House as BC wanted to speak to W about it. Later that day BC did speak to W about the PNA (probably by telephone), who said that she would like the 25% net profit to be after development costs and RPI, did not agree to the £250,000 and thought the value of CD House was £8m, not £10m.

[76] On 19 July 2014, BC emailed H at 10.06 saying 'Did you get my amendments or do I have to print them when I come today?' That was a reference to a planned meeting between them that day at CD House.

[77] The meeting duly took place. W was also at the house, but did not play any direct part in the discussions. BC told me, and I accept, that they had no discussions about the meaning and terms of the PNA because H was, she believed, receiving legal advice on it. It appeared to her that H understood it; at no time did he say to BC that he did not appreciate the terms and intention of the PNA. I reject H's evidence to me that BC told him there was no need to take legal advice as W's sister's lawyers had previously given advice, and time was running out. She said no such thing, not least because she believed H was already receiving legal advice. BC told H that W wanted the £250,000 provision removed from the agreement and placed in the appendices as a liability from W to H (for reasons which nobody can recall, but the arithmetical effect was the same), and inclusion of renovation costs and RPI for CD House before calculation of H's 25% entitlement. BC also thought (albeit only vaguely) that during the meeting mention was made of £1m to £2m cash in W's bank accounts.

[78] After the meeting, BC went home and amended the document on her computer. In his April 2022 Replies to Questionnaire, H asserted that they jointly inputted the amendments on his computer at CD House, which I do not accept. The edit trail shows that the amendments were carried out on an HP computer (which BC owned) and not a Dell computer (which H owned). BC included in H's disclosure 'Shares?' under the section 'property', as she told me, 'just in case', and not, I am satisfied, because she knew of H's business interest. She did not amend the provisions about legal advice which she would surely have done had she truly thought H was not receiving legal advice. She changed the value of CD House to £8m from £10m in accordance with what W had requested. Also as requested, she removed the £250,000 and placed it in the disclosure appendices as a debt owed by W to H.

[79] In Replies to Questionnaire, H said that after 19 July 2014, he did no further amendments. He told me orally that he did not receive any further amended versions from BC or W.

[80] On 21 July 2014 at 19.59, H emailed to KW (but, as he accepted, not to W or BC) an amended version of the PNA which was in the same terms as the

one sent to him 2 days previously by BC, save that under the Appendices, it included in his disclosure '33,3% of the value of MM'. In oral evidence, H could not accept that it was he who made that amendment. He suggested that it might have been W or BC. I reject his evidence. During the hearing before me, an edit search of this document was carried out which showed that the amendment had been done on H's computer and that the last modification was at 19.56, ie 3 minutes before he indisputably sent the email with the amended PNA to KW. It is inconceivable that W or BC carried out the amendments on H's computer 3 minutes before H sent the document. Further, the use of the comma in 33,3% is commonplace on the continent (including H's home country) rather than in the UK. And I accept the evidence of W and BC that (i) they did not carry out any amendments using H's computer and (ii) they did not know of H's business interest and therefore could not have added it. H's assertions about other people accessing his computer to make amendments made no sense. Why would W or BC have done so, clandestinely? Why would BC, instead of using her HP computer, have gone to CD House to use the Dell? Why would W, who was playing no part in the discussions, have contemplated doing amendments herself? These assertions made by H were far fetched and cast doubt on much of his presentation about the PNA.

[81] H's covering email to KW said: 'I have attached it but I am not sure if it is better or not to have you as my signed up lawyer or just get some advice and say I did it by myself'. W submitted that this demonstrates H preparing the ground to omit reference to legal advice so as to challenge the PNA later. Although it is a slightly odd email, I am inclined to reject the submission. For a start, H did *not* in fact receive legal advice, although he had the opportunity to take it. So, to think about omitting reference to legal advice would gain nothing in attempting to evade the consequences of a PNA. Further, it was he who had included amendments on disclosure which arguably strengthened the PNA. No other email points to mala fides. In any event, having heard H, I am confident that he was not attempting a Machiavellian ruse of this nature, despite W's suspicions to that effect. What it does demonstrate is that even at that stage H was considering whether or not to obtain legal advice, which he ultimately did not do.

[82] The final version, dated 26 July 2014 (the wedding day), must have been prepared by H. It included, word for word, his disclosure of his business interest which had been sent to KW, but not to W or BC. It deleted the reference to H having received legal advice from KW, presumably because he had not in fact received legal advice. It included a value of £1m–£2m for W's cash which, in my view, must also have been inserted by H and not, as H suggested, by BC or W; I assume that somebody mentioned this figure at some point. Had W carried out that amendment, she would have been more precise. Again, I reject any intimation by H that W or BC in some way effected these changes.

[83] The circumstances of the wedding day are confused. Having heard the evidence, it seems to me to be most likely that H brought a copy of the final version of the PNA. He signed it in front of a witness, who then took it to W. Had it been the other way round, ie W bringing it to the wedding, she would have signed first, before having it taken over to H; that is not what happened. It was left on a table and seen by BC who took it away and kept it in a drawer.

It is likely that W's signature witness, a long standing family associate, signed it at a later date, although nobody could recall. I accept that W did not read it, thinking it was the same as the version as the one sent by BC on 19 July 2014. H also told me he did not read it, but he had no need to do so as he had prepared the final draft. Thus, W was unaware of the subsequent amendments made by H, including (i) removal of the references to legal advice having been given to H and (ii) insertion of H's MM interest. It was only in 2020, when she retrieved the PNA from her mother to send to H as the marriage was breaking down, that she saw these changes. H said in written evidence that on the wedding day he was told by somebody who he cannot remember (but not W or BC) that he had to sign or W would not marry him. True, he was not cross-examined on this, but then it was no part of his case that W uttered these words to him on the day, so there was no requirement for him to be cross-examined by her counsel on this somewhat vague assertion. In any event, W had undoubtedly said something similar to him in their earlier discussions, so he cannot have been surprised if that is what he was told. That is precisely why he had brought the PNA to the wedding, and signed it.

Conclusions on the PNA

[84] I turn to my conclusions on the PNA and the weight to be attached to it.

[85] I found H's case on the PNA to be confused and, at times, patently wrong. I reject his assertion that he did not understand it. He had it for several weeks from 2 July 2014, and had ample time to read it; it is short (eight pages) and, in my view, even for a lay person, the broad gist was relatively easy to appreciate. He had discussions with W and BC. He carried out amendments himself on at least three occasions (the 17 July document sent to BC, the 21 July document sent to KW and the final version). He was fully engaged in the process. He knew the purpose of the PNA was to protect assets, and he knew that W's assets all emanated from her family. I am quite sure that as an intelligent person, who was careful enough to carry out amendments, he went through it in some detail to make sure of what he was signing up to. I doubt, for example, that he would have included the reference to 25% net profit of CD House unless he realised that his entitlement under the PNA was limited. He had ample opportunity to query the PNA's meaning and intention with BC and/or W, but did not do so. He had ample opportunity to take legal advice, but did not do so.

[86] During his oral evidence, for the very first time, H said he thought the PNA only protected existing assets as at 2014, and not future assets which he said would be divided equally, including property, cash and chattels. This was not credible. The document cannot be construed in that way. Clauses 4, 5, 21 and 22 which are relatively simple to understand, say the complete opposite. If that was really his case, he would surely have set it out beforehand in his multiple, detailed, sworn statements and Replies. Nor does it make much sense given that future assets would inevitably be the product of assets in existence at the time of the marriage; in other words, there would be nothing new. As it turned out, subsequent properties were bought with the proceeds of CD House, a pre-marital asset of W's. Further, W received monies from the sale of the business which emanated from shares owned by her pre-marriage. Putting it another way, if, as he said, assets before marriage were protected, that logically applied to all assets which came into being after the marriage as

they flowed from pre-marriage assets. I did not accept H's evidence on this, incorporating as it did a last minute change to his case. Nor do I accept that H thought the word 'property' in the PNA only meant real property, and not all assets.

[87] If H truly did not understand the PNA (which in itself is inconsistent with his last minute oral evidence that he was entitled to 50% of assets after the marriage), I asked him in evidence why he signed it, which he was unable to answer satisfactorily. Rhetorically, I ask myself whether it could possibly be fair to W to cast aside a PNA on the basis that H did not properly understand it, in circumstances where he had ample time to read it, directly engaged in revisions, and represented that he was in receipt of legal advice. In my view it would not. But on the facts, in any event, I am clear that H did understand what he was signing.

[88] I reject H's assertion that the reference to the state of law at clause 10 of the PNA, which replicated what was contained in W's sister's 2005 PNA, was an incorrect legal summary. It may be less specific than similar clauses today, which commonly refer to *Radmacher*, but the general thrust is both clear and accurate.

[89] H did not formally take legal advice, but he was clearly told by BC that he should, he was aware of the importance of doing so, he had every opportunity of obtaining such advice, and he represented to W and BC that he was indeed taking advice. He was in contact with KW on a number of occasions. Why should W not have legitimately assumed that he had been legally advised, and be entitled to proceed accordingly?

[90] The financial disclosure was in broad terms accurate. Neither party, reasonably enough, attributed values to their respective business interests. Nor did either party seek further disclosure from the other. W should not be prejudiced by H not having pursued lines of inquiry.

[91] Although the period between 2 July 2014 (when the PNA of W's sister was forwarded to H) and 26 July 2014 was relatively short, about 3½ weeks, I have no sense that there was an unseemly rush. Nothing in the evidence I heard, or the email traffic I read, indicates to me that either party felt in a particular hurry, or was under severe pressure to get the document completed. I do not accept that either party was under undue pressure.

[92] I am quite sure that, contrary to his case, neither W nor BC made amendments to the PNA other than in BC's documents of 18 and 19 July 2014. H was, in his evidence, attempting to cast doubt on the various iterations of the PNA, sowing confusion in the hope that the court would thereby attach little or no weight to it. His case on this was demonstrably wrong.

[93] H relied on W referring in her Form E to the 'inadequacies' of the PNA. However, I accept W's evidence that she had not seen all the contemporaneous documentation by then. In particular, looking at the signed PNA at the time of her Form E, she assumed H had not taken legal advice whereas the earlier versions showed (as she thought at the time) that H had been in regular contact with KW. There is nothing in this point.

[94] H submits that the wording of clause 24.1 should be construed to mean that he is entitled to 25% of the net proceeds of sale of CD House, ie about £2.538m. I reject that assertion:

(i) The words state, in terms: 'H shall receive 25% of any net profit after all costs which have been index linked in accordance with the Retail Prices index from the date they were incurred to the date of the sale …'. The words 'net profit' cannot be read as meaning 'net proceeds of sale'. It was H himself who inserted the words 'net profit' in the amended document sent by him to BC on 17 July. When BC's amended version of 19 July included the references to costs and index linking, he did not challenge the wording and say that there had been a misunderstanding. Had H's assertion been the intention, why did they not execute a declaration of trust giving him a 25% share of the property?

(ii) I am satisfied that the intention, clearly expressed, was for H to receive 25% of the net profit. Further, the words plainly intend, and I accept the evidence of BC and W on this, that the 25% should be calculated after deducting from the sale price (a) acquisition costs and (b) renovation/development costs (some £7.7m as it turned out). On that basis, H's 25% share on the eventual sale was £278,000.

(iii) But I am satisfied that it was also intended that RPI be factored in. It is clear that RPI should attach to the renovation costs, but less clear whether it should attach to the original acquisition costs. On balance, I am inclined to attach RPI only to the renovation costs. The consequence is that H's 25% interest would be about £76,000.

[95] Other than the slightly confusing wording in clause 24.1 (which makes no material difference to my decision), the PNA is clear in its specific terms and overall intent.

[96] I suspect what happened here is that neither H nor W thought the PNA would ever be needed. H signed up to provisions which he understood, but did not think would ever bite. H, now appreciating the consequences and regretting having signed it, seeks to cast doubt on the PNA, and in so doing has misrepresented what took place.

[97] I conclude that this was a PNA freely entered into by each of them, with a full appreciation of its meaning and consequences. There are no vitiating factors.

[98] Should it therefore be, as W submits, fully upheld, save for provision of a short-term housing fund? Should it be determinative of the outcome? In my judgment, the answer is no. I have an obligation to look at all the circumstances and it seems to me that there are circumstances which, to my mind, render it sufficiently unfair to justify a degree of court intervention. These are the reasons why it should not be given full and determinative effect:

(i) Circumstances have changed. I appreciate that is often the case with PNAs, but here W received £55m gross from the sale of the family business a matter of 2 years later. H knew she was wealthy, but at the time of the PNA that wealth was tied up in illiquid shares. The financial landscape has changed significantly.

(ii) Most significantly, in my view, the provision for H in the PNA does not address his needs fairly. The factor at (i) above is, in my judgment, relevant to the assessment of needs. After, as it turned out, 6 years of marriage, H is entitled under the PNA merely to £112,000, repayment of £250,000 and a modest sum under clause 24.1. On such sums he cannot reasonably be expected to meet his housing needs, or income needs, in a way which bears at least some relation to the marital lifestyle enjoyed over some 20 years. The parties did not talk about H's needs. As lawyers were not consulted, there was no legal advice about needs, nor any inquiry into what fair provision for needs would be.

[99] I am satisfied that this is one of those cases where I can, and should, depart from the PNA so as to meet H's needs fairly. In so doing, I take into account all the circumstances, including the resources of W, the resources of H, H's earning capacity, the needs of the children, the marital lifestyle, the duration of cohabitation, H's full contribution to the welfare of the family during the relationship, his future contribution to the welfare of the children, and the terms of the PNA which, to my mind, operate as a limiting factor upon considering H's requirements.

H's Needs

[100] I turn finally to an assessment of H's needs within the context of all that I have outlined in this judgment.

Housing

[101] In his Form E, H says he needs a 6,000 sq ft property with up to 100 acres from which to operate a business and sports facility, all of which would cost between £7.8m and £10.6m; a professional report explaining these figures and providing comparables was attached. To that he adds the cost of vehicles (£769,000) and other start-up capital costs (£2.3m) so that the total capital provision sought under this head is between about £11m and £13.7m.

[102] In his open offers, he seeks £8m. There is no particular rationale for a business model within that figure, but on a conventional housing and income model it encompasses housing at £2m–£3m and capitalised maintenance at £5m–£6m, which equates to between £200,000 pa and £235,000 pa on a reverse *Duxbury* basis.

[103] W produces three property particulars for H, all with some sports facilities, between £1.1m and £1.75m. I did not think these houses had sufficient acreage (they ranged from 1 acre to 8.6 acres) to permit him to run a business, which everyone agreed is the logical way for him to earn a living. I appreciate that on W's case, H can rent premises from which to run a business (she says at about £30,000 pa although H suggested it would cost £70,000 pa) but in my judgment it would be preferable for H to be able to run it from home if possible, and thereby not have the added burden of rental costs. I also had a slight unease that W's particulars are far removed from the sort of housing enjoyed by the children with W. All that said, I do not regard it as appropriate or fair to judge H's needs by the highest spec, top end, state of the art facilities of the sort which he aspires to, nor to expect W to pay for such aspirations. I accept that most in their chosen career make do with far less in terms of facilities.

[104] Although both parties agreed it is reasonable for H to pursue a career in his chosen field, I have doubts about how easy it will be for H to establish a secure income stream. H's own business forecast is that he would start with a loss of £268,000 pa, reducing to a loss of £100,000 after 4 years before moving into profit. He has not run such a business by himself before. The businesses run during the relationship were, as both H and W agreed, not truly run commercially and made little or no money.

[105] In answer to my questions, he said that although he would like a minimum of 50 acres, the sort of enterprise carried out at GH with 23 acres, would allow him to run a business. He hopes to compete for another 10 years. GH is valued at about £2m, although the residential accommodation, a rather run down three-bedroom property, would not be appropriate or reasonable for H and the children.

[106] I conclude that H's reasonable needs in terms of housing are accommodation to a maximum price of £2.5m which would allow him, if he chooses, to run an on-site sports and business facility. To balance fairly H's needs and the terms of the PNA, the housing fund should be on the basis that it is held on trust for W, or that H has an irrevocable tenancy. In other words, he shall not own it outright; it shall belong to W and revert to her in due course. I make the following supplemental orders:

(i) W shall pay the stamp duty.

(ii) W shall pay the costs of purchase (eg conveyancing solicitors' fees).

(iii) The property shall revert to W on the first to occur of H's death, or him permanently leaving the property. I consider that a term to the end of his life (as was provided for in *Radmacher*) is appropriate because of the scale of wealth, the duration of the relationship/marriage and H's contributions. There shall be no step down upon the children finishing tertiary education for the same reasons.

(iv) W shall meet the costs of doing the first draft of the necessary documents for H's occupation of the property (whether under a trust or tenancy. Otherwise, each shall bear their own costs of formalising the arrangements.

(v) H's interest shall not terminate upon remarriage or cohabitation.

(vi) There shall be liberty to apply in respect of this arrangement if H's shares in the business are at some point sold. It is impossible to know how much he might net from a sale, and I appreciate this leaves open the possibility of future dispute, but in principle it must be open to W to seek a termination of the arrangement (or H buying her out) if justified. If, for example, H had received £12.8m gross in 2019/2020, it is hard to conclude that the arrangement which I am now putting in place would be appropriate, for he would have ample sums to meet his housing needs and would not require assistance from W. In my view, the same reasoning could well apply in the event of future sale, but I cannot now rule on what should happen as I do not know what the circumstances will then be including, most relevantly, how

much he might actually net. For the avoidance of doubt, this provision does not apply to the lump sum(s) which I provide for below.

(vii) H must provide W with full details of any actual sale of his shares, or sale of the company as a whole.

(viii) H shall be entitled to sell the property and move to another property, but if so, he shall be responsible for all sale costs and purchase costs, including stamp duty.

(ix) H shall be responsible for the costs of maintaining the residential property, other than external structural or major repair costs which are not in the nature of routine repairs, for which W shall be responsible.

(x) H shall be responsible for repair costs (internal and external) of any on-site business facility.

(xi) H shall be responsible for contents insurance on the residential property. W shall be responsible for buildings insurance.

(xii) H shall be responsible for contents and buildings insurance on any on-site business facility.

[107] W shall pay H a lump sum of £50,000 for house furnishing/refurbishment.

[108] As for capital costs associated with setting up a business, H requires initial capital outlay including, it seems to me, funds to buy equipment. He needs a vehicle. W shall pay H outright a lump sum of £200,000 which reflects the figure suggested by W of £50,000–£100,000 plus additional set-up costs.

[109] H shall have the disputed vehicle. W has another one of her own, and if he does not receive it, his capital requirements simply increase.

H's debts

[110] H has debts of £349,000, including the monies owed to his friend and unpaid legal fees. In my judgment, W must pay these. H has no means of meeting them himself. Had H not received the substantial dividend in 2020, his debts would likely be far higher.

Income needs

[111] In his Form E, H puts his income needs at £533,000 pa, including business related expenditure. In his open offer he puts them at £449,000 pa. Stripping out proposed business costs, and the children's costs, his personal needs are £235,073 pa. He was not cross-examined about his budget at all, although it seems to me that I am entitled to assess it in the light of the intentions behind the PNA.

[112] H suggested through counsel that he needs 4 to 5 years to find his feet. I conclude that he should receive a capitalised lump sum of £1.2m. That would meet his personal income needs of £235,000 for about 5 years. Alternatively, it would provide H with approximately £100,000 pa for 12 years, by when all the children will be through, or nearly through, university. I will not make a deduction for accelerated receipt mainly because this will all take a while to set up. It is, of course, open to H to apply the monies towards running his business as he sees fit.

Monies owed under the PNA

[113] For the avoidance of doubt, the above payments which are required to be made by W are higher than the sums due to H under the PNA, namely £112,000, the £250,000 debt and the sum due under clause 24.1. Accordingly, these sums are not to be paid in addition.

Other matters

[114] I assume the parties will be able to agree ancillary matters not expressly canvassed during the hearing, including: transfer of the property company shares to W, division of chattels by agreement, and W to meet school fees. There shall be a clean break.

Conclusion

[115] The order upon which I have alighted provides H with:

(i) the right to occupy for life a property up to £2.5m which will then revert to W, subject to a possible prior termination of the arrangement if H receives substantial sums from the sale of his business interest; and
(ii) £50,000 furnishing/refurbishment costs;
(iii) £200,000 business capital start-up costs;
(iv) £349,000 for H's debts;
(v) the disputed vehicle at £100,000;
(vi) £1.2m capitalised maintenance.

That is a total of about £1.9m (4% of the liquid wealth), plus a housing fund subject to W's reversionary interest. Had the parties married without a PNA. I suspect (although I did not hear argument on this) H's award would have been significantly higher. My decision reflects a proper recognition of the limiting consequences of the PNA, balanced against all the other s 25 criteria.

Costs

[116] After I sent out the judgment in draft, I heard applications by each party for costs orders. H seeks the sum of £417,000, being his costs incurred since his open offer of May 2022. W seeks 20% of her costs, ie about £170,000.

[117] The starting point for costs in financial remedy proceedings is that each party should bear their own costs. By FPR 2010 r 28.3(6) the court may depart from the starting point and make a costs order against one, or other, or both parties. Factors to be taken into account are listed at r 28.3(7) and include:

> '(b) any open offer to settle made by a party;
>
> (c) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;
>
> (d) the manner in which a party has pursued or responded to the application or a particular allegation or issue;
>
> (e) any other aspect of a party's conduct in relation to proceedings which the court considers relevant; and
>
> (f) the financial effect on the parties of any costs order.'

[118] Pararaph 4.4 of Practice Direction 28A states that:

> '… The court will take a broad view of conduct for the purposes of this rule and will generally conclude that to refuse openly to negotiate reasonably and responsibly will amount to conduct in respect of which the court will consider making an order for costs. This includes in a "needs" case where the applicant litigates unreasonably resulting in the costs incurred by each party becoming disproportionate to the award made by the court …'

[119] In *TT v CDS* [2020] EWCA Civ 1215, [2021] 1 FLR 996 the Court of Appeal held it was not unfair for the party who is guilty of misconduct to receive ultimately a sum less than his/her needs would otherwise demand. Examples of first instance decisions where the judge made a costs order notwithstanding that such order would cause the payee to dip into (and thereby reduce) the needs based award include Sir Jonathan Cohen in *Traharne v Limb* [2022] EWFC 27, [2022] All ER (D) 33 (Apr), Francis J in *WG v HG* [2018] EWFC 84 and my own decisions in *WC v HC* [2022] EWFC 40 and *VV v VV (No 2)* [2022] EWFC 46, [2023] 1 FLR 194.

[120] In this case, each party's open offers missed the target by a considerable margin. Neither party put forward an open proposal which came close to my final decision. I do not know what without prejudice negotiations have taken place, but I do not consider that either party can legitimately seek a costs order based on the open negotiations.

[121] H can point to the fact that I came down against W on her case that H can, and should, access his business interest within 4 years. I made clear findings on this point. On the other hand, W can point to my dissatisfaction with H's presentation (particularly in his Form E) about the value of his business interest, and the 2020 business dividend. Most significant, however, in my judgment, is H's attempts throughout the proceedings to persuade the court that the PNA should be completely disregarded. That issue occupied a very large amount of the court's time and energy, and infected the whole case. It dominated the proceedings throughout. I found against H, and did not accept his evidence on the disputed circumstances under which the PNA came into being. Had he not challenged the PNA in this way, I am confident that the proceedings would have been significantly shorter and less expensive.

[122] In my view, H must bear some of the costs, principally because of his approach to the PNA. Doing the best I can, it seems to me that a payment by him of 20% of W's costs is reasonable. I will, however, apply a discount of 30% to the figure of £170,000 which is sought, to reflect a notional deduction for the standard basis of assessment. Thus, H shall pay £120,000 towards W's costs, such sum to be netted off against the lump sum provision which I have made in his favour. I consider that it is reasonable and proportionate to invade, to that extent, the needs based award made by me in his favour. He cannot be insulated from the consequences of litigation. For the avoidance of doubt,

I decline to make a costs order against W in favour of H, an application which I thought was ambitious.

Order accordingly.

AMARJIT ATWAL
Law Reporter

FAMILY COURT SITTING AT
THE ROYAL COURTS OF JUSTICE

No. 1662-7269-3760-1653

[2024] EWHC 740 (Fam)

Royal Courts of Justice
Strand
London, WC2A 2LL

Friday, 16 February 2024

Before:

MR JUSTICE FRANCIS

(In Private)

B E T W E E N :

JENNY ALZENA HELLIWELL — Applicant

- and -

SIMON GRAHAM ENTWISTLE — Respondent

MR R HARRISON KC and MS J PALMER (instructed by [a firm]) appeared on behalf of the Applicant Wife.

MISS D BANGAY KC and MS L NEWMAN-SAVILLE (instructed by [a firm]) appeared on behalf of the Respondent Husband.

JUDGMENT

MR JUSTICE FRANCIS:

1 The parties were married for three years. There were no children. The wife deposes to assets of approximately £61.5 million. The husband asserts that the wife is worth nearer £74 million, but the difference is immaterial on the facts of this case. The husband deposes to net assets of approximately £850,000, although about £500,000 of that is tied up in a property in Spain, of which he is a one-third owner and he is unable to liquidate his share in at least the short to medium term.

2 The wife works through a network of her father's companies in Dubai and has income from all sources, including rental income, approximately £600,000 a year. The husband asserts that she earns about £1 million a year. Again, the difference is immaterial on the facts of this case and, in any event, the wife clearly receives a mixture of income from employment and income from dividends. As I understand it, there is no income tax on that income in Dubai.

3 The husband does not presently work and says that he is unable to work for at least the next year or two for medical reasons to which I will return in detail shortly.

4 The day that the parties married, they both signed a prenuptial agreement which provided that each party shall retain their own separate property, that any jointly owned property would be split between them and that neither party would bring a claim against the other in any jurisdiction. The agreement contained a jurisdiction clause, the jurisdiction being England and Wales.

5 The wife asserts that the whole point of the prenuptial agreement was to avoid the very contest that these parties have had at such personal and financial cost to themselves. The claim originally articulated on behalf of the husband was for £10 million. The claim which he now puts forward is for just over £2.4 million. The parties' respective open positions at court was that the wife should pay the husband nothing and the husband adjusted his claim, as I have said, to about £2.4 million.

6 The costs incurred by the parties in this case are that the wife has incurred costs of about £600,000. No VAT is payable on that because, of course, she is outside the jurisdiction of England and Wales, so, notionally, Ms Bangay tells me, and I accept, that I should add 20 per cent to that if one is to view the costs figures on a like for like basis. The husband's costs are approximately £450,000. It may be that I need to add £20,000-odd or so to that in the light of the costs recently incurred.

7 Between them, the parties have therefore spent a little over £1 million in costs and, as I have said, if one adds the notional VAT to the wife's costs number, to achieve a like for like position, that takes the combined costs figure to about £1.2 million.

8 One often hears counsel and solicitors and judges talking about something being a "paradigm case". In my judgement this case is a paradigm case of how not to conduct litigation on the

breakdown of a short childless marriage. If, at the commencement of a dispute, a party adopts an extreme position, an equal and opposite extreme position is likely to be adopted on the other side. Importantly, in my judgement, on 25 September 2023 the wife offered the husband £800,000. In the post-*Calderbank* era, litigating spouses need to know the consequences of making open offers and the consequences of rejecting them.

9 From 24 November 2022 until 23 August 2023, the husband persisted with the offer made in his Form E of £9.6 million, plus periodical payments to support an asserted income need of £208,000 a year for two years, hence a global sum of £10 million.

10 The absurdity of that offer made by the husband is best demonstrated by his own position adopted in this hearing which, as I have said, is £2.4 million. This represents a collapse of 75 per cent in the claim that he has pursued. Parties litigating after their divorce need to appreciate that litigation is not a negotiation which rewards untenable positions. Starting high to try and make the midpoint higher than it should be is an unwise tactic. The same, of course, applies the other way around, if one starts low. Offers need to be focused, wise, based on likely outcome and not on greedy expectation. The penalty of the failure of such tactics will resound in costs and can be devastating in their consequences.

11 Unless there is a fundamental issue regarding computation, the correct bracket of settlement will be known to the lawyers advising, lawyers who are, as here, experienced in this area of the law. It is obvious that such lawyers will explain to their clients the risk of aiming too high or too low. Litigation, as this case shows, is fearsomely expensive. The costs of the litigation are underwritten by no one and there should be no expectation that one's costs will be paid by the other party. There can never be an assumption that the economically stronger party will just pay the other party's costs without more. People embark upon litigation at risk. That risk must be calculated, measured; and wise decisions taken. Risks need to be balanced and judged. This applies all the more where, as here, there is no meaningful dispute about computation or, perhaps better put another way, where, as here, computation issues are irrelevant.

12 What difference, I ask rhetorically, does it make after a short childless marriage whether the economically stronger party is worth £50 million, £60 million or £70 million, when none of the capital forms any part of the marital acquest, but was gifted to that person by a parent? I ask that question absent of prenuptial agreement, although there is one present here which just adds to the overall risk assessment. For the avoidance of doubt, this is not to condone dishonest or careless disclosure by the wealthy party.

13 The prenuptial agreement here is litigated about as if it is difficult. I am told by Miss Bangay for the husband that it should be cast aside and ignored. I return to that in detail below, but even without the prenuptial agreement, in my judgement, the husband's claims were overblown. A good starting point, in my judgement, is to assess the value of the husband's claims absent the prenuptial agreement. No reasoned assessment of the husband's claims could possibly have justified an offer anywhere close to £10 million.

14 For her part, the wife allowed, if not caused, a remarkably unhelpful and poorly thought through letter to be sent to the husband shortly after the separation. The wife's Dubai solicitors informed the husband by letter dated 24 August 2022 that the husband had to leave the former matrimonial home within three days or face forcible removal by the Dubai authorities. His right of residence, which had been provided by a visa from W's father's company as a result of his historical employment there, had been revoked earlier that month with his knowledge and consent, albeit he said he felt he had no option but to give his consent as he was presented with a form to sign by W. The letter threatened him with proceedings for divorce and even maintenance in Dubai. Quite apart from the fact that this was a completely absurd threat when the wife had £60 million or £70 million to her name and the husband had very little, this also flew in the face of the very prenuptial agreement on which the wife sought to rely, which provided for an English jurisdiction clause and no claims being made by any party in any jurisdiction. And so it was that the husband felt obliged to leave Dubai, which had been his home for nine years, his belongings were placed in storage and, as I understand it, remain there to this day.

15 Adopting a phrase from Mostyn J, but in very different circumstances, when parties litigate in this fashion, a nuclear winter descends and negotiation becomes all but impossible. Positions become entrenched. Costs are incurred.

16 Miss Bangay, in her submissions, forcefully blames the wife for the fact that this inappropriate letter was sent. Whilst I acknowledge that the letter must have been approved by the wife, having heard her evidence over the course of most of a day, I have formed the very clear view that the wife was inexperienced in litigation and in confrontation. She placed, as she was entitled to, trust in her Dubai solicitors and she said that she approved the letter, which she was encouraged to approve, and to have sent. I do not believe that either of the solicitors now instructed by the parties in this jurisdiction would have sent such a letter. Even if a litigious client insists upon a difficult, bad-tempered and stroppy letter, solicitors who are members of Resolution and who abide by the Resolution Code of Conduct rarely send such letters and, in my judgement, should not do so. There is a duty upon solicitors not only to their client but to the court, and that duty requires them to temper the tone and not to worsen it. Of course there can be some exceptions, but in my judgement this letter was sent on behalf of the wife because it was what was recommended to her and not what was chosen by her. I do not find that the wife intended to send a letter which I regard as deeply inappropriate and which I dare say to her, with hindsight, now seems deeply inappropriate. However, the letter was sent and the husband cannot be blamed for being aggrieved by it.

17 Having said all of that, the fact is that the letter was sent and goes some way to explaining, albeit not justifying, the remarkable stance that was taken for a long time on behalf of the husband. As I have said above, extreme positions taken by one side tend to force an extreme position by the other side.

18 And so it was that after this short marriage, where the exit should have been easy, cheap and obvious, the parties were at loggerheads, opposite positions having been taken, trenches dug and a long cold winter anticipated. In this case the wife had and has the luxury of infinite resources.

The husband had the benefit of having enjoyed the trappings of being married into a family of exceptional wealth. I am as certain as I can be that had different positions been adopted from the start, the wife would have given a bit, the husband would have given a bit and the case would have been resolved. Instead, these decent people have litigated in a deeply acrimonious way.

19 It is obvious to me from all that I have seen, hearing the parties give evidence, witnessing their demeanour in court and reading what I have about them, that they have suffered immensely as a consequence. The wife suffered from mental health issues prior to the marriage and the husband has suffered from mental health issues after the breakdown of the marriage. They are both in a difficult place. The fact that their marriage was difficult and was ended after such a short period of time is not something which this court can alter or in any way comment upon but the fact that they have gone through years of litigation hell, given evidence in the most difficult of circumstances, had their personal, medical and mental health history deeply analysed is something that should have been avoided. It was unnecessary.

20 I am sure that, had things been different, the wife would have made an offer that the husband would have accepted and they could have parted with dignity. Instead, I have witnessed two decent people at their wit's end because of the litigation into which they have been plunged. It is an abject lesson to anyone working in the complicated field of family law. It has often occurred to me as a family lawyer that if this was a straightforward commercial dispute between two insurance companies arguing over a lost cargo at sea, the matter would have been resolved. What makes family law both so interesting yet also so challenging is that we are dealing with raw human emotion. It is, in my judgement, the duty of the lawyers to do their best to protect parties in such a situation from themselves. I make it clear that I have no criticism at all of the current legal teams instructed. I am complaining not about the solicitors and counsel in front of me this week in court, I make that very clear. I am talking about the solicitors who started this case in the way that I have described above.

21 I also accept that lawyers, at the end of the day, are only as good as the instructions that their clients give them, but I do strongly take the view that the way that this case was kickstarted overlays everything that has happened since. Eventually, the hole that people dig themselves into becomes an impossible one to get out of because of the incident of costs. If the supposed man on the Clapham omnibus, to coin a phrase from a previous era, was told that a couple spent as much arguing about the case as the case was worth, they would wonder what on earth was going on. They would comment that the only winners were the lawyers. Maybe that is true but, I repeat, I make no criticism at all of the lawyers currently instructed.

22 Miss Bangay correctly also draws my attention to this: the court must, in this case, as in all cases, avoid any form of sexual or gender discrimination. Much has been written about the decision of the Supreme Court in *Granatino v Radmacher*. Would the result have been different, people ask, if Mr Granatino had been the wife and not the husband? The Supreme Court, by a majority of eight to one, gave a very clear Judgment and I must of course assume that there was no gender discrimination or sexual discrimination present in that decision.

23 The first application made in this case was the wife's application pursuant to her Form A, issued on 16 September 2022 and her subsequently issued notice to show cause of 9 November 2022. The wife asserts that the prenuptial agreement signed by the parties on the day of their marriage, 12 July 2019, should be given:

> "... decisive weight and upheld in so far as the husband's financial claims arising from the marriage are concerned."

24 This is the first application which is before the court and, accordingly, Mr Harrison KC opened the case on behalf of the wife. The burden of proof is on the wife to establish the prenuptial agreement is of decisive weight and that no provision should be made for the husband because of that agreement. It was obviously appropriate that the wife's application in respect of the prenuptial agreement should be heard together with the wife's application for financial remedy.

25 The wife's case as articulated by Mr Harrison can be summarised thus. This was a short childless marriage. The husband entered into the prenuptial agreement freely and willingly, with legal advice, aware that the wife was very wealthy, and he understood the consequences. The prenuptial agreement was clear and it was intended to be determinative on divorce. The husband's needs, continues Mr Harrison, are met by his own resources and, accordingly, Mr Harrison contends, the prenuptial agreement should be upheld and the husband awarded nothing. Mr Harrison contends forcibly that the decision of the Supreme Court in *Granatino v Radmacher* is not a green light for a disappointed spouse to come to court with a shopping list of asserted aspirational needs. Mr Harrison contends that the failure to abide by the prenuptial agreement would be a fundamental betrayal of what the parties intended and agreed and would ignore the important respect of autonomy which these courts always encourage.

26 The husband's case, articulated by Miss Bangay KC, may be summarised thus. The husband should not be held to the terms of the prenuptial agreement. He was persuaded to enter into it by the wife as a sop to her father, the wife assuring the husband that, in reality, he would always be provided for as "he had married a Helliwell". Miss Bangay contends that whilst the husband did receive some preliminary limited advice on the prenuptial agreement, but it was without benefit of any financial disclosure from the wife. The husband has waived privilege in relation to the advice that he received from experienced family lawyers, Hall Brown. That firm expressed concern to the husband about the lack of financial disclosure. Miss Bangay contends that the wife admits to a profound reluctance to provide any financial disclosure as she was determined to keep the family assets private. Miss Bangay contends that when the wife eventually provided her financial disclosure, she admits that she deliberately grossly understated her wealth by excluding her business assets and some property interests. Miss Bangay continues that the wife asserted that her wealth was £18 million to £23 million when, in reality, she was worth in excess of £70 million. Miss Bangay also contends that, in any event, the terms of the prenuptial agreement are grossly unfair in that they do not begin to provide for the husband's needs.

27 One of the many side issues with which the court has been concerned during the course of this hearing has been the date of cohabitation. The husband contends that the parties began to live

together in the wife's home in Dubai in October 2016. The wife asserts that the date was April 2017. The parties have also thought it relevant to argue in court about the date of separation. The wife asserts the separation was in April 2022. The husband asserts that the relevant date is the date when written notice was given by the wife's Dubai solicitors, James Berry, on 24 August 2022. Other than the fact that it may go to the issue of credit, in other words which of the parties I believe is giving more truthful and more reliable and honest evidence, I do not think that the difference between the parties regarding the date of cohabitation or the date of separation is of particular assistance to the court.

28 I have said often I other cases, and I repeat here, a relationship is not something that is on one day and off the next. A relationship is something that is usually fairly slow to develop, it is nurtured and comes to a point at which the parties may regard themselves as committed or in an exclusive relationship or engaged or married. Similarly, marriages do not usually break down as a consequence of a single event. Breakdown is usually difficult, gradual, unpleasant. Of course, there comes a time when one or other or both of the parties regard the relationship as over, but I think it is wrong in most cases, and wrong in this case, to look for a specific start date or a specific finish date. Moreover, the irony is not lost on me that the husband asserts that the notice of determination of the relationship must be given in accordance with the prenuptial agreement, but in all other respects of course the husband rejects and disowns the prenuptial agreement. In a similar vein, the wife who seeks to rely on the prenuptial agreement initially threatened the husband with a divorce in Dubai, and even with a maintenance claim in Dubai, by her against him. That, of course, was in flagrant breach of the prenuptial agreement on which she now relies. Moreover, it is farcical in my judgment to suggest that a spouse with the resources available to the wife, whether they be £20 million or £70 million, or anywhere in between, can or should make a maintenance claim against a spouse with resources of less than £1 million and where, as here, the wife's income was at least five times the husband's income, and possibly a very great deal larger than that.

29 It is interesting to see that, in the early stages of their litigation, each of the parties, through their first set of Dubai lawyers, about whom I have said quite a lot already, picked and chose those parts of the agreement that suited them, while disowning the other parts.

30 My view on the length of the relationship is straightforward. There was a period of cohabitation which moved gradually, if not seamlessly, into marriage. Miss Bangay has quite properly referred me to some of the well-known cases on this issue, for example, *RW v GW* and *VV v VV*. I am bound to say that I think it is generally recognised by judges working in this field of the law now that, when considering, as they are obliged to do under section 25, the length of the marriage, it is generally the custom now to add to the length of the marriage a period of premarital cohabitation which has, to use the well-worn phrase, moved seamlessly into marriage.

31 The husband, as I have said, asserts that cohabitation commenced in October 2016. Mr Harrison, on behalf of the wife, says this is a tactical ploy to try and extend the length of the relationship. The wife says that cohabitation commenced in May 2017. The marriage and the relationship were short. In my judgment, with or without the prenuptial agreement, the difference between

the parties of months is an irrelevant tangent which we should not have spent very long listening to or dealing with. It would, in my judgment, be wrong to regard the length of the marriage as some kind of time-related scheme whereby extra entitlement is earned with points granted to each spouse as each month passes. It simply is not like that and, in my judgment, the difference of a few months about which the parties are arguing is of marginal relevance to the decisions which I have to make. Of course, if I come to the view that the prenuptial agreement should be treated as binding, I must look at that agreement itself for the relevant start and finish dates.

32 The husband's evidence was that, in October 2016, he was given a key to the property where the wife lived, the property that was owned by her father. The husband said that, from October 2016 to April 2017, he spent 99 per cent of the nights at the property with the wife. What is not in dispute is that there was a public affirmation of cohabitation in April 2017. I was also taken through a number of WhatsApp messages which do assist me in deciding where the truth lies.

33 In WhatsApp messages dated 3 April 2017, so some six months after the date when the husband asserts cohabitation commenced, the messages go as follows:

> Wife: "When we/if we live together one day I will always make sure [that we have good] meals."
>
> Husband: "I know you will babs.
>
> "You're a masterchef."

34 On the same day:

> Husband: "I'm looking forward to seeing you tonight."
>
> Wife: "... I really feel like we should initially move into mine.
>
> "I can [definitely] make room [as] I've so much rubbish that I can clear out."

35 And then:

Husband: "Yeh I think it's a good idea.

"We shouldn't rush into moving anywhere."

Wife: "We can make better use of the space anyway we can discuss tonight.

"Agreed."

Husband: "But only if you're sure you don't [mind] me invading your space."

Wife: "I'm SUPER excited about living together now though.

"I got butterflies this morning.

"I'm a geek!"

36 4 May, WhatsApp exchange between Husband and Wife:

Husband: "I can't wait to move in either, but the good thing is there is no rush or we are not doing it out of necessity, we are doing it because we want to.

"We are very lucky in that respect.

"The main thing to me is that you're happy and healthy.

"So no pressure re this stupid pill or anything."

Wife: "Ok [thanks] Bub [am] going to physique at 12 I think I need to just zone out for an hour and I massively need the workout!! ... Hope you have a good afternoon."

37 It is, in my judgement, impossible for the parties to have written that exchange at a time when they could ever have imagined in their worst nightmares that we would be sitting here now in February 2024 analysing these messages, but those messages are only consistent with them not yet fully cohabiting.

38 The husband asserted, as I have said, that they spent 99 per cent of the nights between October 2016 and May 2017 living in the wife's property. 99 per cent is cohabitation. I find as a fact that they were not cohabiting as the husband has asserted, at that time. The husband may very well

have stayed over at hers and she may very well have stayed over at his, as couples do when they are moving from the early parts of a relationship to one of settled cohabitation.

39 I am afraid that I have to say that I think that the husband was being dishonest in his evidence about this. I cannot explain it in any other way. Does it matter? Well, it does not matter very much at all, as I have said, in terms of the length of the marriage, but it does matter in terms of my assessment of the credibility of the parties, which becomes of central importance in the issues to which I am shortly to return to determine.

40 I heard oral evidence from each of the wife and the husband. The wife had asked through her counsel on a previous occasion in front of me to arrange for participation measures in court, in other words, I was asked to arrange for the husband to sit behind a screen while the wife gave her evidence and the wife to sit behind a screen when the husband gave his evidence. I made it clear that in agreeing to these special measures I was making no finding that there had been any inappropriate behaviour by either party at any time.

41 It seems to me that, when being invited to agree to participation measures, for the judge to spend long enquiring into the reason for this or to spend time deciding whether the reasons are valid would simply make what could be a difficult situation even worse. It is obvious to me from everything I have read and heard that this couple were engaged in a very difficult time, arguing, possibly coercion and pressure by one party on the other. These are things that I have not been asked to make findings about, and of course I do not. This court will rarely engage in this sort of investigation into conduct because it tends to make things worse rather than better, but it was obvious to me that this was a very difficult situation for both parties.

42 There have been cases where, after the event, I have found that the request for participation measures was a stunt or was a put-on to try and curry favour with the judge or to do down the other side. I find no suggestion of this in this case at all and I am glad that I was able to provide for these measures because I am quite satisfied that, for each party, they found it easier to give their evidence without having to look at the other party, and I do not think it would be appropriate for me to say anything more than that about this aspect of the case.

43 The wife was nervous, tearful and emotional in giving her evidence. There is no need for me, in the course of this Judgment, to spend long reciting the mental health issues which have blighted a significant part of her life, suffice to say that she has suffered from bouts of depression and has had inpatient stays for significant periods of time in connection with anorexia. In spite of her nervousness and occasional tearfulness, I am satisfied that the wife was able to give her evidence in as reasonable an environment as could be secured for her.

44 I observed in court and repeat here that the misery affecting both the husband and the wife is palpable. I am in no doubt that they have both suffered emotional difficulties, possibly emotional harm, as a result of their unsuccessful and, I dare say, traumatic marriage. It is not appropriate for me, or necessary for me here, to make any comments further than this. I have expressly not been asked to make findings in relation to conduct, and I do not do so. But it is obvious to me and it is

right that I observe that both the husband and the wife are in a difficult place emotionally at the moment.

45 On the morning after the husband had commenced his evidence, Miss Bangay asked for some time because she was very concerned about her client's emotional wellbeing. Miss Bangay's instructing solicitor, who has obviously spent far more time with the husband than counsel has, as is usual in these cases, expressed real concern about the husband's ability to resume his evidence cogently. Mr Harrison started to try and persuade me that this was something of a stunt on behalf of the husband. He did not persist in that. I cannot rule it out, but my judgment is that I accept the husband's evidence that he had little or no sleep the night before (sic) he was due to resume his evidence.

46 I was told that the husband had not slept at all. I was told that his mother had expressed real concern about her son's condition. I asked Miss Bangay whether she thought that her client had lost capacity. Plainly, if he had lost capacity within the meaning of the Mental Capacity Act, my duty as the judge would be to stop the process unless and until the husband either regained capacity or had secured the representation of a litigation friend. We adjourned for a time so that Miss Bangay and her team could consider their position.

47 After an adjournment, Miss Bangay informed the court that, in her view, and in the view of her instructing solicitor, her client had not lost capacity. Having heard submissions, I took the view that I would allow the husband into the witness box to try with giving his evidence and see how matters transpired. It is a difficult balance as the judge, because the one thing that is most likely to enable the parties to recover from their emotional difficulties, possibly emotional extremes, is the ending of the litigation. If I had adjourned the case at that point it would have caused immense heartache and trauma to both, not to mention expense, because the adjournment would have been for many months.

48 With the agreement of his legal team and indeed the husband himself, the husband gave his evidence. We agreed to take frequent breaks and I did not permit the husband to give evidence for more than about forty-five minutes at a time without a break. Although this did derail the timetable somewhat, the fact is that the husband, in my judgment, gave his evidence clearly and cogently. It seems to me that he clearly understood the questions and if there was any suggestion that he did not or that a question had too many parts to it, either he asked that it be put again or I did. Obviously, if an application had been made to halt the proceedings at any time on his behalf I would have listened very carefully to that application. The husband resumed his evidence the following day, he assured the court that he had had some sleep that night and was feeling a bit better.

49 In my judgement, Mr Harrison put his questions cogently, but never too forcefully, and the husband dealt properly with everything that was put to him. If he will forgive me for saying so, Mr Harrison is not one of those counsel who is known for his aggressive and hectoring tone. His manner is altogether more measured and, in my judgement, he cross-examined the husband

skilfully without being too forceful, and he was able to put all of the relevant questions to the husband.

50 Importantly, Miss Bangay agreed with me that the husband was coping reasonably well with giving his evidence. As I have said, if anybody had made an application on his behalf for me to stop or pause, I would have done so, and I made sure that there were proper breaks taken.

51 It was difficult for everybody and it was traumatic, but the process will be at an end as soon as I have finished delivering this Judgment. In my view it was much better to conclude matters as we have than to adjourn the case, because adjournment would have simply continued the anxiety and the sleeplessness. What these parties need is to put this case behind them.

52 For reasons that I shall set out in more detail below, I found the wife to be honest and reliable in her evidence. At no time did it seem to me that she was obfuscating or trying to mould her answers to a given case. I took the view that she did the best at all times to tell the truth to the court. I am afraid I am less satisfied that this is the case in relation to the husband. I am afraid I have to say that there were occasions when I found the husband to be less than honest, and I have already given an example of that in relation to the WhatsApp messages. Whether this was persuading himself of the truth of something that he originally did not think to be the truth or because he was deliberately lying is probably unnecessary for me to decide.

53 In his closing submissions, Mr Harrison reminded me of the well-known passages of the well-known Judgment of Leggatt J, as he then was, in *Gestmin v Credit Suisse*, where he said:

> "Memory is especially unreliable when it comes to recalling past beliefs. Our memories of past beliefs are revised to make them more consistent with our present beliefs. Studies have also shown that memory is particularly vulnerable to interference and alteration when a person is presented with new information or suggestions about an event in circumstances where his or her memory of it is already weak due to the passage of time."

54 And then further in that same case:

> "In the light of these considerations, the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts. This does not mean that oral testimony serves no useful purpose – though its utility is often disproportionate to its length. But its value lies largely, as I see it, in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the

witness recalls of particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth."

55 I bear in mind very much what is said in that Judgment. I have been taken to a number of authorities in this case and my failure to refer to each and every one of them does not mean that I do not have them in mind, but it would be impossibly long if I was to go through, in this judgment, all of the authorities to which I have been referred.

56 I have also, of course, in this case, reminded myself of the well-known rule in *R v Lucas*, although not expressly invited to by either counsel. In that seminal criminal case, Lord Lane, then the Lord Chief Justice, held that the mere fact that a defendant has lied is not in itself evidence of guilt. In the instant case it is important for me to remind myself that people may lie for various reasons, such as shame, panic and the desire to cover for someone else, and I bear what is called that "*Lucas* warning" in mind very much when commenting on the parties' evidence. I also bear in mind, of course, that the burden of proof is always on the person who asserts a fact.

57 The background to this case can be summarised succinctly. The husband has an honours degree from the University of Leeds in Law and Accountancy. He told the court he had a 2:1. He is obviously a bright man. He had been previously married in 2013. Initially, he and his first wife lived in Salford, and then moved to Dubai, where the husband secured employment with one of the big four firms of accountants, PwC. He is obviously a clever and talented person. When they moved to Dubai, the husband and his first wife did not sell the Salford property, but arranged for it to be let and they rented accommodation in Dubai.

58 Unfortunately, the husband's first marriage broke down only three years later, in 2016. The husband informed the court, and I accept, that there were no financial remedy proceedings between him and his first wife, and they simply agreed to part and to retain their own assets.

59 A considerable amount of time was spent considering whether the husband had a prenuptial agreement with his first wife. I have to say that I do not find this particularly helpful. I am not concerned with the husband's first marriage but with his second. I did not find this line of cross-examination illuminating. I dare say that Mr Harrison had hoped that if he persuaded me that the husband had a prenuptial agreement with his first wife, it made it more likely he would understand the consequences of the prenuptial agreement in his second marriage. I am concerned with whether the husband knew what he was doing in relation to this case. As I have said, he is a clever man, familiar with reading important documents, not the sort of person who would fail to understand the significance of what he was being told or what he was signing. I do not need evidence on whether he knew about prenuptial agreements in his first marriage to decide whether he understood what it meant in his second marriage.

60 It was in 2016 when he met the wife in Dubai, so not long after he had separated from his first wife. The husband agreed in oral evidence that he knew that his wife to be had suffered from

considerable mental health issues and from anorexia and had long periods of time as an in-patient in connection with those conditions. He agreed when it was put to him that he knew that the wife was vulnerable. She was taking anti-anxiety medication and having regular sessions with a psychotherapist.

61 The husband also knew from discussions with the wife that she was from an exceptionally wealthy family. The wife works as an interior designer, possibly in other roles as well, for one or more of her father's companies, and she receives what, by any standards, must be regarded as a huge income(sic). There is a dispute between the parties as to whether her income is(sic) £500,000 a year or £1 million a year, or something in between. I dare say it varies, but given that there is no income tax in Dubai and that, according to the tables in At a Glance, the cost of living in Dubai is actually a little bit less than that in London, that is plainly a huge income and, without in any sense doing down the wife's hard work and achievements, it seems to me to be obvious that the amount that she receives overall is more than the income that someone doing her job would usually be likely to receive. That is not a criticism, it is simply an observation.

62 The wife describes her father as a self-made man. It is obvious that he is an enormously successful and wealthy man who has spent a huge amount of his time working extremely hard, mostly in the Middle East. Sadly, he is separated from the wife's mother. There is, of course, no income tax in Dubai and although not relevant to consider in this case, my understanding is that there is little or no capital gains tax there either.

63 It became very clear to me that the wife has a complicated and often uneasy relationship with her father. Her father did not, of course, give evidence, but I get the clear impression that he was a generous man, but that his generosity was very much on his own terms. For example, if the wife or any of her siblings wanted to use one of his many fine properties, such as that in the South of France, they needed to seek his permission and make the relevant arrangements.

64 It is obvious from everything that I have heard that the wife's father put a very substantial number of assets into her name, and probably the names of her siblings as well, although I do not know. The wife said, and I accept, that she really did not know what assets he had put in her name, and I gained the very clear impression that she was anxious, if not actually afraid, of asking him for details. I gained the impression that the love that this father gives to his children is, in many respects, conditional love. I sense that one of the essential conditions is their obedience to him and respect for him. I can well understand that the wife did not want to ask her father for details of her financial resources if it meant enquiring into something that he regarded as deeply private. It may seem odd to some of us, maybe most of us, that she was scared of asking him what she had in her name, one might think that that is something that she is automatically entitled to, but I sense that her father is somebody who would put things into his children's name without them necessarily knowing and he may very well have reasons why he did not even want them to know. I have no doubt at all that the relationship that the wife had with her father was complicated and, in many respects, one where there was a great imbalance of power.

65 Also, it seems to me very clear from what I have read and heard that the wife is something of a people-pleaser, a phrase that I have heard others use to describe her, and I am sure that she applied this in particular with respect to her father. I am not for a moment suggesting that the wife tried to please her father for her own financial gain, I do not mean that at all; I think it is far more likely, and I so find, that the wife wanted to please her father because she wanted his love, and conducting the relationship on his terms was the only pragmatic way for her to achieve it.

66 It is clear from everything that I have heard that the husband knew that he was marrying into an exceedingly wealthy family. Again, I am not suggesting for a moment that this is why he married the wife, but he knew that she was wealthy and that he would, whilst in the family, be able to enjoy the trappings of significant wealth. This included exceptionally lavish holidays. I have even been given a holiday schedule as some sort of prop to a claim to support his asserted income needs, and I return to it later. They had the use of various properties that belonged to the wife's father or one of his nominees or companies. One of them was a fabulously expensive and I dare say wonderful property in the South of France.

67 The husband, in his evidence, described how, prior to his engagement to the wife, he had drinks with the wife's father and asked him for permission to marry her. The husband said that he was handed a paper napkin on which the wife's father had sketched out information relating to his business and company interests. It is not completely clear what was said, and the husband's recollection will doubtless be somewhat clouded by the fact, on his own admission, he and the wife's father had had a considerable amount to drink on that occasion. I do not say that with an ounce of criticism, it is merely relevant to the quality of the husband's evidence on the issue.

68 What is clear is that the wife was more than annoyed, she was plainly upset about this because she regarded this as an inappropriate invasion of her family's and in particular her father's privacy. She did not like what she saw written on this napkin. In cross-examination, the husband said that the napkin simply contained an organisational chart about the companies, rather than details of value. The wife gave evidence that the annotation on the napkin set out details of who owns what, rather than just an organisational chart.

69 I am not really sure that it makes much difference to the outcome of this case or the decisions that I have to make, however, having heard the parties both give their evidence, the husband was, if not drunk, certainly under the influence of a significant amount of alcohol, and I prefer the evidence of the wife. I accept that the napkin contained evidence of who owned what within the family, or at least some evidence of it. It seemed to be common ground that the wife was annoyed and tore up the piece of paper, or what I have referred to as the napkin.

70 I have referred already to the wife's concern not to irritate her father or in any way be seen to be invading his privacy, particularly in relation to his financial affairs, and I see this as a good example of that. I find that the wife's evidence on this issue is more reliable and that she was very upset indeed about what had happened. To be fair, I am not, here, blaming the husband because he had the information, I have no idea whether he asked for the information or it was volunteered to him, and I make no criticism of him about what was contained on that piece of paper or napkin.

71 As I have said above, when the husband moved to Dubai he was working with one of the big four firms, PwC. In January 2018, he stopped working for PwC and he started to work for one of the wife's father's companies. Apparently, the husband chose, with the wife's support, to work with one of the travel companies in the organisation. I dare say it had various perks but suffice to say that it did not go well. By the end of 2018, the husband stopped working for the wife's father.

72 At an earlier directions hearing, an application was made on behalf of the husband for the instruction of a single joint expert to report on the husband's mental health and his ability to work. Having read submissions, I decided that it was necessary to obtain a report. The husband's claim, asserted by Miss Bangay at that earlier hearing, was to be a needs-based one and, accordingly, his earning capacity would take centre stage, or certainly would be of very considerable relevance to the determination that I was being asked to make. The court therefore had the report of Dr Tom McClintock dated 18 December 2023.

73 Dr McClintock expressed his opinion that the husband was suffering from low mood, anxiety and depression. He gave his view that the husband is currently unable to work and should not do so for at least six months, and that he required in-patient treatment.

74 The husband's future ability to work depended on, among other things, his ability to access treatment services and make progress. I am told that the cost of that is £22,110. Although other figures have been put forward suggesting that this treatment could be secured at a lower amount, given the wealth available in this case, it seems to me that one of the most important things of all is to repair, if it can be done, the mental health of each of these parties, and I accept that that claim for £22,000-odd to be spent on medical treatment is a reasonable and fair claim for the husband to be making.

75 The husband has said that his plan after his medical treatment is to obtain full-time employment back in Dubai. In some respects, it has surprised me that the husband wants to go back to Dubai, which has been a city of so much unhappiness for him, but there it is. I accept that that is his intention. As I have said, in fact, if anything, Dubai is a lot cheaper because although the cost of living there is pretty similar if not a little bit less than London, of course there is no income tax, and that makes a vast difference for somebody earning good money as he expects again to do.

76 Mr Harrison complained, and I understand why counsel in his situation might do so, that Dr McClintock report would only be as good as the information that he was given by the husband. I accept that, but the fact is that Dr McClintock could have been called to give evidence and be cross-examined and various items of expenditure incurred by the husband which were aired before me in court could have been put to him. To my mind, proving that somebody went to a particular event or place or establishment for a drink does not prove that that person is lying when he says that he is depressed or unable to work. It is, I suspect, to most people, easier to go to the pub and have a drink than it is to hold down an important job.

77 Mr Harrison could have put matters to Dr McClintock in an attempt to suggest that the husband was actually much fitter and more capable than he had reported and that he was, to coin a phrase, putting it on. However, in my judgment, the wife and her legal team made the correct decision in not calling Dr McClintock. His report is there to see and I am not sure that cross-examination of him would have made a lot of difference. It seems to me that I have to err on the side of caution in relation to the husband's earning capacity and, in the absence of any cogent evidence to the contrary, I accept the report of Dr McClintock. I accept that the husband is suffering from low mood and low self-esteem.

78 I accept that the husband will be unable to work in demanding, well-paid employment until after he has completed his medical treatment and had some recovery time. I accept that it may be a year or two after this hearing concludes before the husband is able to secure the sort of position that he had before, which, of course, we all hope will lead him to promotion and increased earnings in due course.

79 The parties agree, of course, that they both signed a prenuptial agreement on 12 July 2019, which is the date of their civil wedding ceremony. They were married in The Seychelles, with only two witnesses, as I understand it both employees of the wife's father's company. They had what must, by any standards, have been a very flamboyant celebration of their marriage in August of the same year in Paris, an event which I am told cost more than £500,000 and for which the wife paid.

80 The prenuptial agreement provides what might be described as a drop hands arrangements. In other words, the parties each retain their own separate property but share any joint property. I can fully understand why a person such as the wife's father would encourage, perhaps require, his daughter to enter into a prenuptial agreement. In circumstances where one party has immense wealth and the other does not, particularly if that immense wealth is pre-acquired, in other words before the relationship started, as here, or given to one of the spouses by somebody else, it may be a paradigm situation for there to be a prenuptial agreement, particularly anticipating, as happened here, the possibility that the parties' marriage might end after a short number of years and particularly if there were, as here, no children. Of course, the situation is very different if a couple separate after decades of rearing children together and pulling their weight together in a partnership.

81 The husband waived privilege in relation to the advice that he received from Hall Brown Solicitors in relation to the prenuptial agreement. The wife has not waived privilege in relation to her consideration of and advice about the prenuptial agreement. It is well known that I cannot and do not draw any adverse inference arising out of the wife's refusal to waive privilege but, in my judgment, in any event, the focus in this case is not about the advice that the wife received but the advice that the husband received. It is, of course, generally regarded as necessary that a party to a prenuptial agreement is given advice about it.

82 The husband says that he should not be bound by the terms of the prenuptial agreement for a number of reasons. The first is that he says that he was persuaded to enter into it as a sop to the wife's father. He says that the wife assured him that he would always be provided for as he had

married as Helliwell. I have already recognised above that the prenuptial agreement was, as much as anything, something that the wife's father was insisting upon.

83 The husband says that the wife told him that her father had had a number of relationships and that, in the case of each of them, he always financially looked after the person concerned when he had moved on from that person to another. That may very well be true, but what I am concerned with in this case is not what the wife's father might have done with a lover or mistress or friend; what I am concerned with in this case is what this husband and this wife agreed and expected, not what the wife's father did. It is, in my judgement, essential to see what the husband read, was advised about, did and signed, rather than attach much evidential weight to an unrecorded conversation and a conversation which the wife denies ever happened. I hark back here to the passage quoted above in the judgment of Leggatt J as he then was. I am going to do what was suggested in that case and what is obviously right, which is to look at the documentary evidence rather than pay much attention to after the event claims, particularly as they come from somebody who I have already found to be less than honest in relation to at least part of his evidence.

84 The second reason given by Miss Bangay as to why the husband should not be bound by the prenuptial agreement is her contention that:

> "Whilst [the husband] received some preliminary, limited advice on the [prenuptial agreement], it was without the benefit of any financial disclosure from [the wife]."

Miss Bangay says that the wife admits to a profound reluctance to provide any financial disclosure and that she was determined to keep the assets very private.

85 As I have said, the husband sought advice from Hall Brown a firm specialising in Family Law. The husband has waived privilege regarding the Hall Brown file. As the husband will doubtless have been advised, he was under no obligation to waive privilege and no adverse inference can be drawn from his failure to do so. However, as he has done so I have been able to find that he was properly advised by specialist solicitors.

86 However, by the time the husband signed the prenuptial agreement he had either been living with or at the very least in a committed relationship with the wife, he knew that she was from a very wealthy family and he had enjoyed, as I have said, the trappings of that wealth already whilst with her. He knew that the property where he lived with the wife was owned by her father. He said that he did not want a long and drawn out process but a high-level/red flag review. There was a considerable amount of secrecy about the disclosure. Nothing was committed to email, it was sent by courier and it was obviously very covert and I am sure, as I have said, that the wife did not herself know quite what assets she owned and did not own.

87 Hall Brown plainly took the husband through the terms of the agreement and it was made clear to him that he would not be able to make a claim for any form of financial remedy in the event of the marriage failing.

88 I turn now to some of the key clauses of the prenuptial agreement which the parties executed. After the expected definitions we find at clause (D) of the recitals, "Jenny" – that is the wife – "and Simon----" – that is the husband:

> "-- hope and intend their marriage will endure for their joint lives. However, they recognise there exists a possibility that the marriage may break down, that they may wish to separate and they may then wish to be divorced. Following discussions between themselves about the financial consequences of their marriage, including the financial consequence of their marriage breaking down, they wish this Agreement to limit the ambit for dispute between them."

89 Reading that and then realising where we now are is, I have to say, sad and remarkable. The whole point of an agreement like this is for the parties to avoid the cost and heartache of what these two people are going through right at the moment.

90 Clause (E):

> "Jenny and Simon acknowledge that there is a disparity between the Separate Property/Assets of Jenny and Simon in Jenny's favour."

91 Clause (F):

> "During the subsistence of this Agreement set out below, it is not their intention that either of them shall, by virtue of their marriage or otherwise, acquire any rights over or interests in the assets of the other; nor do they intend, in the event of a divorce, judicial separation or annulment to make any claims for financial provision against the other in any cause in any jurisdiction, and it is their intention that no other or additional provision for income, maintenance, capital, property transfer, settlement and distribution or other provision of entitlement consequent upon the breakdown of the marriage shall be made for either of them by a court in any jurisdiction in the world."

92 The provisions of that paragraph are very clear. As I have already said, the husband is an intelligent man, with a degree in Law and Accountancy or Economics, who worked for one of the big four accountancy firms in the world. It is completely obvious what that recital means, and he knew exactly what it meant in my judgment.

93 Clause (G):

> "Jenny and Simon agree that the terms of the Agreement reached between them contained herein shall be binding upon them and are intended to be binding upon their heirs, receivers, trustees and personal representatives, and in the event of a divorce, judicial separation or annulment will request that the Court give full effect to this Agreement."

Far from abiding by paragraph (G), the husband invites me to rip it up and start again.

94 Clause (I):

> "Jenny and Simon have entered into this Agreement freely and voluntarily without undue influence, duress or coercion or without any promise or representation other than set out in this Agreement, and all the terms herein represent the entirety of the Agreement between them. They are each entering into this Agreement free from pressure of any kind and have given full consideration with the help of their independent legal advisors to the ramifications of entering into this Agreement."

95 I am afraid that I have to say that the idea that the husband in some way signed this with his fingers crossed behind his back, relying on the representation, "You will be all right because you have married a Helliwell", is risible, and I reject that piece of evidence of his completely. Even if it was said, it was plainly overridden by this agreement which is absolutely clear in its terms.

96 Recital (J):

> "Jenny and Simon are both satisfied that they have had sufficient time for independent legal advice and sufficient time for reflection before entering into the terms of his Agreement."

And then it sets out the people from whom the wife had advice.

97 It then says that the applicable law is the law of England and Wales. It says then, at clause (P):

> "Notwithstanding that they may in the future both be habitually resident outside the United Kingdom, Jenny and Simon intend that the provisions of this Agreement shall be binding upon them in any jurisdiction and that they acknowledge and agree that in the event that they divorce they will invite a court in any foreign jurisdiction to take the terms of this Agreement into account to the maximum possible extent."

The husband in this court, this week, is doing exactly the opposite of that.

98 Clause (Q):

> "Jenny and Simon agree that this Agreement shall be governed by and construed in accordance with the laws of England & Wales."

99 There is then a section which is headed "Full Disclosure" and it says, at clause (R):

> "Jenny and Simon have fully and frankly disclosed to each other their financial resources and liabilities which are set out in summary form in the Appendices A, B, C, D and E to this Agreement."

100 Clause (S):

> "Both Jenny and Simon recognise that the disclosure provided to date each to the other is not completely detailed, but each acknowledges that such disclosure has been substantially complete in all material respects, and on this assumption each voluntarily and expressly accepts the disclosure provided by the other as being sufficient to enter into this Agreement, and they both waive any rights to further disclosure or enquiry. In particular, Jenny and Simon have not sought to have and do not wish to have any further valuations of the various assets contained in Appendices A and B."

101 This, it seems to me, gives the strongest part of the objection launched against this prenuptial agreement and its validity by the husband. Miss Bangay asserts that when the wife eventually provided financial disclosure with an amended agreement which was sent to him in June of 2019, the wife openly admits that she deliberately grossly understated her wealth by excluding a business interest and some property assets.

102 My recharacterization of that statement would be that the wife did not know the full value of her assets and did not know the assets even that she owned or what their value was. She did not want to ask her father and risk incurring his wrath for the reasons that I set out above. But I agree that the wife did not give full disclosure. I have found that she was very reluctant to ask her father about the detail of her assets and I have found that she was doing her best to tell the truth about her worth.

103 It is important to record that the prenuptial agreement incorporates disclosure in summary form in Appendices A and B. It records that disclosure was substantially complete. It was obvious to the husband that the wife was extremely wealthy and whilst understanding that full and frank disclosure is always the gold standard to aim for in a prenuptial agreement, if, as here, there is an understanding that one party is exceptionally wealthy, you cannot, as the economically weaker party, simply get out of the consequences of the prenuptial agreement because the number that was provided in terms of the wealth was a number that was lower than the truth or lower than it should have been. The judge will look at the effect in each individual case.

104 It is clear that the husband was expressly advised by Hall Brown to seek further disclosure and he declined to do so. The husband says that he was put under unreasonable pressure by the wife.

reject this submission. In one sense, in circumstances where one party is substantially wealthier than the other, and that is probably more often the case than not in prenuptial agreement cases because why have one if neither of the parties have anything or indeed have about the same amount each, there is always pressure. Generally, the person with less money would probably rather not have the prenuptial agreement.

105 I have thought very carefully about whether it is unreasonable pressure for a spouse to say, "If you do not agree to sign this, I will not marry you." Baroness Hale gave a forceful dissenting judgment in *Granatino v Radmacher* and a lot of people probably agree with what she said, that marriage is different, this is not the way marriage should be, but it is very clear that I have to follow not the one dissenter, but the eight Judges giving the majority judgment.

106 I do not need to spend long looking at other first instance decisions by judges such as myself trying to hone or mould or measure what was said by the Supreme Court, I look to the decision of the Supreme Court itself, and I bear in mind that Mr Granatino did not even have sight of a prenuptial agreement in his own language. Ms Radmacher was German and he was French and the prenuptial agreement that he signed was in German.

107 The prenuptial agreement, in terms of the actual operative parts, rather than the recitals, provided, at paragraph 1, that it will become operative immediately upon executing the agreement, and then it says this:

> "All separate Property/Assets held by Jenny shall remain in her beneficial ownership during the marriage and thereafter notwithstanding any contribution which Simon has made or may make in the future, directly or indirectly towards the acquisition, maintenance, improvement or growth (including 'the fruits') of Jenny's Separate Property/Assets."

And there is an identical clause the other way around in respect of assets that may be held by Simon. They are then the usual separate property clauses.

108 Paragraph 7:

> "In the event of the divorce of Jenny and Simon, all Separate Property/Assets shall remain in their respective absolute beneficial ownership free from any other claim by the other."

109 Paragraph 13:

> "In the event of the divorce of Jenny and Simon any jointly owned property occupied as a family home prior to their separation shall be divided between Jenny and Simon in the shares that the parties contributed at the time of purchase."

110 There is then a section dealing with their duties in respect of children which do not apply, and then it says, crucially, at paragraph 22:

> "Jenny and Simon have agreed that, in the event that their marriage is terminated by divorce or annulled, their financial claims will be defined and limited as follows:
>
> (a) Their respective Separate Property/Assets shall remain free of claim by the other ...
>
> (b) The family home ... will be dealt with in accordance with paragraph 13 above."

Which says it will go to the person who owns it.

111 It is to be remembered that the wife's father owned the home for the first two years of their marriage, and the idea from the husband that the family home would be half his in the event of divorce is absurd in a situation where the property was owned by her father and then, when her father transferred it, it was not to the parties he transferred it, but to his daughter, Jenny.

112 Paragraph 24:

> "In the event of the divorce of Jenny and Simon neither of them will make any financial claim of any kind arising out of their marriage, or otherwise, against the other, including but not limited to, claims for a lump sum, property adjustment orders, periodical payments, maintenance pending suit and pension sharing orders save that this provision shall not apply to financial claims for the benefit of any child born to them both."

113 It is hard to think of a more comprehensive dismissal of financial claims clause, nor one written in more straightforward plain English. The husband read that clause and knew exactly what he was doing when he signed this agreement, I find.

114 Mr Harrison has set out in his document a whole list of inconsistencies between what the husband has said in his evidence compared with what the records later show when the husband waived privilege and the Hall Brown file became available. Time prevents me from going through all of those now, but I am very clear that the husband had comprehensive advice from Judith Klyne of Hall Brown.

115 Just to give some short examples, Judith Klyne, according to one of the attendance notes in the file, said that the agreement ring-fences anything Jenny brings in. In the event of divorce, it will not cater to needs, and then later records JK saying:

> "... walk away with what [you] have at that time."

JK says:

> "... you need to be happy with the worst case scenario."

116 Later:

> "... seems family home will be dealt with differently, then sets out same that will be divided in accordance with contributions ... agreement reflects as per contributions, as long as you are happy. Again, concern re improvements to family home, are contributions [to be] considered post purchase?"

And then, later, JK saying:

> "... just be careful of putting large sums into her sole property, maybe discuss putting into joint names."

117 What on earth would be the point in that advice if the husband was under some illusion that the moment he married this property was going to be half his?

118 Later, JK saying:

> "... walk away with what you have at that time."

JK saying:

> "... [it] ring fences anything Jenny brings in. In event of divorce, will not cater to needs."

119 Later, JK saying:

> "... if feel like would need more protection then need to think about it, but saying comfortable."

SE, that is the husband:

> "... saying yes comfortable."

JK saying:

> "... good to go in with eyes open."

120 In my judgment, the husband did go in with his eyes wide open. Unfortunately, he has closed them later. "JK saying it may be possible to vary the agreement on divorce:

> "... but enter this assuming how would be dealt with. Do not assume [you] can get out of it."

121 It is hard to think of anything that could be clearer in terms of the advice that the husband received. He had the opportunity, did he not, of refusing to sign the agreement. It might have ended the relationship, or they might have stayed living together and not married, but he made that choice. There is no point in having these agreements, and I would be riding roughshod over the decision of the Supreme Court in *Granatino v Radmacher* if I did not give regard to this prenuptial agreement.

122 Later in the same file, SE (that is the husband) saying:

> "... in appendix, just list of assets, no values, not verified."

JK saying:

> "... depends on level of disclosure you want. Accepting not crystal clear value of assets, just overall understanding as looking to the future. Has limited relevance as financial position will change ... Just need to know that walk out of marriage with what came to marriage with. Need to be happy with that and comfortable financially."

SE asking:

> "... why will not sign."

Which means why will JK not sign and JK saying:

> "... need to see figures ... Would need to communicate with lawyers and review appendices. It makes no difference if not signed."

123 So what Ms Klyne of Hall Brown was therefore saying was she was not prepared as the solicitor advising the husband to sign it off because she did not have the disclosure in the appendices, but she gave the husband the clearest evidence: it makes no difference if not signed. She gave him the clearest advice: do not sign it unless you want to be bound by it; if you do sign it, this is what you get. And I find that Judith Klyne, from what I have seen of the file in respect of which the husband has waived privilege, gave the husband good, sensible and correct advice, and I find that the husband went into this agreement and signed it with his eyes wide open, knowing what it meant.

124 Miss Bangay correctly identifies that the wife did not seek, in advance of these proceedings, to mediate, even though this was provided by the terms of the prenuptial agreement. In my judgement the wife should have at least attempted to trigger this mediation clause, but her failure to do so does not render the agreement worthless or unenforceable; indeed there is a clause in the agreement that says specifically that the failure of one paragraph does not create the failure of the entire agreement.

125 In any event, there is a huge amount of overlay in this case which I have not addressed but I have adverted to from time to time. I am not going to allow myself to descend into claims and counterclaims of what went on in the marriage for to do so would be to fly in the face of the accepted wisdom to which I have already referred. The court should do all that it can to avoid, in many cases, in most cases, descending into the arena of the day to day struggles of a couple's relationship breakdown. It is, however, abundantly clear to me that the relationship between these parties was at a desperately low ebb. There was an atmosphere of mistrust, fear and despair. The wife said she left the home because she was in fear and had to get out. I am not making a finding that she was in fear, still less am I making a finding that the husband made her fearful, because the evidence did not address this issue, and properly so. However, the wife said it and it is difficult to see how mediation could work in the face of a marriage which ended with the level of acrimony, mistrust and anxiety that both parties agree was present. Even the most experienced mediators will say that there are some cases which are profoundly unsuited to mediation and it seems to me that this case may very well have been one of those.

126 Miss Bangay also complains, as I have said, and it is a valid complaint, that the wife's Dubai solicitors,, threatened divorce proceedings and a claim for maintenance in Dubai which flew in the face of the prenuptial agreement which the wife herself wanted to rely on. It was an extraordinary own goal by the wife's Dubai solicitors to do that. I cannot understand what possessed them to say that at the same time as they were trying to rely on the prenuptial agreement. It was an inappropriate threat and it was a stupid threat and in my judgement it was wrong for them to make it. But I have not heard from the wife's Dubai solicitors. They may have answers to what it is I am saying and, in any event, as I have said, although it was a desperately

unhelpful way to start these proceedings, it does not destroy or damage the validity of the prenuptial agreement in my judgment.

127 Miss Bangay asserts that, in apparent recognition of the unfairness of the prenuptial agreement, the wife initially offered, on 29 April 2023, to pay the husband a lump sum of £465,000 and to transfer 50 per cent of a joint portfolio to the husband, then a further £34,755. Miss Bangay continues by asserting that the wife has since proposed an increase of the lump sum to £800,000. That offer is caveated by her intention to pursue the application of the prenuptial agreement at trial in the event that the husband refused to accept her proposal.

128 I agree with Miss Bangay that those offers were made, it is obvious that they were, but I do not agree with the phrase "in apparent recognition of the unfairness of the prenuptial agreement". I have often said in this court, particularly when trying to encourage people to settle when I am dealing with FDRs, to say to the party with money, "You have got the luxury here of being able to spend as much as you like on your lawyers, but you have also got the luxury here of being able to "pay off" your wife or husband, as the case may be, to "get rid of the problem by being generous", and it would be completely wrong, in my judgement, for me to criticise those offers made by the wife or to say that they support any sense of the prenuptial agreement being unfair. It was, in my judgement, a perfectly proper attempt by an anxious, emotional and vulnerable person to say, "I would rather pay you this money than go to court; please take my offer, it is generous", and I cannot align myself with Miss Bangay's criticism of it as being a recognition by the wife that the agreement was in some way unfair. In my judgement, the offer of £800,00 was a generous one and the husband should have accepted it.

129 Mr Harrison reminds me that the prenuptial agreement in this case was drafted and signed a decade after the seminal decision of the Supreme Court in *Granatino v Radmacher*. The husband is, as I have recorded, an extremely intelligent man, and a man who is experienced in preparing and understanding documents. In my judgement, had he been asked at the time that he signed this agreement, "What do you think will happen if your marriage ends after three or four years when there were no children?" he would have been bound to reply, having read the document and received the advice that he had from Hall Brown, "Under the terms of the prenuptial agreement I am not entitled to claim anything against Jenny." How could anybody who understand plain English documents possibly have understood anything else? The husband's answer that he would always be a Helliwell and he would be looked after is, as I have already found, absurd and, even if it was said, it was absurd for him to rely on it.

130 It is ridiculous, I am afraid, to say on the one hand, "I am signing this and I am recording on the face of it that I know what I am doing, I know what the consequences of it are, I know I get nothing", and yet, on the other hand, like a child with his fingers crossed behind his back, say "It will be all right really." That is not the way that prenuptial agreements, documents of this kind, work. The husband is too smart, too clever and too experienced to have been able to think in that way; and I am afraid I have to say that I think that he was being less than honest when he gave his evidence about this. I have said the same thing in relation to his expressed understanding about the family home being in some way half his if they separated or divorced.

131 He may have found out, he may have been told, that there is a case which says that, in many circumstances, if not most, the family home, which is the centre of the family, is owned 50/50 by the husband and the wife. That was not the case here for all of the reasons that I have set out, but principally because he knew that the property was not even owned by the woman that he was marrying, but by her father. It was only later that it was transferred, and then it was transferred, at the wife's request, into her sole name, and I find that there was no expectation or understanding that the husband was entitled to half of the value of the property if they were to split.

132 In *Radmacher*, the famous words of the Supreme Court bear repetition:

> "The court should give effect to a nuptial agreement that is freely entered into by each party with a full appreciation of its implications unless in the circumstances prevailing it would not be fair to hold the parties to their agreement."

133 And then Mr Harrison, in his document, sets out a number of cases, including the decision of Peel J, in *HD v WB*, where he distilled the principles into a series of statements. However I am not going to delve into the reinterpretation of that case by other judges, but will stick with the headline point of the Supreme Court.

134 The next reason given by Miss Bangay why the husband should not be held to the terms of the prenuptial agreement was that it was not signed by the husband until the parties' wedding day. All commentators on this subject will correctly advise that agreements should be signed some weeks in advance of the wedding in an ideal situation and, indeed, had the Law Commission's proposals on prenuptial agreements come into force or been made into a statute that received Royal Assent, there would almost certainly have been a statutory period between the date of signing and the date of the wedding, possibly twenty-one or twenty-eight days, possibly longer.

135 Of course, judges in the situation that I am in are not applying a statute that has specific regard to prenuptial agreements. Section 25 of the Matrimonial Causes Act, which guides the decision that I am making, and the discretion that I am exercising, does not mention prenuptial agreements. They had not really been thought of in this country in 1973, which is the date of that Act, although it dates back actually to legislation from 1969, but section 25 does require me to look at "all the circumstances of the case". Much has been written and said and lectured about section 25 and it has found itself remarkably adept at adapting itself to the mores and principles and understandings of the time. Given that it has its origins in the legislation from 1969, this is a remarkable tribute to its authors and to the people that have interpreted it ever since.

136 For all of the reasons articulated above, I propose to give effect to the prenuptial agreement into which the parties entered. However, I must now decide, as the Supreme Court had to decide in *Radmacher*, how to address the husband's reasonable needs. Miss Bangay has, quite properly, asserted that the husband has needs, and she says he has needs that are not fulfilled by the agreement. I am not going to tear up the prenuptial agreement, I am not going to pretend that

does not exist, but I am going to look at it in the way that the Supreme Court did in *Radmacher*, and decide what provision, if any, should be made by the wife for the husband's reasonable needs.

137 I go back here to look at the original Form ES2 that was provided on behalf of the husband and, as I have said, he has total assets, including pensions, according to this schedule, of £868,000. I am going to round that down to £850,000 because there has been a bit more costs since that was prepared. As I have said, on that £850,000, the husband's interest in the property in Andalucia, which is valued at about £500,000, is illiquid, and that means that the husband has, effectively, access at the moment to approximately £350,000 after his costs are paid.

138 I am going to run through the summary of needs that Miss Bangay has put forward. I have already agreed that the figure of £22,110 for medical treatment is one that I accept. I recognise that the wife has asserted that this treatment can be obtained at a lesser cost in other places However, in my judgement, one of the most important things of all for each of these two spouses is to get better, to do all they can to address their mental health issues, and if this is a case, as it is, where there is significant money, then it is only fair that the husband should be entitled to have that treatment.

139 The husband put forward what I have regarded as something of an aspirational budget. One of the astonishing claims that he put forward was £36,000 for flights. I know of no provision or clause or practice which says that if you enter a marriage as a regular person with a regular income you can suddenly exit it thinking that you can spend £36,000 a year on flights at your spouse's expense after only three years of marriage. It is a proposition from which I completely disassociate myself.

140 Similarly, the husband's initial claim for a meal plan, to spend £26,000 a year on a meal plan just for himself, I regard as remarkable. He said to me, "I can't even cook an omelette." Well, my answer to that is, "Learn." It is not difficult. You do not have to be a master chef to learn how to eat reasonably well. In fairness, the husband ameliorated his claim here and I am not going to descend into the details of how or why or what he should cook each day, but I do suggest to lawyers who prepare these budgets that if you put something in the schedule which is absurd, it can discolour the whole case. Of course I am not judging the whole case on the basis of this particular aspect of the schedule, but it is unhelpful I am afraid when people put their expenses forward in that kind of way. Being married to a rich person for three years does not suddenly catapult you into a right to live like that for very after the relationship has ended.

141 The husband now says he needs income in the UK of £23,300 pursuant to a varied budget, and I am not going to pick at that, it is too small an amount to make it worthwhile.

142 The husband says that he needs £28,000 for a visa in Dubai. There is some debate about that. The wife says, well, he could enter on a tourist visa and then he could get another visa later, when he gets a job. I want to eradicate any sense of debate about this. If, as he says is his intention, he is going to go back to Dubai, as I expect that he will, then I am going to accept that that £28,000 is an acceptable expense, and I am not going to quibble over the moving costs of £10,000.

143 The husband says that he needs, while living in Dubai, a budget of £134,774 a year. He asks for that to be paid in full for six months, and then to be paid that less an income of £60,000 a year, which it is said he can earn for the next two years. I do not think that it is necessary or appropriate for a judge doing what I am doing to nitpick over the entire budget. I have given some hints as to why I think some of it is unreliable. I take into account that the cost of living in Dubai, according to everything that I have seen, is, if anything slightly less than London rather than more, but it seems to me, just looking at it globally, that the husband should be perfectly capable of managing, indeed living well, on £110,000 as his budget, and I am going to work with that figure rather than the £135,000 he has put forward.

144 So, using my figure of £110,000 means he needs £55,000 for the first six months on the same formula as put forward by Miss Bangay in the renewed figures. If I then take the same income, two years of employment where he is going to be earning £60,000, that means he is going to need his income augmenting by another £50,000 a year, which is an additional £100,000 if I allow for two years. Of course, I will hear submissions from counsel on the detail of the maths after this judgment if they take the view that there is anything that I have done wrong. I do not mean in terms of the principle, I mean in terms of the maths.

145 The huge issue here for me to determine is whether the husband should have to rent or a property purchased for him. In other words, should I require the wife, contrary to the terms of the prenuptial agreement, to purchase a properly for him? The husband puts forward a claim for a property of £1.75 million. I am not going to spend long on the argument as to whether that is a good, bad or indifferent type of property in Dubai. In my judgment, I should not require the wife to provide the funds to enable the husband to purchase a house. I am sure that it is wrong in the context of the prenuptial agreement. But even without the prenuptial agreement, I think it is extremely unlikely that, after this short childless marriage, I would have been saying that the husband could walk out, after three years or marriage or five years of cohabitation, even six if you stretch it to the widest point put forward by Miss Bangay, which I have already rejected for the reasons stated, with a property of that sort of value. I am going to delete altogether the cost of purchasing a house. I have found that that is the wrong thing to do having regard to the terms of the prenuptial agreement which I am applying, albeit varying marginally to meet short term needs. This is the same approach as was applied by the Supreme Court in *Radmacher*.

146 I now turn to look at what the husband should be spending by way of rent for, I am going to say, a period of two years in Dubai. That would cover him for the period of time before he can get a job. The formula that I have been given is 5 per cent of value as the cost of renting. If I take Miss Bangay's figure of £1.75 million and I take 5 per cent of that, it is £87,500 a year. If I double that to make it for two years, it becomes £175,000, and I am going to put that figure into my schedule. I should say here that it is not accepted by the wife that a property worth £1.75m is in any way necessary or appropriate for the husband. The figure of £1.75m comes from the husband and I recognise that I am being generous to the husband in selecting this figure.

147 I am told that the husband wants to spend £75,000 on a car which he asserts that the wife should provide for him. I am not going to get into any argument about what type of car. He says he needs

an SUV for safety in Dubai. I am not going to quibble with that. I am going to put in here a figure of £40,000. It is something that, inevitably, is a bit of a compromise, but it seems to me to be entirely reasonable for me to say that he could buy a good used good condition SUV for £40,000. I can well see there is an argument for saying that the wife should not be providing him with a car at all, but I am going to accede to the husband's view on that.

148 The husband then seeks £226,000 for unpaid legal fees. That is now about £246,000. I may or may not be asked to deal with the issue of costs later but, in regard to that claim, I am not going to allow it, at least at this stage. In my judgement, and as I have explained in detail above, the offer that the wife made of £800,000 is one that the husband should have accepted, and he would have been better off if he had than he will be now, and I have said time and again, and other judges of the division have said time and again, that costs must take centre stage in these cases. Just because you are married to someone rich does not mean that you get a blank cheque to underwrite your costs, and I am afraid that I am not going to be allowing that in my award. As I have said, this Judgment may in due course be followed by costs applications and I shall, if called upon to do so, consider them at that stage.

149 I shall just then recalculate this, and I am going to ask counsel to do the same, either now or after I have finished delivering this *ex tempore* Judgment, so that we can be sure that my mathematics is correct. I am not changing the principles, but I will hear any submissions the parties want to make on the numbers, on the maths. According to me, that comes to £453,110. I will just round that up to £455,000.

150 The husband of course already has some liquid resources in his own name, and whilst I accept that the Spanish property is inaccessible, he still has at least £300,000 in his own name, and it could be argued that he has actually got more than that when I deal with costs in the way that I have, because I have arrived at that figure because the husband has netted off his costs liability on his Form ES2. There is room here for me to be generous, and I know the husband will not accept that this is generous, but generous in the context of what I have determined is the right way of approaching this case, and generous in terms of looking at the offers that have been made by the wife already, but, doing the best that I can and erring on the side of generosity to the husband, I am going to award the husband a lump sum of £400,000, and that is the decision that I make, and that can be payable by the wife, I assume, within twenty-eight days.

151 I am grateful to all counsel and to their legal teams for the assistance and clear submissions that they have made to the court and I now invite them to draft an order giving effect to my decision, subject of course to any further applications that may follow.

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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This transcript has been approved by the Judge.

Neutral Citation Number: [2023] EWFC 133

Case No: FD22F00068

IN THE FAMILY COURT
SITTING AT THE ROYAL COURTS OF JUSTICE

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/08/2023

Before :

SIR JONATHAN COHEN

Between :

TRNS	**Applicant**
- and -	
TRNK	**Respondent**

- -

Mr S Webster KC & Mr J Webb (instructed by **[a firm]**) for the **Applicant Husband**
Mr J Southgate KC & Ms Y Hughes Pugh (instructed by **[a firm]**) for the **Respondent Wife**

Hearing dates: 17 - 20 July 2023
- -

Approved Judgment

This judgment was handed down remotely at 2.00pm on 10 August 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives (after anonymisation).

.....

SIR JONATHAN COHEN

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

SIR JONATHAN COHEN:

Introduction

1. I am dealing with the Applicant husband's ('H') notice to show cause as to why a Post-Nuptial Agreement ('PNA') signed on 9 April 2020 should not be made an order of the court. The Respondent wife ('W') seeks to resist on the basis of material non-disclosure by H.

2. The parties met in Jamaica in 1998 and cohabited from 1999. They married in Bermuda in 2002 and first separated in April/May 2019. H petitioned for divorce in September 2019 but the parties reconciled in November 2019. In September 2021 the parties separated again and H left the family home. The marriage is to be treated as one of some 22 years.

3. W is 57 years of age and H is 48 years of age. The parties have four children aged between 15-23 years.

History

4. The parties share a head for business, which they have reflected upon as being a strength of their relationship. Both parties have obtained a Master of Business Administration degree from American Business Schools. Before meeting H, W worked with the US Department of State and Foreign Service, latterly involved with private equity. At the time the parties met, both W and H were working for international consulting firms.

5. In 1999 the parties founded an internet business, SH Ltd. This venture was successful, and the parties sold SH in 2000.

6. In 2004 the parties acquired a 30% interest in DB, a company which provides outsourcing services to a wide range of organisations across various sectors. The parties' family and friends purchased another 25%. This approach was adopted to enable the parties to benefit from the Enterprise Investment Scheme (EIS) whereby gains in business assets can be received free of tax (and any losses limited) provided that the shareholding acquired does not exceed 30% and the shares are held for a sufficient period of time (three years). In 2007, after the requisite three-year period under the EIS scheme had elapsed, DB bought back the shares owned by the family and friends who had come in with the parties in 2004.

7. The parties resolved to market DB for sale in 2008 but were unsuccessful in the light of the adverse business climate then prevailing. They instead restructured the business with a view to future growth. Following the re-structuring, H repurchased W's shares in the business due to US tax implications. In return, W was given the right to call for half of H's shareholding to be transferred to her with no associated cost and H was precluded from selling or

transferring more than 3% of the shares in his name without W's written authorisation.

8. Over the course of the marriage, DB grew from revenue of less than £10m to become a large enterprise. In the year ending 31 March 2020 its turnover increased to over £100m and it has grown substantially since then.

9. Both parties contributed to the success of DB in slightly different ways. Broadly speaking, H was responsible for the financial side of the business and 'back-of-house' operations while W focused on 'front-of-house' sales, marketing, business development, and human resources. In 2019, upon W's proposal, DB launched a fund within DB to channel profits into 'green' ventures.

10. Aside from DB, the parties pursued their own business ventures over the years. In 2010 H established MT, a business focussing on renewable energy enterprises. It is accepted that MT was H's 'baby' in which W was not involved. H is now the majority shareholder of the business, although until recently the majority shareholding was owned by H's parents on his behalf.

11. A number of investments have been made through MT, including in commercial and residential real estate, start-ups, and private equity and venture capital interests in various companies. For the purposes of these proceedings the most important investments are as follows:

    i) Since 2016 MT has invested in PD via PL, a growth equity firm focussed on industrial technology companies.

    ii) Since 2008 H has invested directly in and been a board member of ER, a technology company. In 2021 H sold some of his shares in ER to MT.

12. From 2016, MT also has had an agreement with PL for MT to receive the benefit of carried interest in PL and H has had a place on the Advisory Board of PL.

13. Further, MT was effectively invested in Tesla, following an agreement with a third party, TR, in 2019 whereby TR bought Tesla shares on the basis that MT would receive the profits and bear any losses whilst TR would receive interest on the sum invested.

14. W started her own venture in 2016, an investment platform called PC, whose aim was to help finance and mentor social-impact businesses.

15. In 2017 H co-founded HL, a company developing transportation infrastructure. H is an investor and board member of HL.

16. In recognition of their business achievements, the parties went on to win a prestigious award marking their success.

Post-Nuptial Agreement

17. On 7 August 2019 H sent W an asset schedule he had prepared showing the parties' financial position. It was headed "Net Worth - As at 31 March 2019". According to that schedule, the "estimated value" of the assets amounted to around £83.5m, of which around £79.6m were in H's sole name and nearly all the balance in the name of W. H's interest in DB was put by him at £69.6m and in MT at £3.5m.

18. H prepared a voluntary Form E which was sent to W's representatives on 15 October 2019. The Form E was accompanied by around 600 pages of supporting documentation. In his Form E H valued his interest in DB at £70.1m "calculated on the same P/E multiple used to calculate the share of WW upon the recent sale of his shareholding".

19. He valued his 100,000 shares in MT at £1.138m, though in an accompanying without prejudice letter also dated 15 October 2019 confirmed that he should be treated as controlling 740,000 of 900,000 shares (82.2%), equating to "an estimated value of £3.5m." This brought in his parents' holding as well as that of several other small investors.

20. I shall deal with the values attributed to other assets when I deal with the allegations of non-disclosure.

21. On 31 October 2019 H offered W a settlement by which W would receive total assets of £30m. This offer was not accepted.

22. On 13 December 2019 W sent to H an email containing a small number of questions about his Form E, including questions pertaining to the estimated values ascribed to DB and MT. H responded the next day. With regard to DB, H explained that the value ascribed to the shares for the purpose of a number of recent share buybacks had varied but that the most recent buyback was at a "generous" figure calculated on the forecast budget which was unlikely to be met. As to MT, H explained that the valuation had been calculated based upon "the net asset value of the business. It is not a trading company and therefore that is the most accurate way to value it". W had asked how the valuation for MT had been "divided out between all the line items", and H replied that he did not understand that part of the question. W did not follow up on that email with any further questions.

23. On 24 December 2019 W's representatives wrote to H's representatives setting out W's proposed terms for a PNA. The letter stated as follows:

> "In headline terms, [W's] proposal is for **an equal split of the assets as of today's values.** This will allow [H] to keep the benefit of any increase in value from his endeavours going forward including DB. She proposes to take the figures at [H's] estimates (from his Form E and the schedule he provided before), which result in a total asset figure of approximately £75million (net of tax and contingencies for [H]). In principle, therefore, this will leave [W] with c.£37.5million of the assets, although the tax consequences for her will also need to be calculated and agreed and tax advice obtained, particularly regarding any US tax implications, so that they can be accounted for in the overall division." [emphasis added]

24. The parties discussed the terms of the PNA both directly throughout December 2019 and January 2020 and between solicitors. On 20 January 2020 H's representatives sent draft Heads of Terms for the PNA to W's representatives. The parties again discussed the terms between themselves on 21 and 22 January 2020 and W's representatives sent an amended draft Heads of Terms to H's representatives on 23 January 2020. A further revised draft Heads of Terms was sent to W's representatives on 24 January 2020 with some amendments relating to tax provisions. The parties again discussed the terms directly and H made some concessions in respect of the timing of the transfer of one of W's investments and in respect of the tax to be paid by H. H's representatives sent an amended draft Heads of Terms to W's representatives on 27 January 2020.

25. The Heads of Terms were signed on 28 January 2020 as the parties left for a holiday in Cuba to mark their reconciliation. W alleges that H put her under pressure to sign while the taxi was waiting in the driveway or else he would not be able to go on the trip. H denies any form of ultimatum. This aspect of the case was not pursued at trial and I make no findings in respect of it.

26. On 6 March 2020 W's representatives returned the draft PNA with W's disclosure. H agreed to some minor amendments on 11 March 2020 and W's representatives confirmed on 23 March 2020 that the PNA was agreed. The final amount agreed for the lump sum to W was £36m to be paid over a period of time with index-linking.

27. The parties signed the PNA on 9 April 2020. The PNA recorded that the parties intended the PNA to be binding upon them in the event of the permanent breakdown of the marriage, that they considered its terms to be fair, and that they had received independent legal advice as to the PNA. Of particular import are the following recitals in the PNA:

> "(T) Each Party has had the opportunity to make enquiries of the other Party's disclosure and financial circumstances and the Parties confirm they are satisfied that they have sufficient knowledge of

each other's financial circumstances and have received sufficient information and documentation about the financial circumstances of the other Party to be able to assess the terms and fairness of the terms of this Agreement.

(U) [The parties] each acknowledge that the financial disclosure set out at Schedule 3 and Schedule 4 is based on estimates of value and that formal appraisals have not been obtained. [The parties] acknowledge however that the other has made available upon request all available information regarding their Property and income and access to any information that might be needed if such Party had decided to have any of the Property and income formally appraised."

Alleged non-disclosure

28. W says that she came to question H's 2019 disclosure after she became aware that H had purportedly mishandled her tax filings by not disclosing that W owned property in the UK and by giving an incomplete list of W's UK investments. W says that she then came across some documents in the home office which indicated a much higher value in MT and she was told by a third party that H had investments worth over $40m in PD and PL. W's account is that she was surprised by the scale of these investments and this set off alarm bells as to whether H had been truthful when making his 2019 disclosure. H has expressed concern that W was rooting around in what he contends was his private office in an attempt to undermine the PNA.

29. W now makes the following allegations of non-disclosure by H prior to signing the PNA:

    i) H failed to disclose that he had funded MT by extracting liquidity from DB.

    ii) H failed to provide full and frank disclosure about the true value of MT.

    iii) H failed to disclose the extent of his control/potential ownership of MT.

    iv) H failed to disclose that he/MT had an arrangement with a third party, TR, that TR would invest $500k in Tesla and MT would provide a corresponding guarantee of $500k and pay the interest. In turn, MT would benefit from future profit of Tesla shares.

    v) H failed to disclose that the basis for the valuation of DB was based on a pre-agreed multiple from 2010 for a different class of shares and projected EBITDA, not on fair market value of the business.

vi) H failed to disclose relevant information and documentation concerning the true value of his interest in ER.

vii) H failed to provide full and frank disclosure about the true value of his shares in HL.

viii) H failed to disclose his investment/interest in a number of other businesses/properties.

30. H denies these allegations, save that he accepts that he did not disclose some of the smaller investments listed at paragraph 29(viii) above because he forgot. H contends that, in any event, these omissions were not material in the context of the PNA. H also accepts that he forgot to disclose his pension with Aviva, though he notes that W also failed to disclose her pension which he believes to have been of a broadly similar value to his own at the time.

The law

31. In reviewing the law I have highlighted in bold type statements of particular relevance to this case.

32. The starting point of the law on nuptial agreements is the well-known case of Granatino v Radmacher [2010] UKSC 42 where the Supreme Court said:

> "[68] If an ante-nuptial agreement, or indeed a post-nuptial agreement, is to carry full weight, both the husband and wife must enter into it of their own free will, without undue influence or pressure, and informed of its implications. […]
>
> [69] The safeguards in the consultation document are designed to apply regardless of the circumstances of the particular case, in order to ensure, inter alia, that in all cases ante-nuptial contracts will not be binding unless they are freely concluded and properly informed. It is necessary to have black and white rules of this kind if agreements are otherwise to be binding. There is no need for them, however, in the current state of the law. The safeguards in the consultation document are likely to be highly relevant, but we consider that the Court of Appeal was correct in principle to ask whether there was any material lack of disclosure, information or advice. Sound legal advice is obviously desirable, for this will ensure that a party understands the implications of the agreement, **and full disclosure of any assets owned by the other party may be necessary to ensure this. But if it is clear that a party is fully aware of the implications of an ante-nuptial agreement and indifferent to detailed particulars of the other party's assets, there is no need to accord the agreement reduced weight because he or she is unaware of those particulars. What is important is that each party should have all the information**

that is material to his or her decision, and that each party should intend that the agreement should govern the financial consequences of the marriage coming to an end."

The Court went on to explain the principle underlying this approach:

"[78] The reason why the court should give weight to a nuptial agreement is that there should be respect for individual autonomy. The court should accord respect to the decision of a married couple as to the manner in which their financial affairs should be regulated. It would be paternalistic and patronising to override their agreement simply on the basis that the court knows best. This is particularly true where the parties' agreement addresses existing circumstances and not merely the contingencies of an uncertain future."

33. The question which I must ask, therefore, is whether there has been material non-disclosure in this case. In approaching that question I have borne in mind the dicta of Mostyn J in BN v MA (Maintenance Pending Suit: Prenuptial Agreement) [2023] EWFC 2 at [30]:

"That does not require "full and frank disclosure (as Mr. Marshall repeatedly put it); it requires only a sufficiency of disclosure to enable a free decision to be made."

34. It has been submitted on behalf of H that W had every opportunity to make further enquiries were she not satisfied with H's disclosure. In considering that submission, I note the words of Moor J in KG v LG [2015] EWFC 64:

"52. The third principle advanced by Mr Amos requires at least some clarification. Mr Amos submits that an applicant should not be able to rely on putative non-disclosure if such would have been avoidable by reasonable enquiry by her. He relies on B v B [2007] EWHC 2472; [2008] 1 FLR 1279 per Sir M Potter, President. He submitted with vigour that the Wife in this case had taken the conscious decision to abandon the exchange of Forms E in favour of negotiation. The Husband had offered full disclosure and she cannot therefore now complain that she chose to settle without that disclosure.

53. Mr Posnansky QC for the Wife responds equally forcefully that, if that was the law, no case would ever settle again without exchange of complete Forms E and all supporting documentation. He submits that a decision by parties to negotiate does not absolve them from their duty of full and frank disclosure. In short, one cannot allow the other to settle on information that is materially in error.

54. The submissions of Mr Posnansky in this respect are correct. I remind myself that Livesey v Jenkins itself was a case involving a consent order. B v B arose in very different circumstances. A wife was attempting to set aside an order on Barder [1987] 2 All ER 440 principles, complaining about an allegedly inaccurate valuation of a

matrimonial home. In such circumstances, each party is in a position to test the valuation evidence by reasonable enquiry and cannot complain if they fail to do so. A more pertinent example would be a case in which there is £100,000 in a bank account that happens to be in the joint names of the parties. It is not disclosed by either party. If the Wife knows that the account exists, she can make reasonable enquiry herself (as she is a joint holder of the account) and cannot complain if she fails to do so. It is just possible, however, that she might not know about the account. If that is the case, she cannot make reasonable enquiry herself and she must rely on her husband's disclosure being full and frank.

55. In this particular case, the Wife did not have access to the trust deeds or accounts. She was reliant on the Husband making full and frank disclosure in that regard. **Her solicitors did ask questions but both parties (not just the Wife) decided to abandon the formal Form E procedure and negotiate. In doing so, the duty of both parties to provide full and frank disclosure did not disappear. A husband cannot simply rely on an offer to provide full disclosure in a future Form E. He has to provide sufficient disclosure to give the wife a proper picture of his financial resources. In such circumstances, a Wife is entitled to rely on the information that is provided**."

35. I also have regard to the words of Peel J in HD v WB [2023] EWFC 2 at

"90. The financial disclosure was in broad terms accurate. Neither party, reasonably enough, attributed values to their respective business interests. Nor did either party seek further disclosure from the other. **W should not be prejudiced by H not having pursued lines of enquiry."**

36. I remind myself that the duty to disclose is not limited to the assets which each party has at the time disclosure is made. In Bokor-Ingram v Bokor-Ingram [2009] EWCA Civ 412 the Court of Appeal had to consider whether the husband should have disclosed that at the time of the FDR he was negotiating a new contract of employment, albeit that he had not yet signed the contract. The Court answered that question in the affirmative, Thorpe LJ noting at para [18] that:

"The court's duty under s 25 of the Matrimonial Causes Act 1973 is to have regard, amongst other things, to '(a) the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future …'. The fact that the contract had not been signed by 20 July was irrelevant to the question of whether the negotiations had to be disclosed. Disclosure was essential to enable the court to assess the husband's future prospects. **The duty to disclose extends beyond**

what is certain on the date that the order is made to any fact relevant to the court's review of the foreseeable future."

37. The point was affirmed by Wilson J in Kingdon v Kingdon [2011] 1 FLR at [23]:

"For the husband's non-disclosure was material even if the shares were likely to be of value only in the foreseeable future (s 25(2)(a) of the Matrimonial Causes Act 1973), provided only that, as a result, the outcome of the case would be likely to have been significantly different (Bokor-Ingram v Bokor-Ingram [2009] EWCA Civ 412, [2009] 2 FLR 922, at [17])."

38. It is clear from these authorities and others (for example Roberts J in AB v CD [2016] 4 WLR 36) that notwithstanding the ability of a party to opt out from a detailed investigation of a spouse's finances if she/he wishes, the disclosure given by the other must be sufficiently accurate that it gave the receiving spouse sufficient information to make an informed judgment of the value of the family assets.

39. H cannot escape this obligation by pointing out that he gave the net asset value of his assets as at 31 March 2019 if (i) their actual current value was to his knowledge or belief materially different to their recorded cost and/or (ii) there had been to his knowledge or belief a material increase in the value of the asset between 31 March 2019 and the date that the PNA was signed.

The Allegations of Non-Disclosure

40. Pursuant to my direction, W provided a schedule of allegations of non-disclosure upon which she relied. H pleaded in response to that schedule.

41. Inevitably during the course of the hearing the weight to be attributed to each of the allegations altered as the evidence developed. I shall therefore address the various areas in dispute in a different order to that which was pleaded.

DB

42. I start with DB as being the principal business of the parties and that on which they have built their subsequent success. In H's disclosure made in August 2019 he included DB equity at an "estimated value" of £69,630,330. In addition there was debt owed by way of director's loan in the sum of £547,100. The sum of those two figures, £70,117,430, was disclosed in his Form E on 15 October 2019 as being the estimate of the current value of his business interest.

43. The Form E went on to say that the equity was calculated on the same P/E multiple basis as used to calculate the share of WW upon

the recent sale of his shareholding. The Form E continues "it is acknowledged that this valuation methodology is generous; it is used to be consistent with the approach agreed with WW". This ambiguous statement was not investigated but in the light of his reply to the written question put to him, H's response implicitly suggests that the shares had been valued at too high a figure.

44. W has a number of specific objections to H's disclosure in respect of this company. The first is that H did not disclose that approximately £20-£25m of DB funds had been invested in MT, which had risen to £26m at the date of the PNA. There is no suggestion that this loan of funds was not properly accounted for in the accounts of each company, respectively as an asset or a liability. W's objection was that she had understood that MT had been funded with only a relatively modest input from DB, with the balance by way of bank borrowing.

45. Whilst I understand W's upset if she was unaware of the inter-relationship between the companies, and I accept that there is nothing in the accounts of either company which suggests that the advance of funds came from an inter-connected company, I do not accept that this amounts to non-disclosure by H. Should W have wished to, she could have asked questions about the asset/liability. She chose not to do so. There was nothing in the disclosure in this respect that was misleading, in the sense of affecting value.

46. The second area of enquiry was the multiple applied to the EBITDA so as to produce the valuation of approx. £70m of DB. The multiple used was 5.5 and, says W, whilst she did not challenge the figure in the disclosure exercise, she was unaware that this was a multiple that had been agreed with WW as long ago as 2011, albeit used in a recent buyback of his shares. W says that if she had known that fact she would have challenged it and sought a higher multiple. She reminds me that each 1x increase in the multiple increases the value of DB by a little over £18m.

47. I do not regard the fact that WW would have wanted a higher multiple to be applied for the buyback of his shares to that which he had agreed to be bound as being helpful. It is what he had agreed. Furthermore, in 2017 the accountants MHA had advised that an appropriate multiple was in the bracket of 4-7, and 5.5 is right in the middle of that bracket.

48. I am not persuaded that the fact that W was not aware that the WW multiple was so historic is a ground for making out an allegation of non-disclosure. There is no evidence before me that it was not a reasonable multiplier in 2019 and it had been used in respect of other shareholders who were bought out.

MT

49. It is no surprise that the biggest area of contention related to MT. This was the entity which both H and W regarded as H's venture and in which she had minimal involvement. In his initial disclosure in August 2019 he had put the value of his interest at £3.5m and he explained in his solicitor's letter of 15 October 2019 that he had aggregated shares held in the names of his parents which were to be treated as if his so as to produce "an estimated value of £3.5m." In fact this was a wrong calculation as it assumed that he and his parents held 85% between them when in fact those interests totalled only 82.2%, resulting in the figure that he had given for value being slightly overcalculated. It is W's case that in fact H badly undervalued MT in his disclosure.

50. Before I turn to H's valuation of MT, I deal briefly with W's allegation that H, by claiming that he controlled 82.2% (as corrected) of the shares in MT, failed to disclose the extent of his control/potential ownership of MT. This allegation relies on a letter to NatWest dated 23 April 2019 which explained that MT had the right to repurchase shareholders' shares at a pre-determined price. H contends that he was not able to buy back shares at a pre-determined price, but at fair value. In any event, I accept H's evidence that the NatWest letter was simply an attempt by H to raise funds, for which he needed to represent that he had control of MT. The letter does not demonstrate, as W alleges, that H owned 100% of MT. I accept that H should be treated as controlling 82.2% of shares in MT.

51. MT had invested significant sums of money in PL which in turn invested in PD. The investment is one of many which MT had made in different ways in different entities. As the shares were held by PL, it was up to them to make a sale. H was on PL's advisory board.

52. The PL investment in PD was reflected in the MT accounts (and subsequently in H's 2019 disclosure) at the value of the sums paid for the shares. They appear as £7.128m (page 719) and £7.319m (page 3599). It does not matter for these purposes which is the correct figure. However, in the accountant's working papers for MT for the year ending 31 March 2019 under the heading Fixed Assets Investments Valuation Testing there appears the following note:

Note 2 - PD

The client has provided us with the audited financial statements of PL, which is the company that MT has invested through to hold the PD investment.

The financial statements of PL shows us the position of PL and equally the investment in PD. PD is showing a value of £132m at the

end of December 2018, the initial cost value of the investment is £66m.

MT's capital account with PL, shows that their investment is value is $14m which equates to £10.75m, significantly more than the investment held in the balance sheet. However, MT's shares are ranked lower than over [sic] *shareholders and there is no active market to buy or sell.*

Therefore it could be argued that the client has understated this investment. However, because the information on the investment holding has come from PL directly and could not be agreed to an independent source no adjustment to increase this investment holding has been added to A27-1. As there is no active market for the share class held by MT no valuation adjustment can be made.

53. In the PL accounts there appear the following figures:

Fund	**Capital commitment**	**Opening balance 1 January 2019**	**Closing balance 31 December 2019**	**Reference**
PL PD	$7,500,000	$14,076,251	$13,729,310.09	**[SB/471]**
PL III	$2,500,000	$2,752,192.79	$2,963,330.12	**[SB/497]**
PL V	$1,000,000	$663,640.33	$1,024,946.77	**[SB/523]**
PL XYZ	$400,000	$1,040,290.99	$1,074,562.48	**[SB/549]**
PL ABC	$500,000	$468,290.62	$473,119.31	**[SB/575]**
	TOTAL	**$19,000,665.73**	**$19,265,268.77**	

54. For these purposes it is only the first three entries which are relevant, namely PL PD, PL III and PL V. These show that for a capital commitment of $11m the value given is just under $17.5m as at January 2019 and just over $17.7m as at 31 December 2019. This translates to about £14m, or double the sum appearing in the MT accounts.

55. Thus, it is said by W that H understated the value of the PD shares by approximately half. He must, she says, have known that their value was much more than the MT accounts represented; she draws

support from the fact that between 2021-2023 MT received profits of £38m from this investment with another £5-£10m still to come.

56. In response H points out that note 2 concludes that because there is no active market, it is proper for the accounts to show the cost price and he refers me further to paragraph 2A.5 FRS (The Financial Reporting Standard) 102:

There are many situations in which the variability in the range of reasonable fair value estimates of assets that do not have a quoted market price is likely not to be significant. Normally it is possible to estimate the fair value of an asset that an entity has acquired from an outside party. However, if the range of reasonable fair value estimates is significant and the probabilities of the various estimates cannot be reasonably assessed, an entity is precluded from measuring the asset at fair value.

57. W further relies on the presentations made in 2019 by BDO and EY for the purpose of obtaining additional finance which quote high values for the assets held by MT as indicative of H's awareness of the true value of the PD shares.

58. I am not impressed by the argument that H misled W in any material respect by failing to disclose the entitlement of MT to carry in PL; Nor do I consider that the presentation in the accountant's reports for obtaining further finance is indicative of anything other than a not unusual degree of optimism in such presentations.

59. I accept that the value of the shares was volatile but that does not absolve H from his duty to disclose; indeed it may enhance the need for the provision of information.

60. In that context, what is most material is that H presented the figures for MT at £3.5m as being their current value. The fact that the schedule was headed "Net Worth as of 31/03/2019" does not avail him. H's duty to disclose continued up until the PNA was signed. Whilst the accounts of MT may have been properly drawn up in accordance with FRS principles, H cannot hide behind the accounts when he had knowledge that the value of the investment was likely to be significantly greater. I do not regard the fact that the holding was in the name of PL rather than MT as material in connection with his duty to disclose. There has been no suggestion that if H wanted to sell PL would not cooperate. The figure he gave was a material undervaluation.

61. The next allegation in respect of MT relates to the calculations relied upon by H which are the backdrop to his calculation, erroneous as I find it to be in any event, of the value of his shareholding in MT at £3.5m. I have used the word "his" as a shorthand. I accept of course that not all the shares were held in his name and some were held in

the names of his parents which H rightly accepted should be treated as his own.

62. It is in this context relevant to look at the share purchase history of MT when it bought back the shares of various holders. This is illustrated in a table prepared on behalf of W:

Date	Number of shares sold	Cost per share	Cost paid	Total value of MT	Reference
2 March 2018	10,000	£9.08	£90,761	£20,600,000	**[SB/4907]**
24 May 2018	60,000	£17.50	£1,050,000	£30,000,000	**[SB/4910]**
2 April 2020	40,000	£29.275	£1,171,000	£26,350,000	**[SB/4916]**
13 October 2020	54,000	£30	£1,620,000	£27,000,000	**[SB/4919]**

63. This does not tell the whole story because there was an additional share purchase or buy back on 30 April 2019 when 800,000 shares were bought back at the much lower price of £1.50 per share. I do not include any transactions that took place before 2018 or after October 2020 as being too remote from the timeframe material to this case.

64. H and his parents held between them 740,000 shares. If they were to be valued at £18.60 each (the average of the 3 sales before the agreement was signed) they would be worth £13.76m and if valued at £30 each (as they were on 2 April 2020, just before the PNA was signed) the figure rises to £22.2m. If I bring in the sale at £1.50 and use all 4 sale prices with a resulting average of £14.33, the shares are worth £10.60m. Even without weighting for the April 2020 sale (the last before the PNA), the value far exceeds what H quoted.

65. H's explanation of the differing buy back figures was hard to follow. He said that the higher prices of £17.50, £29.275 and £30 per share were sums paid to two business colleagues and one relation as a thank you for the help that they had given him in the business. H gave no explanation as to the methodology underlying the calculation of the figures beyond saying that he wished to reward

them. No such thanks were due to those who received only £1.50 per share. How the value of their shares was calculated was similarly unclear. If 740,000 shares were worth £3.5m, each share would be valued at about £4.70.

66. I find it very hard to believe that H would purchase shares by way of buy back at a price so significantly above that which he quoted to W in his disclosure as their value if he was not aware of the added value. I do not accept that he believed the current value of his shareholding in 2019-2020 to be £4.70 per share. I do not accept that H genuinely believed the total current value of his 740,000 shares to have been £3.5m when he knew that MT had by 8 April 2020 paid out far higher figures to buy back shares. Of course the transaction on 2 April 2020 was after the terms of the PNA had been agreed albeit before it was signed, but there must have been a period of negotiation before then which established the transaction price. I therefore find that there was material non-disclosure as to the value of MT.

Tesla shares

67. Between May-June 2019 H acquired through a business associate a significant shareholding in Tesla. He had long been a believer that these shares were undervalued and had substantial upside, as he had said to W on various occasions. During the course of 2019 more than 5,000 shares were purchased in tranches by TR, largely at around $237 per share, at the behest of H.

68. These shares were bought by an arrangement whereby the third party provided the investment and received interest upon it but with H receiving/bearing any gain or loss. The investment was not apparent in the accounts of MT as an investment as it was inchoate, in the sense that a gain (or loss) would only arise upon sale and the holding was in the name of TR.

69. A couple of the shares were sold in January 2020 and the balance was sold between then and September 2021. By January 2020 the value of the shares had more than doubled from what he paid and by the date of the agreement in April 2020 they were worth a little more than 3x their purchase price. Nonetheless, the shares were volatile and it is dangerous to focus on just one moment in time. By far the biggest sale took place in September 2021 (approaching 80% of the holding) and the vast bulk of the profit was made in that sale.

70. Whilst it is true that no gain or loss had crystalised, the fact is that after March 2019 and prior to the agreement being signed there was a gain in the value of the Tesla shares. But, so far as I can tell on the limited information provided (for example I have not been told what the value of the holding was on the dates that are significant in this

case) the gain is largely attributable to the period after April 2020. Prior to then, and in the context of this case, it was not significant.

71. This was a volatile publicly quoted stock in which W was also invested. It is true that H did not disclose his involvement in a holding of this stock but I am not satisfied that H had an asset which at the time disclosure was required was of or could reasonably be predicted to have a value which made it material to settlement.

HL

72. In his initial disclosure H described both the book value and the estimated value of his holding in HL as at 31 March 2019 to be £935,040. In his Form E of 15 October he explained that he held 1,667 shares out of the 221,670 allotted ordinary shares at an acquisition cost and current value of £50,010. However, in his letter of commentary of the same date his solicitors wrote to say that he had gifted the acquisition funds to a range of other investors and that H estimates "that the value of the shares held by these third parties is £885,030 meaning that when combined with his shareholding the overall shareholding has an estimated value of £935,040."

73. The capitalisation table produced provides a breakdown which was not available to W in 2019 which shows that the figures H gave comprised a mixture of ordinary shares issued at £1 per share in October 2017 and further shares issued in April 2018 at £30 per share. H had bought in at the outset and had paid £1 per share, hence the figure that appeared in his Form E. By his concession that shares held by others should be treated as if his, H accepted that he should be treated as a 79.5% shareholder. W was not to know the different prices paid by H for his shares.

74. In particular H did not disclose that as at April 2018 shares were being issued at £30 per share, and at that price the value of his holding would be worth not £50,010 or £935,000 but £5.285m. H failed to disclose the increase in price between 2 October 2017 and April 2018 and instead quoted only the price he had paid.

75. On 2 December 2019 the company issued a total of 71,736 shares at £75 each of which the majority were preference shares issued to 3 commercial investors. The balance of 21,669 ordinary shares were split between individuals who were to be treated as if H and a smaller number of independent shareholders. The preferred shares were acquired by 2 institutions with whom H had no connected financial interest and by 1 organisation with which he was intimately connected, namely EL.

76. It is obvious that for a commercial investor to purchase shares at £75, it must have done due diligence. The connected commercial

investor correctly recorded in its books the purchase of shares at £75 each.

77. 293,406 shares at £75 each would give a value of £22m to the company. H's deemed holding of 79.5% of the ordinary shares would yield a value of £14.5m.

78. H sought to persuade the court that the price of £75 per share was not really an actual value to any individual, as opposed to an institutional, shareholder because the individual would benefit from EIS relief and thus have a maximum exposure of 40% of £75, namely £30 per share.

79. I did not regard this as persuasive. The combination of the fact that independent commercial finance institutions were prepared to invest £75 per share and the fact that the EIS scheme from which all the individuals benefitted require the transaction to be at proper commercial value is overwhelmingly persuasive of the approximate value of the shares.

80. H accepted that he did not tell W of the transactions at £75 a share but pointed out that he did tell her in an email of the raising of funds from commercial investors. However, the information that he provided her did not permit her to draw any conclusions about the value. It gave no information that would help W ascribe a current value to H's holding. He is right to say that W could have asked for details but he knew that he was holding information which would show that the information previously given by him as to value was not a true representation of current value.

81. I accept that the £75 per share transaction took place after H had given his disclosure. He was not asked about when the commercial institutions were first approached about a purchase of shares at £75 each, but H was under a duty of continuing disclosure. True it was that in his Form E dated 15 October 2019 he made it clear that he was valuing his shares in the company at acquisition cost but under the heading "Total current value of your interest" he gave the same figure. He never corrected or updated the figures. This is a clear example of non-disclosure.

82. On receipt of the draft judgment, H's counsel have sought to argue that W could have made inquiries of Companies House and would have been able to ascertain the price per share in the capital raise. They make the same point about in respect of the transactions referred to at paragraph 72.

83. There are a number of problems with this. First, this point was not raised at trial in argument. I do not know when the material appeared on the Companies House website. W was never asked about it in evidence.

84. Secondly, I do not accept that W was under a duty to make her own inquiries in circumstances when H had made a representation which was, even if initially accurate, overtaken by events. The duty is on H to update, not for W to investigate to see if he is telling the truth and/or his representations still hold good.

85. The above is the answer to the point repeatedly made to me on behalf of H. This is not like the matrimonial home or the joint bank account in Moor J's examples quoted at paragraph 54 of KG v LG. The trading values and matters relevant to the value of this and the other investments to which I have drawn attention were matters known to H and to which W was not privy. She should not suffer from H's failure to provide the material which would give W the full information to which she was entitled.

ER

86. This investment appears in H's Form E at £500k. Stripped to its basics, W's argument is that as it sold in 2021-2022 for nearly £10m (approx. £45m for the whole company), it must be that H undervalued his 20% interest in the business. W says that there is no explanation given for the radical improvement in performance and that the only possible explanation is that H under declared its value.

87. H denies this and refers to the hugely variable performance of the company. The email provided by the CEO of the company in August 2019 refers to the challenges the company was facing and also the possibilities open to the company. It certainly cannot be said to be a clear indicator of a substantial upside.

88. I am not prepared to find that simply because the value of an investment in a speculative venture goes up it follows that H must have knowingly undervalued it. In this case W has simply not provided evidence which persuades me that there has been non-disclosure.

Other non-disclosure

89. H admits to omitting a number of small investments which he should have included in his disclosure. Some of them, such as a beneficial interest in a property owned by his parents, were probably known to W whilst others may not have been. They were not the subject of any significant investigation in the hearing and indeed most were not touched on at all. H rightly points out that his failure to disclose his pension with Aviva was matched by W also failing to disclose her pension in a similar sum.

90. In short, I do not regard any of these minor matters of being of relevance to the decision I have to make. They are insignificant when compared to the sums with which I have been concerned such

that any absence of this disclosure would not have led to a substantially different outcome than that which would be achieved if disclosure had taken place.

91. For the avoidance of doubt, I do not regard as material the failure to disclose the carry arrangements with PL or the arrangement with TR. In each instance what was significant was the value of the underlying investment rather than the arrangement.

92. In reaching my conclusions I have not been swayed by the attack by Mr Southgate KC and Ms Hughes Pugh on H's general credibility. Whether or not he has been taking improper advantage of EIS relief is not something which was helpful to investigate. Nor, am I prepared to accept that I should view his evidence "through the lens of general dishonest behaviour".

93. H asks the legitimate question of how much disclosure should really be expected of him in circumstances where he has so many investments. He claims that he cannot be expected to provide updated information on every one of his investments that he sets out in his schedule of assets. This is not a difficult question to answer. Insofar as he has given information as to the value of an asset, he is under an obligation to update it if there is a material change in value prior to agreement being completed. I accept that in respect of a quoted investment of which W is aware that H holds, W is in a position to make her own enquiry. But, if W is unaware of the investment or if H holds information about it which is not available to W, he is obliged to inform her of any material change.

94. Nor am I impressed by his complaint that whilst W has picked on those aspects of his disclosure which she says are deficient because of his failure to provide an accurate market value, no credit is given by her in respect of those of his assets which since disclosure have reduced in value. The short answer to this point is that if there has been a significant decline in value of an asset then it is up to H to provide such information. He cannot complain subsequent of the event that there has been such a decline which he had not disclosed.

95. I am similarly unimpressed by his reliance on the financial background and knowhow which both H and W share. There is no doubt that each is educated to the highest level and has great experience and knowledge of business and investment. They are both highly articulate and numerate. Of the two of them, H is far more attuned to the advantage of tax breaks and as both agree he is much the more inclined to enter into what might be thought as risky ventures than W. But, their abilities and qualifications do not mitigate the disclosure obligations.

96. Against that background it is not surprising that the majority of the allegations of non-disclosure relate to MT and HL. MT was the

medium through which H's more risky ventures were routed. It was also a business which both regarded as being H's baby. HL was a similar venture. It was clear and accepted that in the future they were to be his to deal with as he wanted. But, none of that negates H's responsibility to give accurate information of value right up to such time as agreement is concluded. Only by doing so could the equal sharing of the family assets which both sought to achieve be properly calculated.

97. In sum, I find that there was material non-disclosure in relation to the value of H's interest in HL (and in particular of the share transactions at £30 a share and £75 a share), the value of his shareholding in MT, and the value of MT's investment in PD via PL. For the avoidance of doubt, I do not find that W's other allegations of non-disclosure are substantiated.

98. I will hear from the parties further as to the way forward in the light of my findings.

Neutral Citation Number: [2024] EWFC 200 (Fam)

Case No: 1663-6645-4570-5013

IN THE FAMILY COURT
SITTING AT THE ROYAL COURTS OF JUSTICE

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 4 July 2024

Before :

MR JUSTICE CUSWORTH

- -

Between :

BI — **Applicant**

- and –

EN — **Respondent**

- -
- -

Rebecca Carew Pole KC and **Kyra Cornwall** (instructed by **Miles Preston**) for the **Applicant**
Lewis Marks KC and **Marina Faggionato** (instructed by **Katz Partners**) for the **Respondent**

Hearing dates: 17 June - 5 July 2024

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JUDGMENT

This judgment was handed down remotely at 10.30am on 26 July 2024 by circulation to the parties or their representatives by e-mail and by release to The National Archives.

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The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media and legal bloggers, must ensure that this condition is strictly complied with. Failure to do so may be a contempt of court.

Mr Justice Cusworth :

1. This judgment is intended to conclude financial remedy proceedings between BI (aged 51), and EN (aged 50). As is conventional I will refer to them as the wife and the husband in this judgment.

2. **Background.** The couple were married in May 2001, and separated in September 2022, so on any view theirs has been a substantial marriage. They have 3 children: B, born in July 2002, so nearly 22; C, born in August 2004, and so aged 19, studying; and D born in June 2007, so aged 17, and still at school, in London studying for his A levels.

3. The parties are both French, and met in France in 1997 whilst studying at a prestigious business school. Having graduated that summer, with an MsC Masters in Business Finance, the husband took a job in Hong Kong, where the wife soon joined him, transferring her place at a business school in Hong Kong from late 1997 or early 1998. The parties were cohabiting from this point. The wife graduated with an MBA in 1998, and began working in Hong Kong. The couple agreed to marry in early 2000. In March 2000 the husband gave notice in relation to his job with the bank, leaving in June that year to start – his first venture as an entrepreneur.

4. By November 2000, following a brief return to professional sport which she herself had first taken up before meeting the husband, the wife obtained what she has described as a 'dream job', working as a telecoms strategy consultant. Meanwhile, the husband's new venture did not flourish, and by March 2001 it was clear that the company was in trouble. The husband says, and I accept, that it had become clear by then that he would need to close it down. It was eventually closed in the following July, and the husband went back to work at the investment branch of a different bank.

5. So it was that the parties were both living and working in Hong Kong at the point of their marriage in May 2001, although the husband's financial position was evidently somewhat precarious.

6. It should be said at the outset that, although much has been in dispute between the parties, both as to the value of the assets which have now been built up during their marriage, and as to the circumstances which should affect their distribution, the principal issues for determination before me have finally been relatively limited. The one issue which will have most impact is

the extent to which the outcome of the wife's application for financial remedies should be impacted by the '*Contrat de Mariage*' ('the contract') which the couple signed in Hong Kong before returning to France for their wedding. I will deal with their respective evidence about that a little later.

7. Less than a year after their marriage, in April 2002, the husband was transferred to London by his then employer, and the wife, who was by then pregnant with their first child, resigned from her job in Hong Kong to relocate with him. B was born in July 2002. In January 2004, the wife returned to work, with a new company as an international strategy consultant, although she reduced her working week from 5 days to 4 in July 2004, ahead of C's birth in August of that year. The company relocated their team abroad in 2005, and the wife was unable to follow them. Instead, the family bought their first home in London and the wife took a job in a different field which she was to continue until 2013.

8. In 2007, the husband lost his job with the bank, but in 2008, with a financial crisis unfolding, he co-founded E Capital, an investment vehicle through which he was soon able to make significant returns as the markets recovered. Whilst the levels of profit appear to have plateaued or fallen recently, the company had enjoyed substantial success during the intervening years, which has led to the amassing of a substantial fortune, the detail of which I will consider later. The parties are however in agreement that, aside from the impact of the contract, all of the assets now held by them, including the husband's business assets and a significant holding in trust, would all otherwise be accounted as matrimonial and so subject to the sharing principle.

9. **The *contrat de mariage*.** The evidence which I have heard about the circumstances surrounding the signing of the contract is therefore of the utmost importance, but there are some significant differences between the parties. I will deal with that evidence under a number of separate headings.

10. Motivation. In her first statement about the contract, the wife says that she has 'struggled to recall anything much at all' about the parties' discussions prior to its signing. She says that she does not believe that they talked about it 'other than in the most brief and insignificant way', because she does not remember any discussion. She says that she thinks if it had been important, she would have been able to remember. She goes on that she is 'almost certain' that it was the husband who first suggested that they sign it. The only context she gives is that the

impetus was linked to the husband's desire to be an entrepreneur. By electing *separation de biens*, as the couple did, she says that it was 'a way of protecting assets in the name of your spouse'. She also thought that the husband did not wish to consult her or get her signature ahead of investments as might otherwise have been necessary. She says that she cannot remember having a discussion with anyone about what it might mean on divorce.

11. The wife in her first statement described her parents as being comfortably off, but not wealthy. She drew no distinction between the social status of her parents and the husband's, whom she described as 'not wealthy either'.

12. She went into more detail in her second statement, after the husband had indicated that he had felt a gap in social class between their respective families at the outset of their relationship. She accepted that when she met the husband, in addition to a home in the Paris suburbs, her parents had also owned a summer holiday home bought in 1995, as well as 2 studios in the mountains. She described how her paternal grandparents were not wealthy after her paternal grandfather, also an entrepreneur, had become bankrupt in the late 1960s. She accepted that her mother's parents had more than those of her father, such that although one of six children, her mother had still received an inheritance of some £1,000,000 in 2013. The overall impression which she gave, and which was confirmed by her parents who both also gave oral evidence to me, was not one of great wealth, but of a comparatively comfortable and well-heeled middle-class family, who were certainly able to enjoy the good things in life without financial concern. However, it is clear that the wife's parents were not so wealthy that their lifestyle could withstand unscathed their divorce in 2003.

13. In his brief statement, the wife's father confirmed that he and her mother had a similar '*separation de biens*' contract because that is what his father-in-law had wanted. However, he denied ever having a discussion, either specifically or generally, about marriage contracts with the husband.

14. The wife's mother in her statement confirmed that she relied on her father to 'sort the legalities' of their contract. She said that she did not really think about what *separation de biens* meant at the time. She denied having any discussions with the parties ahead of their marriage about the terms of any contract. She says that whilst it is probable that she booked the parties' civil wedding, she cannot recall this, and that whilst she was at the civil ceremony where the fact of

the parties' chosen regime was confirmed, she never discussed this with her daughter at the time.

15. By 2003, however, the wife's parents' own marriage was in difficulties. Her mother recounted 3 lengthy telephone conversations with her daughter expressing concerns about the wife's father placing joint funds into accounts in his sole name, to deprive her of her share under the terms of their contract. She also recalls the wife telling her of a conversation she had had with the husband triggered by her concerns about her father's behaviour. She says that she was told that the husband had reassured her that he would not behave in the way that her father had. She recalls a further conversation at their holiday home in the summer of 2004, when the parties were staying with her, when the wife reassured her that she felt that the husband would be respectful and make sure that assets were put into her name. She has not spoken directly to the husband about these things.

16. The husband's evidence is that his parents are of modest means, and did not have a marriage contract. This was not challenged. He drew a contrast with the relative affluence of the wife's family, and said that he found this initially intimidating. I do accept from what I have read and heard that there would have been an appreciable social gulf between the families, which may be as important for these purposes as any financial detail. Whilst it may be that the wife's paternal grandfather's bankruptcy had an effect on the value of his estate, which might have led to her maternal grandfather insisting that her father sign a *separation de biens* contract as he said, the overall impression which the evidence gives is that the wife's family are far more used not only to having money, but also to protecting it and to the risks of losing it over the course of generations.

17. The husband himself says that he does not recall who first raised the subject of a marriage contract after the parties' engagement, but says that he does recall a conversation with the wife's father from which he got the impression that there was an expectation that they would choose *separation de biens*. Despite her father's denial, it is on balance likely that some such conversation would have taken place. In circumstances where the wife's own parents had such a contract, where her own paternal grandfather had suffered bankruptcy as an entrepreneur, and where her maternal grandfather had required her father to sign their contract, it is clear that the risks and benefits of the arrangement were well known to the family. Whilst the opportunity to transfer assets to the wife or into joint names for their protection in the event that the husband's

future businesses proved unsuccessful may have been the primary motivation for the family, I cannot accept that they did not also understand in 2001 that any such contract would also have consequences in the event of a subsequent divorce, at least under French law.

18. Thus whilst I cannot know from the evidence that I have exactly who first broached the subject, I am satisfied that the wife would have understood what a marriage contract is, and its various purposes, and that her family's instincts in the spring of 2001 would have been to have provided for her the sort of protection that her mother had had when she married her father, in light perhaps of the bankruptcy that had befallen her paternal grandfather in the past. This is therefore not a case where the contract has been foisted onto an unwilling and ill-informed ingenue, who signed and then married without any understanding of the consequences.

19. I cannot therefore accept the wife's account that she 'never considered that the contract would be important on divorce'. I do accept that at that stage in her life she would not have considered that a divorce was in any way a likely prospect. When she says that she recalls feeling like she 'had no choice', she was not suggesting that that was in any way due to any inappropriate pressure from the husband. I accept that the main motivation may have been to protect assets (or the wife's share in them) from the vicissitudes of the husband's business career, which did not then look promising. That would at that time have appeared to the wife and her parents to be significant consideration for entering into the agreement.

20. Whether the suggestion came first from the husband, or from the wife, or from the wife's parents, everyone on the wife's side of the family would have understood what the arrangement would connote and how it would operate. In May 2001, the husband's finances were precarious. He had a business venture in the process of failing, whilst the wife was in reliable employment. Neither then had any inherited wealth to protect, but the wife's prospects would have been rather stronger than the husband's. Thus, the contract would offer her a measure of protection and security going forward, in the hope perhaps that the husband would do the decent thing and put property into joint names. Indeed, if anything, the wife's initial lack of recollection about what happened would suggest that she really had few concerns at the time about what was being arranged, rather than she did not have any understanding of what the contract meant.

21. <u>The signing process.</u> The contract was signed in Hong Kong in May 2001, just 7 days before the wedding. Whilst this is a short time, this is not of especial significance in light of my

findings above about the background. The wife professes to remember very little about making the arrangements, and has only a 'faint memory' of going to the consulate. She remembers only a short meeting without specifics. She describes it as a 'tick in the box for the contract to be signed (as part of the many items on the wedding to do list)'. It is notable that she appears to have been unconcerned, notwithstanding that she is a woman of education and intelligence. She does not recall reading the document either before or at the meeting, nor who provided the information for its contents, which included such things as her parents' full names. She says that she does not believe that she can have received any advice, as if she had had it explained she would never have signed it.

22. The husband says that it would have been the wife who contacted the consulate, given his travails at the time with the struggling start-up. He recalls at least 2 meetings, at the first of which they brought identification, explained the regime that they had chosen, and had explained to them the consequences and effect of signing. He says that they could have asked questions if they had any doubts, although he does not recall any. At the second signing meeting, he is clear that the consular notary read out the entire contract, and again there was a facility to ask questions. He describes the feel of the two different rooms in which he says that the two meetings took place. On the basis of his clearer recollection of these events, and the wife's 'faint memory' of these important events, I prefer the husband's account and do find on the balance of probabilities that there were two meetings as the husband says, at the first of which the information which has been typed into the contract ahead of the second meeting would have been provided.

23. The contract itself is in fairly conventional terms, setting out the full names of the parties and their parents. Article 1 records that the parties will adopt the regime of separation of property as the basis of their union, the consequences of which, deriving from the civil code, are then spelt out as relevant in the document (omitting references to the death of either party).

a. *Art.1*. They will respectively retain the ownership, management, enjoyment and freedom to dispose of the movable and immovable property belonging to them personally and such property which may accrue to them subsequently on any basis whatsoever. They shall not be liable for the debts of the other either before or after marriage…

b. *Art.2.* The spouses shall contribute to the charges of the marriage in proportion to their respective abilities…The expenses of joint life which are due and committed to at the time of the dissolution of their marriage shall be the responsibility of each spouse as to one half

c. *Art.3.* Each of the spouses shall be deemed to be the owner of the [*chattels*] for their own personal use, and also of equipment for work…the said items shall be taken over by the person concerned…upon dissolution of the marriage, whatever the magnitude thereof…

All consumable objects…which exist at the time of dissolution of the marriage shall belong…to each of the spouses as to one-half each.

The furniture…and other movable objects adorning the joint accommodation during the marriage and also on the date of dissolution thereof shall be deemed to belong…as to one half to each of the spouses…

Registered securities, claims, businesses and immovable property shall belong to the spouse who is the owner thereof; property of the same nature which is in the name of both shall be deemed to belong to each of them as to one half in the absence of any indication to the contrary in the document of title. [*There are then equivalent provisions for cash, bearer securities and bank accounts*].

d. *Art.4.* Each of the spouses… shall be guaranteed and indemnified by the other spouse…against all debts and commitments contracted by the other spouse during the marriage…

24. At this juncture, I note that another contract carrying similar clauses to those in Art.3, dealing with the consequences of dissolution of the marriage, was considered in *Z v Z* (No 2) (Financial Remedy: Marriage Contract) [2011] EWHC 2878 (Fam). There, Moor J determined as follows from [48], with reference to the contract in that case:

> 48. 'Article 4 provides, among other things, that:-
>
> "*At dissolution of the marriage, the spouses ...will recover all articles of which they substantiate ownership by title, use, make or invoice; articles and assets over which no ownership right is substantiated will be deemed automatically to belong undividedly to each of the spouses half each, irrespective of their value and composition.*
>
> *Real estate, receivables and registered securities will belong to whichever of the spouses is the titular holder. Any assets of such a kind that are in the name of both of the spouses will be deemed to belong to each of them to the extent of half unless the relating documentation indicates otherwise."*
>
> 49. Apparently, it was not necessary to include Article 4 in the Agreement, although the parties may not have known this at the time. The Notaries, however, would have known. Its inclusion therefore provides some support for the proposition that this Agreement was not simply being entered to provide protection to the Wife from any creditors of the Husband.'

25. I consider that the same argument applies here, and that whilst protection from future creditors probably was a primary motivating factor for both parties in entering into the contract, and neither may have had divorce at the forefront of their mind at the outset of their relationship, it was nevertheless very clear from the document that they each signed that under French Law,

the law that they were electing, the contract would have the consequences on divorce which it explained.

26. Mrs Carew Pole KC for the wife has sought to criticise the clarity of the contract as not anywhere specifying that it would be effective in the event of a divorce, nor in using the word 'divorce'. I do not accept that this is a valid criticism. The clear references to the distribution of the parties' assets between them on the dissolution of the marriage can only have one meaning, especially when the alternative outcome when the marriage ends on the death of one of them is also provided for. I am satisfied that the wording set out above was both intended to, and was understood at the time by the parties to, refer to a situation where the parties' marriage came to an end on their divorce.

27. Mrs Carew Pole KC has also referred me to the recent decision of the Court of Appeal in *Standish v Standish* [2024] EWCA Civ 567, where Moylan LJ said from [154]:

> '154. *Radmacher* dealt with nuptial agreements which expressly sought to regulate the parties' financial affairs on the breakdown of their marriage. The agreements being addressed clearly needed a sufficient degree of formality to constitute an agreement to which the court would potentially give effect. This required, for example, that each party: had "all the information that is material to his or her decision"; was "fully aware of the implications of" the agreement; and intended "that the agreement should govern the financial consequences of the marriage coming to an end"…
>
> 156. The sharing principle is applied as a matter of fairness; it is not elective save when the parties have entered into a formal nuptial agreement of the type described in *Radmacher*.'

28. The document in this case was said to be signed before the Vice-Consul and Head of Chancery in the Consulate, and was then 'read over' or '*Lecture faite*' in the French, to the parties before signing. This accords with the husband's recollection that the entire document was read to the parties at the second meeting, contrary to the wife's suggestion that she did not read it. Orally, she suggested that it was not read to her either, but I find that this was something which if not remembered she has forgotten.

29. That French consular officials no longer carry out the duties of notaries for these purposes does not, in my judgement, in any way undermine or impugn the process which the parties went through in 2001, which is one that the SJE on French Law, Laurence Mayer, has opined would be recognised and accepted by a French Court. I accept the husband's evidence that one of the motivations for the parties in entering into the contract was to ensure that, even though they

were then living, and intended to continue to live, abroad, they nevertheless as French citizens wished to submit their marriage to the principles of French Law. That a consular official may not have been competent to give property advice, as Ms Mayer suggests, does not in my view undermine the weight which this agreement should carry.

30. In those circumstances, I am clear that this agreement is of sufficient formality that the court can potentially give it effect, if it is fair to do so, although it can never be more than one of the circumstances of the case that the court must consider in undertaking the statutory exercise mandated by the MCA 1973. I will set out my conclusions as to the parties' intentions, understanding and awareness below.

31. Subsequent reactions. By the time of her own parents' marriage problems from 2003, the wife could not have been, and evidently was not, under any illusion about the potential ramifications of the contract that she the wife had signed. Her mother's evidence that she was 'relaxed' about the workings of the *separation de biens* regime in her own marriage, despite her mother's upset at how her father was perceived as behaving, chimes with her own lack of concern at the time of the signing. That the wife was having conversations with the husband then, during which she was reassured that he would place properties into joint names, and would not take funds from joint accounts and place them into his own name as her father had, makes it clear that she was under no illusion at that time that the contract which she had signed would be effective in the event of a divorce. It is equally striking that there is no suggestion by her mother that she the wife was taken by surprise to learn that this was its effect.

32. Her own evidence is that the fact that the contract might be effective on divorce was something which the wife understood *only* when her parent's marriage ran into difficulties, and that this triggered her to have the conversations referred to above. But on her own account the conversations were around reassurance that the husband would not behave as her father was doing, not that he would not enforce the terms of the contract at all. At this point, in 2003/4, the husband had not yet set up his investment vehicle, and thus placing the homes that they owned into joint names once acquired would have been the extent of any discussion.

33. Further, whilst the parties were then living in London, the yardstick of equality was still a comparatively new concept in the English Court, not yet developed into the sharing principle, and *Radmacher v Granatino* had yet to be decided. It is therefore believable for the wife to

state as she does that it had not occurred to her that the French contract would be important in England, but noticeable that she distinguishes this from her realisation that in France, the contract would be important on divorce. And it is in that context that her conversations seeking reassurance from the husband that properties would be placed into joint names, and that he would not behave like her father, must be seen. She knew that the couple had elected for French law to govern the terms of their marriage.

34. Later, just before D's birth in 2007, the wife says that she asked that the parties have a yearly meeting to discuss such things as the division of the husband's bonuses, as this appeared to become a sore point in the marriage. Within months, however, in September 2007, the husband had lost his regular banking job, and in the next year was to embark on his new investment venture. Thereafter, he did continue to acquire homes for the couple in joint names – a flat in Paris in 2008, the holiday home in 2013, and the family home in London in 2015, but the various business ventures were kept separate. The wife does not suggest that she ever required him to go further as the marriage continued.

35. Disclosure. I am invited by Mrs Carew Pole KC for the wife to consider the husband's evidence in all these matters through the prism of what she says has been persistent inaccurate and late disclosure by him through these proceedings.

36. Her primary point has been that he made no reference at all in his Form E, which was dated 16 December 2022, to the impending sale to a third-party investor of a significant element of his interest (through a company, held in a trust) in a professional sports franchise/club. It is certainly the case that there is no hint in that document of what by then were already non-binding but very well-advanced negotiations for a third party to buy into the club. The husband only said, in a rider to the document, that: *'The respondent is exploring external investment options to strengthen the capital base of the club*'. He then however went on to conclude that it was reasonable to use the net equity of the club to estimate its value, which put at €6.9m, to which he then applied a 20% discount to reflect volatility in the club's earnings, apart from the separate value of some training facilities.

37. In fact, on 21 December 2022, the husband's solicitors did write confirming that discussions with one investor were advanced, which could lead to a capital injection and a partial sale of the club. They then wrote again on 12 January to confirm a 'subject to contract' agreement,

with conditions precedent to be met, for a sale of a 33% stake in the club for €30m, and with a further €10m injection into the club to follow, leading to the passing of a further 10% of the shares.

38. The deal had actually been signed on the previous day – 11 January 2023 – albeit still subject to some conditions precedent. On 1 February 2023, €27m was received by the company (the last €3m remains subject to a retention), but its actual receipt was not then disclosed. At the first appointment in the financial remedy proceedings on 16 March 2023 before Francis J, there was agreement that questions about the valuation of the club should be referred to the SJE, Mr Bezant of FTI. The documents confirming the above were made available in a data room in June 2023, to which the wife's advisors were then given access, and Mr Bezant's report came out on 11 August 2023.

39. The wife's solicitors then wrote on 15 August 2023, requiring the husband to preserve any funds received from the sale of shares in the club to be available to meet the wife's claims in these proceedings. On 1 September, the husband's solicitors replied to the effect that the sale proceeds had been invested or committed, principally in fixed income investments. In fact, whilst some had by then been so invested, a fair amount was still awaiting allocation in liquid accounts.

40. It has been the case that the husband has sometimes been a little late with the meeting of court timetables for responses and disclosure. This has not been an extensive problem, but in circumstances where the wife and her advisers have perceived that they are only told about the existence of liquid funds after they have already been committed, this has only gone to increase tension. Further issues about the existence or not within the trust of segregated income accounts also took up significant time and energy during the hearing, without advancing sensibly the outcome of proceedings.

41. All of these events have led to there being a significant degree of suspicion and mistrust between the parties, which have inevitably led to an increase in the costs of these proceedings. However, whilst there is no doubt that the husband has not been as forthcoming as he might have been about the ongoing process of the transaction at a number of stages, there is little doubt now as to what has been received, where it has been invested and its current value.

42. The palpable frustration and anger between the parties over this issue has, I find in large part, been caused by their different perspectives as to how these proceedings should be concluded. As the wife and her advisors have been proceeding on the basis that she has a sharing entitlement, they have sought oversight in relation to the husband's dealings, and a measure of control over the use and management of the proceeds of the deal. The husband, by contrast, relying on the *separation de biens* agreement enshrined in the parties' contract, has treated the shareholding in the club as his separate property, and has evidently resented the notion that he should make advance disclosure of the various stages of the transaction, certainly before they had been confirmed, or whilst money was still obviously available which the wife might seek to have set aside on account of the settlement to which she felt that she was entitled, but which was still in issue between them.

43. Overall, the husband could certainly have been clearer in his disclosure, both in his Form E, where he failed to disclose a letter of intent, albeit at that stage non-binding, dated 27 October 2022, based on a valuation of €90m; and in the aftermath of his receipt of the €27m, which funds he had already banked before he allowed joint instructions to go to Mr Bezant on 18 April 2023 still referring only to a 'proposed transaction'. By his later seeking to claim discounts for illiquidity in relation to investments made with the received funds – regardless of whether the funds had in fact been invested by the time of the wife's solicitors' letter of 15 August 2023 – he has inevitably fermented further argument, although it remains -the case that even with the discounts sought applied, the investments across the board have gained value beyond any simple interest that might have been applied if the funds had been held as cash.

44. The arguments over this issue have generated much heat between the parties, but ultimately, now that clarity has been achieved as to what has been received and where it has been invested, little is added to any understanding of the key issues in the case. I do not find that the husband's tardiness in revealing the deal, or his receipt of the funds that have flowed from it, have infected his reliability as a witness in other areas. The parties have however each spent a very significant amount on costs as a result.

45. Conclusion on the Contract. Consequently, after carefully considering all of the evidence that I have heard and read in relation to the contract during the course of the hearing, I am entirely satisfied that at the outset of their marriage, and thereafter throughout its length, both of these parties have both understood and acknowledged by their actions and attitudes that they had

elected the *separation de biens* regime to apply to their marriage, and that its consequences in the event of their divorce would be that, subject to the question of what in French law is termed *prestation compensatoire*, and in this jurisdiction is referred to as the meeting of needs, their capital entitlement would be defined by how they held their various properties and other assets. They had all of the information that was material to their respective decisions; were fully aware of the implications of the agreement; and understood and so intended that the agreement should govern the financial consequences of the marriage coming to an end.

46. **The Assets.** Before considering the remaining differences between the parties on applicable tax and discounts to be applied to the valuations of the various assets, the assets now available to the parties (on the basis of the husband's concession that the assets in the trust can properly be classed as a resource of his) may be summarised in the following table:

	agreed/determined	discount/further tax per H	H best case
London Home	£3,720,500		
Paris	-£358,974		
Holiday home	£3,312,068		
Cave	£1,154		
French property A	£8,547		
French property B	£189,037		
French property C	£173,077		
H Banks	£3,038,326	-£22,250	
Company	£23,378,754	-£1,343,851	
H liabilities	-£14,948,914		
W banks	£1,978,184		
W liabilities	-£1,581,315		
joint banks	£42,902		
E Capital	£7,905,983	-£1,581,197	
Property company	£1,166,537	-£1,271,435	
Trust	£108,182,325	-£9,331,482	
tax on trust	-£22,443,554	-£14,351,611	
H pension	£1,401,919		
	£115,166,556	-£27,901,826	£87,264,730

47. The above table incorporates certain findings, which I will explain below, in relation to the value of the club, and in relation to costs of sale and agents' fees. Before determining the outstanding issues in the central column, it produces a range between £115.15m and £87.25m. As the husband accepts, all of that money has been generated during the parties' marriage and would thus, absent the existence of the contract be accounted 'matrimonial'. The wife's prima facie entitlement on a sharing basis in circumstances where the contract is held to have no weight at all would thus appear to be in the bracket between £43.5m and £57.5m, subject to decisions about tax and discounting.

48. The valuation of the club has taken much time and energy during the course of the hearing, in some part because of criticisms of the husband's disclosure in relation to his part sale of the club at around the time of the service of his Form E in December 2022, and in part because of the uncertainty now, in the summer of 2024, as to the future of the club given its performance. It is clear to me that the impact of the club's circumstances upon their future prospects and real net value is to a significant extent unknowable.

49. Each side propose that I adopt as a value one or other of the bases for valuation put forward in the last few months by the husband. I am entirely satisfied that neither represents the true fair position, which is in any event completely impossible to determine conclusively with any hope of reliable accuracy, other than as a fairly arbitrary snapshot.

50. I take the view that the safest outcome for the sake of achieving any degree of sufficient certainty on the asset schedule is to take a mid-point value for the club between the figures calculated by Mr Bezant derived from the two different bases, and have therefore deducted £8m from the figure relied on by the wife, which broadly achieves that end.

51. A simpler equation presented itself in relation to costs of sale and agents fees, where I prefer the husband's figure of 10% overall, on the basis that the transfer costs figure of 6.9% adopted by the SJE valuer does appear to exclude agents' fees. I am satisfied that with the range of valuation provided in the above table, I can fairly assess whether any other outcome not calculated directly proportionately may be considered fair.

52. **The Trust**. I must next address with the argument raised by Mrs Carew Pole KC that by placing the majority of his assets during the marriage into a discretionary trust, the Trust, an

irrevocable Guernsey law trust with trustees based in Geneva, the husband has changed the nature of those assets and rendered them no longer sole property, but rather property to which the sharing principle should apply, even if I find that the contract should otherwise be determinative of capital entitlement.

53. In her report of 9 May 2023 the SJE on French law, Laurence Mayer is very clear that:

'…the liquidation of interests placed in this trust does not seem to pose any particular difficulty, given that the spouses are married under the regime of separation of property and that only the husband's personal property has been placed in said trust. The wife is only entitled to Trust profits but not to the actual entrusted rights.'

'A French court has already had the opportunity to indicate, in a tax dispute, that the beneficiary of income cannot be considered as the owner of movable assets as long as he is not the holder of a real right presenting a patrimonial value.'

'In our case, the trust deed grants the beneficiary, Mrs I, no ownership.'

'According to our reading, the trust deed also does not grant Mrs. I any right of claim (which could potentially have a patrimonial value) as there is a power to remove the right to profits from the spouse.'

'In the distribution of assets under the separation of property contract, Mrs. I would therefore not have any right, strictly speaking, over the assets of the trust.'

54. Thus, in French law it is clear that the establishing of the trust would not have affected the way in which a court might have approached the *separation de bien* arrangement. Whilst that may not be determinative for the purposes of the English law that I must apply, I am clear that I should not treat the assets in trust any differently from the other assets still held by the husband in his sole name in these proceedings.

55. I accept that the husband did not intend by setting up the trust to affect the way in which the assets would be treated on divorce, nor was it a process in which the wife was engaged at all. His assets have not been mingled with hers in the trust. He has correctly acknowledged that the assets in the trust must be treated as a resource of his for the purpose of these proceedings, and the settlement itself would be classed as a nuptial one in English law. However, as the assets would still fall within the protection offered in French law by the contract, I am satisfied that I should not treat them in any different class from the rest of his solely held assets, notwithstanding the wife's status as a discretionary beneficiary of the trust.

56. I am not persuaded either that the absence of reference to the contract in the trust documents indicates in some way that the husband did not consider, at the point of the trust's settlement in

2017, that the contract had any relevance to the financial consequences of divorce. As Ms Mayer has made clear, the fact of the trust would not have affected the way in which the assets which were settled into it would be treated in the event of a divorce in France, and there was thus from the husband's perspective no need for any express reference to the contract within the trust deed.

57. If anything, that the husband does indicate in his 2022 letter of wishes in relation to the trust that there should be an annual distribution to the wife from the profits of the trust in the event of his death or incapacity at a time when they are no longer married, suggests that he was not then anticipating that the wife would be entitled to receive an equal share of the assets held within the trust following any divorce. In those circumstances, such a bequest would have been completely beyond comprehension.

58. Equally, I am not persuaded by Mr Marks KC for the husband that in some way the proportionality of any award which I determine for the wife should be judged only against those assets held by the husband outside of the assets in the trust. These assets are to be treated as matrimonial, and have been accepted by the husband in these proceedings as his resources, and so should be properly included in any cross-check.

59. **The Law**: In those circumstances, I come to consider the law that I must apply in deciding the weight that I should give to the *Contrat de Mariage* which the parties signed. I must consider inevitably the landmark decision in the Supreme Court which now governs courts' approaches to agreements such as this - *Granatino v Radmacher (formerly Granatino)* [2010] UKSC 42, but will start with the useful and accurate precis provided of that decision by Lewison LJ in *Versteegh v Versteegh* [2018] EWCA Civ 1050 at [178]:

> '[178] The key points in *Granatino v Radmacher (Formerly Granatino)…* seem to me to be these:
> (i) Whether a PMA is contractually binding or not is irrelevant. The court should apply the same principles whether or not a binding contract has been made (para [63]).
> (ii) There is no need for black and white rules about the process leading up to the making of a PMA. What matters is whether each party has all the information material to his or her decision, and that each should intend that the agreement should govern the financial consequences of the marriage coming to an end (para [69]).
> (iii) Factors which would vitiate a contract will negate any effect that the PMA might otherwise have had (para [71]). But factors falling short of those which would vitiate a contract may reduce, rather than eliminate, the weight to be given to the PMA (para [72]).
> (iv) If the terms of the PMA are unfair from the start, this will reduce (not eliminate) the weight to be given to it (para [73]).

(v) If the parties to the PMA are nationals of a state in which PMAs are common and binding, that will increase the weight to be given to the PMA (para [74]).
(vi) In principle, if parties have made a PMA there is no reason why they should not be entitled to enforce it (para [52]).
(vii) Thus, the court should give effect to a PMA that is freely entered into by each party with a full appreciation of its implications unless in the circumstances prevailing it would not be fair to hold the parties to their agreement (para [75]).
(viii) Typically, it would not be fair to hold the parties to their agreement if it would prejudice the reasonable requirements of any children of the family (para [77]); or if holding them to the agreement would leave one spouse in a 'predicament of real need' (para [81]).
(ix) But, in relation to the sharing principle, the court is likely to make an order reflecting the terms of the PMA (paras [82], [177]–[178])…

60. Looking then at the separate factors, as relevant here, I will first consider the questions of the necessary levels of advice if any agreement is to be given full weight, and how the court may be satisfied that the parties intended their agreement to be effective. In *Radmacher* (above), in the majority judgment ascribed to Lord Phillips, he said this under the heading '*Factors detracting from the weight to be accorded to the agreement*':

'69. …Sound legal advice is obviously desirable, for this will ensure that a party understands the implications of the agreement, and full disclosure of any assets owned by the other party may be necessary to ensure this. But if it is clear that a party is fully aware of the implications of an ante-nuptial agreement and indifferent to detailed particulars of the other party's assets, there is no need to accord the agreement reduced weight because he or she is unaware of those particulars. What is important is that each party should have all the information that is material to his or her decision, and that each party should intend that the agreement should govern the financial consequences of the marriage coming to an end.
70. It is, of course, important that each party should intend that the agreement should be effective... As we have shown the courts have recently been according weight, sometimes even decisive weight, to ante-nuptial agreements and this judgment will confirm that they are right to do so…
74. The issue raised under this heading is whether the foreign elements of a case can enhance the weight to be given to an ante-nuptial agreement. In this case the husband was French and the wife German and the agreement had a German law clause… When dealing with agreements concluded in the past, …foreign elements such as those in this case may bear on the important question of whether or not the parties intended their agreement to be effective.

61. In this case, disclosure at the time of the Contract was not important to the couple, as neither party had already built up any significant asset base. But I must consider the extent to which the evidence allows me to determine the extent to which the wife in this case can be said to have been fully aware of the implications of the contract. In *Versteegh* (above), King LJ said this about the approach to be taken:

> '[59] The desirability of legal advice forms part of the miscellany of factors which a judge considers before concluding that a party did (or did not) have a full appreciation of the implications of the PMA. Doubtless in some cases its presence or absence will be critical. In the present case, the judge was fully aware that the wife had not received legal advice but, having seen her give evidence, made the clear finding that the wife knew 'full well' the effect of the agreement. The judge said that he was able to 'reach a firm and clear conclusion' and to 'find as a fact that throughout the marriage the wife has known and understood the impact of the PMA' (J1, at para [183]). On the judge's findings there can be no doubt but that the wife clearly felt herself to be bound by the PMA in England and acted to ameliorate its effect.
>
> [60] The parties are Swedish and the wife lived her entire life in Sweden prior to the marriage. PMAs are both commonplace and binding in Sweden. The brief document signed by the wife was in absolutely standard form, written in Swedish and which the wife agreed she understood. The agreement was to be subject to Swedish law. Under this standard agreement the parties elected a regime of separate assets with no delineation as between inherited and other kinds of wealth, all of this in contemplation of their married life being in England not Sweden.
>
> [61] The judge had the benefit of the opinions of three Swedish commentators on family law who confirmed that such formal requirements for a PMA as existed in Sweden at the time were complied with. Further, neither the absence of, nor lack of opportunity to take, independent legal advice (nor the proximity of the signing to the ceremony) would of themselves offend a Swedish court (para [184])…

62. She then continued at [65]:

> [65] In my judgment, when an English court is presented with a PMA such as the present one, signed in a country where they are commonplace, simply drafted and generally signed without legal advice or indeed disclosure, it cannot be right to add a gloss to *Radmacher* to the effect that such a spouse will be regarded as having lacked the necessary appreciation of the consequence absent legal advice to the effect that some of the countries, in which they may choose to live during their married life, may operate a discretionary system…

63. Lewison LJ said this in the same case at [182]:

> [182] …In the case of a globe-trotting couple, it would require the giving of advice about multiple possible matrimonial regimes all over the world. That seems to me to be both impractical and prohibitively expensive. Moreover, if the move from one country to another is not anticipated at the inception of the marriage, why should a couple seek such advice on the off-chance that one day they might move? It is also, in my judgment, inconsistent with the Supreme Court's discussion of 'the foreign element' in *Granatino v Radmacher (Formerly Granatino)* …

64. In this case, there can be no dispute but that the wife understood the force and effect of the contract in French law by the latest in 2003, when her own parents' marriage got into difficulties. Given the evidence that I have considered above, I am clear that on the balance of probabilities the wife did understand at the point of signing in 2001 that the contract which she signed was intended to govern the financial affairs of this couple on divorce, and that she and

the husband were intending by that election for the regime of *separation de biens* to apply to their finances throughout the marriage.

65. The reality may well have been that the wife did not think that the prospect of divorce was other than remote, and that she was far more concerned about protecting assets from creditors in the event that the husband had another business failure. However, I am satisfied by her responses as I have found them to be to her own parents' troubles, that she well knew that in the event of divorce the property arrangements created by the contract were to have effect not just during the marriage but also thereafter.

66. I acknowledge that although we are dealing with a French contract, the agreement was signed in Hong Kong, and for over 20 years the couple have lived in London. However, it is significant that after the signing the couple did return to France for their marriage, and I am satisfied that the fact of the signing in Hong Kong was simply an expedient because they were both living and working there in the lead up to their French wedding. I am also clear that they chose to apply French law to their marriage at the time, having then in 2001 both lived the vast majority of their lives in France and being both entirely French in origin. That they have since then chosen to live and spend their lives elsewhere does not undermine the significance of that choice, in circumstances where neither of them has sought to alter or cancel the agreement in the intervening years. I am satisfied from the contents of the May 2003 *Donation Entre Epoux* that the wife, who is an intelligent and perceptive person, was aware that the contract was not immutable. She has never asked that it be rescinded.

67. As to other factors that may affect the weight to be given to an agreement, Lord Phillips in *Radmacher* said this from [71]:

> '71. In relation to the circumstances attending the making of the nuptial agreement, this comment of Ormrod LJ in *Edgar v Edgar* [1980] 1 WLR 1410, 1417, although made about a separation agreement, is pertinent:
> 'It is not necessary in this connection to think in formal legal terms, such as misrepresentation or estoppel; all the circumstances as they affect each of two human beings must be considered in the complex relationship of marriage.'..
> 72. The court may take into account a party's emotional state, and what pressures he or she was under to agree. But that again cannot be considered in isolation from what would have happened had he or she not been under those pressures. The circumstances of the parties at the time of the agreement will be relevant. Those will include such matters as their age and maturity, whether either or both had been married or been in long-term relationships before…'

68. From the circumstances as I have been able to discern them above, this was not a case where any undue pressure was applied to the wife, nor was her emotional state a matter of any relevance. Indeed, she appears to have been remarkably unmoved by the whole experience. Whilst she now ascribes this to her lack of understanding of the consequences of the document which she signed, as I have explained I find that she did understand what she was agreeing to, and at the time saw no reason not to go ahead. Whilst this was a first marriage for both parties, and all that they now have has been generated since, they were both then highly intelligent and educated people who were making plans for what they hoped and intended would be a successful professional life together.

69. Lord Phillips continued:

> 73. If the terms of the agreement are unfair from the start, this will reduce its weight, although this question will be subsumed in practice in the question of whether the agreement operates unfairly having regard to the circumstances prevailing at the time of the breakdown of the marriage…
> 75. …The problem arises where the agreement makes provisions that conflict with what the court would otherwise consider to be the requirements of fairness. The fact of the agreement is capable of altering what is fair. It is an important factor to be weighed in the balance. We would advance the following proposition, to be applied in the case of both ante- and post-nuptial agreements…:
> '*The court should give effect to a nuptial agreement that is freely entered into by each party with a full appreciation of its implications unless in the circumstances prevailing it would not be fair to hold the parties to their agreement*.'

70. Here, there is agreement that absent the contract all of the assets which the parties now have would be categorised as matrimonial, and so subject to the sharing principle. But that does not mean that their agreement can be classed as one that was unfair from the start. After all, there was plenty of consideration for this wife in her being offered protection from possible entrepreneurial failures that might have bedevilled the husband's future. And I am entirely satisfied that in 2001 this couple saw themselves completely as a French couple, regardless of where they were choosing then to work.

71. What neither of them could with any accuracy have foreseen is the very significant fortune which the husband has now amassed through his business activities. There can be no doubt that the wife has been fully contributing to a long marriage, so the question that I must ask myself, in fairness, is whether, in the events that have since happened, the contract which this couple signed in Hong Kong in May 2001 should now have the effect of significantly reducing the value of her claim. Of course, the fact of the contract of itself has a significant bearing on fairness, as does the fact that, throughout the length of this marriage, there is evidence that the

wife has understood the consequences of the regime that this couple adopted, and whilst she has sought to ameliorate its impact in the past, she has never apparently sought to alter it. I have to consider whether in those circumstances it is now fair to the husband to tear the agreement up, as the wife suggests.

72. There are other factors which are discussed by the Supreme Court in Radmacher that are also pertinent here. Lord Phillips continued:

> '76. That leaves outstanding the difficult question of the circumstances in which it will not be fair to hold the parties to their agreement. This will necessarily depend upon the facts of the particular case, and it would not be desirable to lay down rules that would fetter the flexibility that the court requires to reach a fair result…'

73. That flexibility was emphasised recently by Peel J in *AH v BH* [2024] EWFC 125, when he said at [50]:

> 'It seems to me that the Supreme Court in *Radmacher* and the Court of Appeal in *Brack* have emphasised the latitude and flexibility available to the judge to meet the demands of fairness in cases where a PMA has been entered into by the parties. That latitude and flexibility applies to the assessment of needs as much as it applies to the other s25 factors. Each case is a highly fact specific evaluation and discretionary exercise.'

74. It was put slightly differently by King LJ in *Versteegh* (above), where she quotes other passages from the Supreme Court judgments in *Radmacher*, at [68]:

> [68] At the end of the day, England and Wales is indeed a discretionary jurisdiction, and that in itself provides the wife with her protective safety net. As Lord Phillips of Worth Matravers said:
> '[7] There can be no question of this court altering the principle that it is the court … that will determine the appropriate ancillary relief when a marriage comes to an end, for that principle is embodied in the legislation.'
> And Baroness Hale of Richmond:
> '[163] … the court always has to exercise its own discretion, if there is to be a starting point for the exercise of that discretion it has to be the statutory duty under s 25 of the 1973 Act. This applies to all applications for orders for financial provision, property adjustment and pension provision ancillary to divorce, judicial separation and nullity decrees.'

75. I also have to have in mind the important consideration of autonomy, dealt with by Lord Phillips thus, at [78] in *Radmacher*:

> '78. The reason why the court should give weight to a nuptial agreement is that there should be respect for individual autonomy. The court should accord respect to the decision of a married couple as to the manner in which their financial affairs should be regulated. It would be paternalistic and patronising to override their agreement simply on the basis that the court knows best. This is

particularly true where the parties' agreement addresses existing circumstances and not merely the contingencies of an uncertain future'.

76. Here of course, the 'contingencies of an uncertain future' is exactly what this couple were addressing when they signed their contract, before any children were born, and at a time when the wife was in more reliable employment, and the husband's first business venture was in the process of failure. Lord Phillips considered the problem further at [80]:

> '80. Where the ante-nuptial agreement attempts to address the contingencies, unknown and often unforeseen, of the couple's future relationship there is more scope for what happens to them over the years to make it unfair to hold them to their agreement. The circumstances of the parties often change over time in ways or to an extent which either cannot be or simply was not envisaged. The longer the marriage has lasted, the more likely it is that this will be the case. Once again we quote from the judgment of Rix LJ, at para 73:
> '…the marriage of young persons, perhaps not yet adults, for whom the future is an entirely open book. If in such a case a pre-nuptial agreement should provide for no recovery by each spouse from the other in the event of divorce, and the marriage should see the formation of a fortune which each spouse had played an equal role in their different ways in creating, but the fortune was in the hands for the most part of one spouse rather than the other, would it be right to give the same weight to their early agreement as in another perhaps very different example?'
> The answer to this question is, in the individual case, likely to be "no".'

77. Crucially, the contract in this case does not purport to deal with any more than the couple's interest in their respective property. It does not deal with maintenance or needs more generally, which in France would be dealt with under the principle of p*restation compensatoire*. It is not an agreement that will therefore provide for no recovery from either spouse against the other. It leaves the court to determine how fairly to make appropriate provision for the wife, in circumstances where she has agreed that she should not acquire a share *per se* in the value of the assets which the husband has built up in the marriage.

78. As Lord Phillips in *Radmacher* made clear, this is an important element in the fairness of any agreement when considering how it operates at the point of breakdown of a marriage. He said, from [81]:

> '81. Of the three strands identified in *White v White* [2001] 1 AC 596 and *McFarlane v McFarlane* [2006] 2 AC 618, it is the first two, needs and compensation, which can most readily render it unfair to hold the parties to an ante-nuptial agreement. The parties are unlikely to have intended that their ante-nuptial agreement should result, in the event of the marriage breaking up, in one partner being left in a predicament of real need, while the other enjoys a sufficiency or more, and such a result is likely to render it unfair to hold the parties to their agreement. Equally if the devotion of one partner to looking after the family and the home has left the other free to

accumulate wealth, it is likely to be unfair to hold the parties to an agreement that entitles the latter to retain all that he or she has earned.

82. Where, however, these considerations do not apply and each party is in a position to meet his or her needs, fairness may well not require a departure from their agreement as to the regulation of their financial affairs in the circumstances that have come to pass. Thus it is in relation to the third strand, sharing, that the court will be most likely to make an order in the terms of the nuptial agreement in place of the order that it would otherwise have made.'

79. That this was an acceptable approach was also confirmed in her dissenting judgment in *Radmacher* by Baroness Hale, where she said at [177]:

'[177] … Some of the precedents I have seen are of comparatively wealthy couples making a prediction of comparatively generous sums which ought to provide for the "reasonable requirements" of the recipient spouse in a way which might well have attracted the "millionaire's defence" in the days before *White v White*. In effect, therefore, they are contracting out of sharing but not out of compensation and support.

[178] Provided that the provision made is adequate, why should they not be able to do so? On the one hand, the sharing principle reflects the egalitarian and non-discriminatory view of marriage, expressly adopted in Scottish law (in s 9(1)(a) of the Family Law (Scotland) Act 1985) and adopted in English law at least since *White v White*. On the other hand, respecting their individual autonomy reflects a different kind of equality. In the present state of the law, there can be no hard and fast rules, save to say that it may be fairer to accept the modification of the sharing principle than of the needs and compensation principles.'

80. That of course does not mean that the court will not consider in all the circumstances whether a sharing outcome might nevertheless be appropriate even where it finds that there has been a valid agreement. That was made clear by the judgment of King LJ in *Brack v Brack* [2018] EWCA Civ 2862, where she said at [103]:

'[103] In my judgment, in the ordinary course of events, where there is a valid prenuptial agreement, the terms of which amount to the wife having contracted out of a division of the assets based on sharing, a court is likely to regard fairness as demanding that she receives a settlement that is limited to that which provides for her needs. But whilst such an outcome may be considered to be more likely than not, that does not prescribe the outcome in every case. Even where there is an effective prenuptial agreement, the court remains under an obligation to take into account all the factors found in s 25(2) MCA 1973, together with a proper consideration of all the circumstances, the first consideration being the welfare of any children. Such an approach may, albeit unusually, lead the court in its search for a fair outcome, to make an order which, contrary to the terms of an agreement, provides a settlement for the wife in excess of her needs. It should also be recognised that even in a case where the court considers a needs-based approach to be fair, the court will as in *KA v MA*, retain a degree of latitude when it comes to deciding on the level of generosity or frugality which should appropriately be brought to the assessment of those needs.'

81. **An outcome without sharing**. So I must weigh the fairness to the husband of the court upholding the contract which I find that this couple have understood and accepted throughout their long marriage, against the contributions of the wife over that same period, and whether these can properly be met by an award which does not include any element of sharing – one which, in the language of the MCA 1973, is limited to her 'needs'.

82. Needs here of course is a misnomer, in that what the concept properly reflects where the parties are debating the division of an asset base valued at up to £100 million is not need at all, but rather the provision of an appropriate lifestyle and capital base to provide for the recipient appropriately for the rest of their life in all of the prevailing circumstances.

83. Moor J described the exercise to be undertaken fairly in *CMX v EJX* [2022] EWFC 136 when he said at [48]:

> [48] Finally, I would have to consider her needs. It is clear to me that this is a case where I do not need to consider issues such as whether she will be reduced to 'a predicament of real need' as referred to in *Radmacher*. There is nothing in this Marriage Contract that prevents an award based on needs. As Eleanor King LJ said in *Brack*, in deciding on her needs, I would have to consider all the s 25 factors. This was a long marriage where the wife made a full and complete contribution in every respect. There are very significant resources available. The standard of living enjoyed during the marriage was high. The husband's income was very high and large capital resources were generated. I am quite clear that any award based on need should be generous and complete.

84. I consider that I must in fairness determine what an award for the wife on this basis would amount to, before I can finally consider whether in all of the circumstances such an award will be fair for her, or whether further consideration should then be given to an element of sharing. Without assessing proportionately the element of the parties' overall asset base that the wife will be receiving to provide her with the appropriate lifestyle, such an evaluation could not conclusively determine whether an outcome without any element of sharing can produce fairness for her.

85. In considering what an award on such a 'lifestyle' basis might consist of, I do bear in mind that it may in some cases be appropriate to temper the basis of assessment of any claimed items by reference to the existence of the nuptial agreement. In *KA v MA* [2018] EWHC 499 (Fam), Roberts J expressed herself thus:

> '111. I am satisfied that a fair outcome in the assessment of both housing and income needs in this case must reflect the fact that this wife agreed to restrict the ambit of her financial claims should the marriage end in divorce'.

86. In this case however, I am not persuaded that any such curb would be appropriate. The funds available to the parties in *KA v MA* were somewhat less than those here[1], and an element of the husband's wealth was pre-acquired. The agreement had purported to provide for fixed lump sum for the wife on divorce, which would have severely limited the level at which her needs could have been met going forward. The judge was therefore dealing with a case where a constraint on needs had been agreed, but that constraint was found to be inappropriately limiting. There, the fact of agreed constraint was relevant to the outcome. In this case there was no such agreement, all of the assets have been generated during the marriage, and the value of the assets is perhaps 4 times greater. I therefore do not consider there is any good reason why the fact of the contract should impact on the assessment which I will now make.

87. The relevant factors to consider will be all of those in s.25 of the MCA 1973, and most particularly here in assessing the wife's financial needs and obligations:

a. First consideration will be given to the welfare of D;

b. The resources which have been available to the parties during the marriage, and will be available to the husband going forward;

c. The standard of living which has been available during the marriage; and

d. The contributions which each has made to the welfare of the family.

88. In those circumstances I am not persuaded that it would be appropriate to quantify any award on the basis that the wife should be required, either immediately, or eventually, to move to a smaller or cheaper property. Whilst I do not consider myself bound by its terms as a floor in any way, in this regard I do bear in mind the open offer which the husband made to resolve the wife's claims on 9 May 2024, which, as he was entitled to, he withdrew when it had not been accepted one week before trial, on 10 June 2024.

[1] A range of between £23m and £33m

89. By that proposal, he offered to transfer to her the family home in London, free of any borrowing - £7.65m less costs of sale; the property on the holiday home also free of any borrowing with 12 months - €8.95m less costs of sale; and a lump sum of a further £9m, also within 12 months of the order. In return he sought to retain the parties' small Paris flat; to receive the use of the holiday home property for 3 weeks over every summer; and for the wife to be removed as a beneficiary of the Trust. Aside from ongoing support for the children still in education, he also offered £20,000pa in child periodical payments for D.

90. The total value of this award at asset schedule values, including the wife retaining the net value of her own accounts, would have brought her to just over £22.5m as set out below:

London Home	£7,420,500
Less second mortgage(W to repay)	-£1,500,000
Holiday home	£7,264,957
Lump sum	£9,000,000
W's own funds	£396,869
	£22,582,326

91. In making their offer, the husband's solicitors were very clear that they did not intend to set a floor on the award for trial, as they are entitled to. They made the fair point that it was the husband's case that the wife should not receive both of the parties' principal homes, and also that her budget was significantly overstated. The husband's position at trial was that the wife's needs should appropriately be met at the level of £14.66m – a housing fund of some £7.5m to be split between a home in London and another home in the same place as their holiday home, and a *Duxbury* fund of £7.16m. This was calculated to provide for her £287,692pa – or her Form E budget after an exchange rate correction. The current product of a capitalise calculation for this amount, fully amortising but assuming a state pension for the wife, would be a lifetime net income without step-down of £298,743pa. On the same basis, the £9m offered by the husband's final withdrawn open offer would produce for her £370,743pa.

92. W's last produced budget, with her s.25 statement in March 2024, came to £364,417, but after the same currency adjustment could currently be corrected to £350,932pa. If the costs of maintaining the parties' third property in Paris – a relatively small flat that is used usually by the husband, and the transfer of which to herself the wife is no longer seeking - then a corrected

figure of £25,677pa for those costs can also be removed. The net resultant figure is £325,255pa. A whole life Duxbury figure for income to that level for the wife is currently £7,838,325.

93. In circumstances where this couple have been married since 2001 and both have made a very full contribution, there is no reason why the assessment of an appropriate budget to underpin the wife's award should be anything other than 'generous and complete', to use Moor J's phrase. These parties have had 3 children and have amassed a significant fortune. The wife should not be subject to any too rigorous 'needs' assessment in these circumstances. I acknowledge that the husband has recognised this in the quantum of the offer that he has made. If I find that the contract should be effective to prevent the wife from seeking to make good a claim on the sharing basis, then I see no reason why in budgetary terms I should seek to make any further cuts or downward adjustments to that figure which the wife provided as her final budget in March, and an appropriate income fund would then be not less than £7,850,000 (rounding up).

94. I should add that I have not included into that figure the net funds currently held by the wife in her own name, as that is a fully amortising figure. Whilst the wife may choose not always to spend at her budgeted level and make further capital savings, she will not be required to do so, and should therefore not be obliged also to foreseeably spend what she has left aside.

95. As to capital, Mr Marks KC cross-examined the wife on the basis that there are in London, and in the same place as their holiday home, cheaper properties where she could live perfectly comfortably. I'm sure that that is the case, but in the context of this marriage, and the value of the matrimonial assets available, if not for sharing then to meet the claim for appropriate housing that the wife should have, I can see no reason in fairness why she should be put in a position where before too long she would be forced to downsize from one or both of the properties of which she has had the use during the marriage. There is no issue but that she should retain the London home, and I am satisfied that the husband's open offer to redeem the mortgage on that property for her was appropriately made. There is no question here of proportionality or affordability.

96. As to the holiday home, the question is not so much as to whether the wife should have a property in the same place of that value, and unencumbered – I am satisfied that she should, for the same reasons as given above in relation to the London home. Rather, the question is as to

which party should retain that particular property. I am sensitive to Mr Marks' arguments about the obvious fairness of the 'crown jewels' of a marriage usually being divided between the parties at its end. That argument has particular force where the assets of the marriage are being shared. Here, however, fairness has a broader horizon in circumstances where he also argues that the contract should disentitle the wife to her otherwise substantial sharing claim. In those circumstances, depriving her of the property as her holiday home, proximate as it is to the property that her parents have occupied for many years, would I consider detract from the overall fairness of any outcome calculated on this basis. To have her ex-husband owning the property next door might foreseeably also impact on her ability to spend time with her parents and siblings in the next-door property.

97. I have also carefully considered the husband's proposal that, whichever of the parties is to retain the holiday home, the other should be afforded a 3-week period there with the children during the summer months. He points out that such an arrangement has to date worked for the wife's parents, since their divorce which began 20 years ago. It was, however, clear from the evidence that they gave that whilst they have made the arrangement work, it has not been by any means ideal, much less so now that the property has become the wife's father's main home. I consider that this is the sort of arrangement which the parties can certainly put in place if, when these proceedings are concluded and behind them, they can agree to do so. This, however, would not be an arrangement that I think it appropriate to impose on them at the conclusion of these hard-fought and contentious proceedings. It is also of course the case that the husband can, in the absence of a sharing outcome, certainly afford if he wishes to buy an equivalent property nearby.

98. Insofar as she still maintains it, I do not accept that the wife can advance a sensible claim to the provision of a third property, without the reallocation of the resources otherwise provided to her.

99. So, in the event that I do find that there would be no element of sharing in the wife's claim by reason of the contract, the outcome for the wife would then appropriately be expressed as:

London home	£7,420,500
Holiday home	£7,264,957
lump sum	£7,850,000
W's own funds	£396,869

£22,932,326

100. Given that the husband's own open proposal sets out a basis on which he offered to discharge the mortgages on both properties and pay a similar lump sum within 12 months, I see no reason why he should not be held to those proposed terms. I would also accept as reasonable his proposal for child maintenance.

101. **Fairness.** Having formed that clear view, I turn to consider whether such an outcome would be fair in all the circumstances of the case, or whether, notwithstanding my findings above in relation to the contract, there should nevertheless be an additional element of sharing to this award. I anticipate that, if ever there were to be a case for such an outcome, it would be in a case with a background such as this where significant assets have been built up during a long marriage, but that by reason of an agreement at the outset the right to a sharing outcome at the dissolution of the marriage has apparently been waived. However, after careful thought, I am satisfied that this is not a case where an element of sharing is required to achieve a fair outcome.

102. To now import a sharing element into the award would not in my view be a fair outcome for the husband who has throughout the marriage understood that the *separation de biens* agreement was both understood and operative. I accept that this couple have kept their finances separate during the marriage, other than in the placing of family homes into joint names, which the wife has understandably been anxious to secure, as explained above.

103. Furthermore, an outcome for the wife which leaves her with liquid assets worth very nearly £23m is on any view a substantial award. As a proportion of the whole pot, which I accept by nature is entirely matrimonial, it is somewhere between 20% and 26% of the assets. Whilst this is certainly less than a sharing outcome would have produced, it nevertheless is an amount that does properly reward the wife's contribution. At that level, I am satisfied that no compensation arguments arise, for she could not have hoped for a more secure financial future by her own efforts if she had not made the significant career sacrifices which I acknowledge that she has, both in following the husband to Hong Kong at the outset of their relationship, and then in giving up her job in London when its continuation would have required a relocation to Germany.

104. I am satisfied that this award is fair to both parties, in all of the circumstances of the case, applying as I do the principles in the MCA 1973, and considering in particular the matters identified in s.25. I remind myself of the words of Baron J at first instance in *Radmacher*, later endorsed both by Wilson LJ as he then was in the Cout of Appeal, and by Lord Phillips in the Supreme Court at [83], where she said:

> '119. Upon divorce, when a party is seeking quantification of a claim for financial relief, it is the court that determines the result after applying the Act. The court grants the award and formulates the order with the parties' agreement being but one factor in the process and perhaps, in the right case, it being the most compelling factor . . .'

105. Further, having come to that determination, I will not go on and make any further findings about those areas mainly related to tax and discounting where the parties remain at odds. In the absence of a directly proportionate award, there is no need for such exactitude, and I am satisfied that the bracket within which the amount which I have determined the amount due to the wife (£22.9m) falls (20-26% of the available assets) remains appropriate and fair.

106. I will only add that it may be wise in cases such as this to consider the following course, where the parties have signed a contract such as the one here, or executed an English nuptial agreement, and there are very substantial available assets which are subject to significant valuation issues. Then, at an early stage of any proceedings, a court may consider whether a preliminary hearing as to the validity of the agreement might be appropriate. This would not usually be a *Crossley*[2] type hearing where there would be a strong possibility that at the end of the hearing a claim could be dismissed or significantly curtailed. Rather it might enable the court, on the basis of appropriate findings, to move forward proportionately to carry out the exercise mandated by the MCA 1973. In this case, such a hearing might have saved significant time and money for the parties.

107. Where there is found to be an unimpeached agreement, whether or not purportedly comprehensive, there may well still need to be consideration given to budgets, and to property valuation, to determine whether any receipt under the agreement would be sufficient to meet needs, or to understand the broad range of possible values for the available resources to enable necessary cross-checking to be undertaken. This is especially if those resources would otherwise have been classed as matrimonial. I do not suggest that this would be suitable in the

[2] *Crossley v Crossley* [2007] EWCA Civ 1491

majority of agreement cases. However, taking such a course may in an appropriate case prevent the need for involved accountancy and tax arguments such as have arisen here, in an attempt to achieve extensive and precise cash equivalent valuations of every asset, in circumstances where that level of precision ultimately has not proved to be a requirement of achieving a fair outcome in this case.

108. That is my judgment.

In the Financial Remedies Court sitting at Medway (Remotely) Thursday 18 July 2024

Case Number 1703-0002-1318-3153

Neutral Citation Number: [2024] EWFC 199 (B)

Before DDJ Nahal-Macdonald

In the matter of the Matrimonial Causes Act 1973

Between

NM (applicant/husband)

-v-

PM (respondent/wife)

Preliminary Issue Hearing

Background

1. The case before me today is an ongoing matter within the Financial Remedies Court ('FRC') between the applicant husband and respondent wife. For brevity, I will refer to them either as the applicant or respondent or as H and W, as is customary, no offence is intended. The hearing was for a determination of a preliminary issue. H was represented by Mr GILCHRIST and W by Mr HARLEY, both of counsel.

2. H is a Solicitor-Advocate aged 69 who has practiced primarily in the fields of criminal and regulatory law, and W is a Barrister aged 58 who is the head of the family team at chambers in London. The parties married in 2010 and separated in 2023, on W's account, or around 2020 on H's account. In effect, this is a marriage of medium length in respect of the cannon of caselaw.

3. The petition for divorce was in September 2023. Both parties came to this marriage after earlier relationships of significance. H has three adult children and two grandchildren. W has one child, who is now at university, who was around 4 years old when the parties married.

4. I heard this case on 4 April 2024 at a First Directions Appointment ('FDA'), where it became clear that there was a significant issue in dispute between the parties which needed to be resolved prior to progressing the case, perhaps to a Financial Dispute Resolution hearing ('FDR') or to a consent agreement. I set the case down with directions for both parties to file and serve narrative statements and evidence in support of their competing positions. The court heard evidence today from each of the parties and they were cross examined in turn. Both counsel made helpful submissions.

The Dispute

5. The dispute centres around the interpretation and effect of a Pre-Nuptial Agreement ('PNA') which was agreed between the parties prior to their marriage on 5 June 2010. The PNA is seven pages long, and includes, inter alia, that:

    a. the parties "*agree this is not a marriage where upon [...] divorce a 50:50 division should be applied*" and;
    b. "*both parties enter into [the] agreement free from duress*" and;
    c. "*neither party [took] legal advice, neither party discouraged the other from doing so*" and;
    d. *"both parties agree that they are sufficiently conversant with the law, the effects and application of [the PNA] to enter the agreement without independent legal advice"* and;
    e. *[at paragraph 10] "[W] will not seek to exercise a right in law to a share of the pensions [of H]"* and;

f. *[at paragraph 11] "any inherited wealth should be preserved and separate from the matrimonial assets"*

6. The broad crux of the dispute is, whether most centrally paragraph 18 of the PNA, has the effect either party argues it does: i.e. whether certain properties held in the name of H are non-matrimonial or matrimonial property.

7. H owns three properties in the home counties with an aggregate residual value of around £902,000 after accounting for mortgages and cost of sale; W owns one property in London with a nominal residual value of £824,500 in turn, though each disputes the exact values, those are the values I have adopted today for concision. In the end, as is axiomatic in these cases, the true values will be dictated by the market if the parties cannot agree them, either via Estate Agents or expert valuations.

8. H has greater savings, investments and pension than W, meaning that per the ES2 his total assets amount to £1.7m and W's to £885,000 in round figures. It is agreed that two of the properties held by H, and rented out, were purchased by him during the marriage. What was in issue is the provenance of the funds, vis a vis the effect of the PNA. W specifically avers today that one of the two properties – purchased in 2013 – ought to be considered as a '*second matrimonial home'* as it was, on her view, purchased as a home where the parties would spend holidays and weekends.

9. Broadly, W argues that on the effect of paragraph 18, in context and on her construction of paragraphs 9-11 prior, it would be unfair to consider the property held by H as ringfenced. She further argues the wider point, that even if the property in dispute is, on the face of it, non-matrimonial, that it would be unfair, per s.25 Matrimonial Causes Act 1973, to hold her to that division of assets on a 'needs basis'.

10. H's case is that the paragraph 18 of the PNA should be construed to mean that his property essentially stays his, that W's property remains hers, and that such a construction would still be fair in the circumstances. This is due to the property being specifically excluded from being shared, or later property being the result of 'conversion' also being excluded by virtue of paragraph 18. H's case as to W's needs is that they are met, even based on a roughly 65/35% split, on his construction of the PNA and in respect of fairness and 'needs' as per the framework.

The Law

11. The legal framework was helpfully set out previously for the court by Mr GILCHRIST on behalf of H, and rather than reinvent the wheel, I adopt the salient points as to the approach outlined by him here.

12. The law has long encouraged people to come to agreements and avoid conflict when possible. The seminal case for prenuptial agreements is that of *Radmacher v Granatino* [2010] UKSC 42. If there is a prenuptial agreement, the court should give effect to one that is freely entered into by each party with a full appreciation of its implications unless in the circumstances prevailing it would not be fair to hold the parties to their agreement.

13. There are therefore two limbs as to whether a pre-nuptial agreement should be upheld:
    a. Whether it was freely entered into (aka 'vitiating factors'); and
    b. Whether it is fair not to hold the parties to the agreement in the prevailing circumstances.

14. Vitiating factors may include material non-disclosure or lack of independent legal advice, however this may be context specific, and the fact that both parties to this PNA are lawyers is an important point. The PNA itself provides that they did not take legal advice, did not dissuade each other from doing so, and are both conversant with the relevant law.

15. Even when there is a prenuptial agreement, the court is still under an obligation to take into account the factors in s.25(2) of the Matrimonial Causes Act 1973, per *Brack v Brack* [2018] EWCA Civ 2862 at [103]. The court may then hear an early 'abbreviated' hearing to determine whether the agreement should govern the outcome of the case.

16. Mr HARLEY, in his own very helpful and detailed Skeleton Argument on behalf of W, broadly made similar points as to the framework, with additional context as to the ongoing recommendations of the Law Commission, which I note are not settled law or rules per se, but are indictive of the need for certainty underpinned by legal knowledge or ideally expert advice, in good time in advance of the wedding, where calmer heads might prevail.

17. Mr HARLEY reminds me, as does Mr GILCHRIST, that a qualifying nuptial agreement cannot be used to contract out of providing for a party's *needs*. An agreement attempting to do so will fail as a qualifying nuptial agreement and will be remitted to the court. Agreements that are not qualifying nuptial agreements will continue to be treated as a "relevant factor" under section 25 of the Matrimonial Causes Act 1973 and be subject to the fairness test set out in *Radmacher*. I agree that there is a principle that if needs cannot be met then this is relevant.

18. In summary, at the prior hearing I broadly took the view that I would need to approach the untangling of the competing arguments in this case by reference to a three-stage process: ascertaining the scope and interpretation of the PNA; identifying the source of the funds for each of the assets in dispute; and hearing evidence as to fairness per s.25, which underpins the courts discretion in the FRC. The advocates agreed with that approach, and helpfully narrowed issues prior and during the hearing.

The Operative Parts of the PNA

19. **Paragraph 8** gives a list of disclosed assets to which the agreement is to apply. I find that it essentially creates classes of property for the purpose of the agreement. Those assets included the properties then held by each, personal valuables, cash and pensions.

20. **Paragraph 9** then goes on to make it clear that the intention of the agreement is for the property in paragraph 8 to revert, insofar as possible, to the party who holds it.

21. **Paragraph 10** deals with pensions. It makes plain that W "*has no pension provision*" and that H "*has substantial pensions* [via the Civil Service and private practice]". It goes on to say that W will not seek to exercise a right or claim in law against H's pensions on divorce, and that H would in turn not seek maintenance from W. Broadly I find that it means H keeps all his pensions accrued up to the date of marriage, W has no right to them, and H has no right to pursue maintenance from W.

22. **Paragraph 11** relates to inherited property. The clear plain meaning of the paragraph is that, even if property is to be inherited after the wedding, it is to remain the property of the person who inherited it and not become matrimonial. It is of note that this is duplicated at paragraph 8 in terms of "anticipated inheritance" being an asset particularised there.

23. The previous paragraphs underpin the comprehension of **paragraph 18.** This paragraph deals with the distribution of assets upon divorce. It reads:

"It is the intention of the parties that all other income and assets acquired ***after 5th June 2010, and not arising*** *from the* ***conversion*** *of any* ***aforementioned assets****, should be shared equally. However, both parties recognise that the present running of their respective households exhaust their income."*

24. Mr GILCHRIST submitted that the paragraph turns on two points: (i) **what** are the '*aforementioned assets*' and (ii) **how** are they '*converted*'?

25. H submitted that '*aforementioned assets'* are the ones that are specifically referred to earlier in the agreement, such as:

    i. Disclosed assets (paragraph 8);

    ii. Pensions and maintenance (paragraph 10); and

    iii. Inheritances and gifts (paragraph 11).

26. H submitted that '*conversion'* ought to be given the plain meaning from the Oxford English Dictionary definition i.e. "*the action of turning or process of being turned, into or to something else: change of form or properties, alteration*" and that in this case the meaning of the clause is that the intention of the parties was for assets acquired after 5 June 2010 to be shared as matrimonial property. The effect would be to share all property which had not been hitherto excluded at the prior paragraphs 9-11.

27. W, for her part, did not disagree with the submissions as to how I should approach the construction of those related paragraphs, but did continue to assert that one of the two properties purchased by H in 2013, is de facto a 'matrimonial' asset. She asserted that H lived with her in her central London flat, and that this afforded H savings which supported his ability to buy the 2013 property ('*Granville*').

The competing arguments as they relate to assets held by H

28. It is common ground that two of the three houses owned by H were bought post 2010. The property referred to as '*Granville'* was bought in 2013 and the property known as '*Castalia'* in 2021. They would plainly fall to be considered as matrimonial assets unless H can satisfy the court as to the engagement of paragraph 18 as against the factual matrix. I heard evidence from H and W in turn as to the assets in dispute.

29. It is H's case that he bought '*Granville'* in 2013 using an endowment mortgage policy taken out by him in July 1986, with the balance from a new mortgage product. Plainly, H's argument is that the root of the 'new' asset is *conversion* from an existing asset (and a further liability, being the mortgage).

30. H argued in relation to '*Castalia'* he had purchased this in July 2021 funded by a lump sum from cashing in one of his pensions. H argued that because paragraphs 8 and 10 expressly ringfenced pensions as non-matrimonial assets, to be held by the original owner, this is another example of '*conversion'* from pre-martial assets.

31. It was W's argument in turn that she had certainly contributed indirectly to H benefitting from the two properties, namely by:

    a. The fact that H lived "rent free" with W in the marital home being her mortgage-free flat in central London, which led to economies of scale and savings for him in terms of commuting and overheads, and allowed him to rent out his own home in turn, to generate income; and
    b. By decorating the two properties, maintaining them and providing furniture, without which they would not have been habitable

32. Moreover, W advanced that she had spent weekends and holidays working from *Granville* and noted that it was half an hour from the school in Kent where her child undertook their education. H asserted that he had not been involved in the decision over her child's education, and had purchased the property of his own volition. H disputed the argument that the *Granville* property was a "*second family home*" and instead that it was always intended to be a "*holiday home*" but that he would retain it.

'Fairness'

33. H argued that the PNA is not '*unfair*' simply because the court may have made a different order as to the assets at a Final Hearing. In the matter of *JS v RS* [2015] EWHC 2921 (Fam), Sir Peter Singer held that, where one party puts forward a coherent case for an outcome which appears less advantageous than that which the court might have adopted, the court is under no obligation to make a higher order in line with that it regards as that individual's entitlement.

34. This was the same in the earlier case of *Z v Z (Financial Remedies: Marriage Contract)* [2011] EWHC 2878 (Fam). Mr Justice Moor stated that, had it not been for the prenuptial agreement, he would have divided the assets equally. However, the burden on someone arguing not to uphold an agreement was a heavy one, and there had to be the clearest evidence before a court would contemplate using this as a reason not to enforce the agreement. In that case, the court ended up giving the wife around 40% of the property on a needs-basis.

35. *Radmacher* summarised the three main areas as to whether a prenuptial agreement was fair as:

    i. Children of the Family;

    ii. Non-matrimonial property; and

    iii. Future circumstances

36. H maintained that there is a significant amount of non-matrimonial property, which is the exact thing the agreement was trying to protect. It is also submitted that the agreement meets the future needs and circumstances of the parties. It is not as though there has been some material change in the lives of the parties that were not covered by the agreement itself. The most common future circumstance that would change the needs would be if

there was a child born and one party stayed at home to look after them, but that is not the case here.

37. It is therefore submitted by H that the result of the correct interpretation of the prenuptial agreement is that all parties retain all the assets in their current name (apart from some cash and/or equivalent pension accrual post marriage). This is due to it all be specifically excluded from sharing under the agreement, or from it arising from property that was converted from specifically excluded property.

38. As to income capacity and other resources, H is a solicitor-advocate, working as a consultant. His income is around £119,621.00 per annum. W is a barrister working in family law with 25 years of call. She puts her income at £40,000.00 per annum. It is submitted by H that that is low and that she is not maximising her income.

39. W for her own part says that she has had recent health difficulties but is maintaining her workload at the Bar. She asserts that she is "*coming to the end of [her] career*" which I found puzzling bearing in mind her age relative to H and the nature of this profession, where it is not uncommon for lawyers to continue working, albeit on a reduced basis, for a decade or more beyond her age.

Live Evidence

40. Both parties gave evidence and were cross examined as against oral evidence and the written statements they relied on. I made a preliminary ruling that large parts of the witness statement I ordered from W were irrelevant, characterised by unnecessary innuendo and without an evidential basis, such as would amount to a backdoor attempt at a 'conduct' argument per section 25(2)(g) MCA which was not appropriate or helpful. The advocates agreed not to adduce evidence on those matters.

41. Notwithstanding my recollection is that W sought this preliminary issues hearing, and that it has the effect of being akin to a 'Show Cause' hearing in which the burden would be on the person seeking to not be bound by the PNA, W refused to give evidence first, so H instead agreed to go first.

42. Further to the written statements and skeleton arguments, H was initially asked about the purpose of *Granville* as he saw it, which was now the focussed argument from W. He maintained that this was only a "*holiday home*" and not a "*second family home*" where the family would spend anything like significant or equal time. He accepted that W's child went to school near there, in Kent, but that he was not involved in the choice of school and made the choice of buying that property separately. I found his answers as to *Granville* to be clear, coherent and concise.

43. H was cross examined on the background to the PNA at some length. He maintained that W had drafted and typed the PNA, that her expertise in family law eclipsed his, and that he was happy to sign the document. It was suggested that the document was finalised around May 2010 but not signed until the day before the wedding, but H denied any pressure, '*emotional haze*' or other form of duress on either party. He maintained that both parties were lawyers and neither suffered any duress or second thoughts. H suggested that because the terms are now not favourable to W, she wants to resile from it.

44. H was adamant that the development potential of W's flat in London is perhaps twice the estimated value, because it is part of a four-story block of flats whereas the surrounding buildings are much taller, which makes it attractive for builders.

45. It was put to H by Mr HARLEY that he must have been aware of the case of *Radmacher* as it went through the courts in 2010, but H denied this. I find as a matter of fact that the

Supreme Court did not publish the judgment in that case until October 2010, and the wedding was in June, so I was not attracted to that point.

46. It was put to H that there was a review clause in the PNA, but that neither party reviewed it over the years, and that this was something they should have done, not least as H later moved from a Civil Service prosecution job to a private practice one where he earned more money, perhaps going from around £35,000 to £55,000. H maintained that neither party discussed, nor sought a review of the PNA and this cuts both ways, which I accepted as a matter of fact. I saw no evidence that either party had considered a review over the years.

47. H denied that he has a materially better lifestyle than W, and in fact says that because he no longer has access to the London flat, he can no longer stay there when working or socialising in London, leading to further costs if he needs to work in the capital. I accepted that broadly, the two have a similarly comfortable lifestyle, with certain concessions and not on a lavish basis from the information available.

48. It was put to H at some length that his pension accrued in private practice (indeed, working for one of the biggest and most renowned law firms in the world) between 1976 and 2000 was a highly significant asset, and that he obscured the value of it from W at the time of the PNA. H strongly denied this assertion, maintaining despite persistent and somewhat forceful cross examination from Mr HARLEY that he did not know the value of that pension from 2004 when he left the firm, to 2013 when he drew it down to pay for *Castalia*. He denied this was a lack of transparency on his part, and maintained that the principle of each party keeping inheritance, property and pensions was clear, not the amounts of the same if they were not known. I found it quite concerning that there was assertion being put to the witness absent an expert basis for the calculation, i.e. at one point I intervened when it was suggested that the pension had been worth "*£800,000*" at the time of the PNA, when there is no evidence for this. I took it at face value that H did not

enquire or know about the value of the private sector pension in 2010, nor did W. I found it somewhat unedifying that W seems to be putting to H now that he had hidden the value of this asset from her. I also took note that none of the parties addressed me on what by inference must be 13 years of public sector, defined benefit, pensions, held by H, which are an arguably rarer and often prized asset type.

49. H was cross examined as to what he thought W's needs were, and what she would do in the medium to longer term without a pension of her own. H pointed out that Clause 10 of the PNA clearly demonstrates that it was W's intention to treat the equity in the London flat held by her as a 'pension'. H maintained that the flat, proximal to various desirable areas on the South Bank, could be rented out for, he suggested £1,500 per week. In summary, H maintained that the PNA was freely entered into, was clear on its terms and was not unfair.

50. W gave evidence in turn. She maintained that when *Granville* was purchased it was a "*very happy time*" in the marriage – for instance that this home was used for leisure, entertaining and dinner parties. She explained that the family were part of the local church community, they had a garden and better access to the countryside and open spaces in which to raise her child, who was at all times treated as a child of the family.

51. W maintained that H is wrong about the development potential of the flat in London which she still holds. She maintained that it was "*demeaning*" to suggest that she could rent the flat out and live elsewhere later on, and maintained that she had not known the value of H's private pension, and did not enquire. She maintained in 2010 she was in her forties, and that she was not thinking about retirement.

52. In terms of her practice at the time of the PNA and now, W maintained that she had previously been working at a 'set' which only did crime, and then she moved to her current chambers, where she began to work more in family, and latterly she does do "*a bit*" of matrimonial finance. It was put to W that on her chambers website profile it did indicate

that she practiced in matrimonial finance and in '*TOLATA*' and related matters. W sought to demure from this, indicating that chambers staff write the profiles, and that she was predominantly practiced in private family and care.

53. It was put to W that prior to the signing of the PNA, she had accepted briefs involving financial remedies. She said this was possible. It was put to her that she drafted the PNA, she said this was inaccurate, she "*did not take the lead*" and she "*typed it but didn't draft it*" – which I found to be confusing and an attempt to minimise her role.

54. As to H's private pension, W maintained that she did not know the value of this, and inferred that H had kept "*the magnitude*" of this asset secret. I did not find any compelling evidence to support this inference of secrecy and/or dishonesty by H.

55. W maintained that H had told her father, when asking permission to marry her, that he would "*take care of her*" and made various paternal comments of that nature. W used the term "*crafty*" when speaking about H, which I found to be frankly unhelpful and in contrast to the evidence of H, which had not sought to cast aspersions as to W. It is further axiomatic that both are officers of the court.

56. W suggested that she had wanted the protection of the PNA so that she would not be "*cheated*" out of her flat in London, and agreed that at the time of the marriage, it was the superior property in terms of value compared to the property then held by H. I found this to be persuasive indicative evidence that in terms, W was in fact likely the driving force behind the PNA, though she does now not want to be bound by it.

57. W said that the parties had "*very clear*" discussions at the time *Castalia* was purchased in 2021 as to provision for their respective children, and that this was around the time that H had lost his mother. W's account was that the property was purchased to make "*our future more secure*" and disagreed that this was not discussed.

58. Paragraph 10 of the PNA was put to W – where it says that H had a "*substantial*" pension. W sought to resile from this, and sought to suggest that the clause was written for the benefit of H, and that due to him being older than her, and that it was to protect H in later life as he was closer to needing his pension, and to "*protect her from maintenance claims*". I found this narrative unclear and not compelling.

59. I asked W questions about this at the close of her evidence – i.e. whether the reality is that she was "*doing better*" than H at the time of the marriage (in terms of income, standing in the professions and the value of their respective homes in 2010) and whether on reflection that the attack on the PNA was disingenuous. W denied this, and placed emphasis on the shared impression that the marriage would be longer and more equitable than the PNA suggested.

60. W was asked questions about the beneficence of her father, who the court heard had paid for W's child's tuition and is currently making contributions toward the overheads at university.

61. It was put to W that her income was low for her years of call. She said she did not know as against comparators in the industry whether £40,000 was low for her years of call or area of expertise. She maintained that she worked very hard in a difficult field.

62. It was put to W that there was no medical evidence to support purported medical impacts of menopause or epilepsy. She accepted this, and said that the two conditions in tandem caused fatigue and concern to her, and that she became rundown.

63. It was put to W that she did not provide any mortgage capacity evidence. She said that she did not have affordability, but the lack of any evidence to support this was frankly unhelpful. The court takes note of the fact that there is a difference between a lay person who does not have a mortgage simply telling the court that she has no mortgage capacity,

and not even making enquiries with a broker. It was put to her that she could take a mortgage and use that as a vehicle to pay for somewhere else. W seemed very upset at the suggestion that she would enter the marriage without a mortgage and then have to take one at her stage in life.

64. W said she was "*quite insulted*" when Mr GILCHRIST put to her that H had offered to contribute to the bills on the flat in London. She said this was "*absolute rubbish*". It was put to her that H instead paid for club memberships, nights out and groceries etc. W seemed to begrudgingly accept this was correct, but said that whilst H would pay for meals out, they rarely did go out for dinner, and instead H spent a lot of money on himself including his musical hobby and clothes.

Submissions

65. Both advocates made submissions further to their skeleton arguments and the evidence from H and W. Mr HARLEY for W submitted that the chambers W works from is a lower league set which "*fights for the scraps*" whereas Matrimonial Finance work tends to go to established sets with prestige in this area. It was submitted that W is not in a profitable area of legal work, and that her expertise is not in the requisite area of matrimonial finance to have fully understood the gravity of the PNA.

66. Mr HARLEY emphasised that the wording at paragraph 10 in the PNA -where it says the pension held by H was "*substantial*" – was an elastic term, which is context specific, and that the broad value of that pension fund is as much as £800,000 now, which had W known about it, might have led to a rethink of the terms of the PNA. There was a lack of legal advice, lack of disclosure and those things make the PNA materially doubtful. He invited the court to consider whether if there had been legal advice, disclosure as to the value of the pensions, would the terms of the PNA have been different?

67. Moreover, Mr HARLEY said that the strongest argument for his client was in terms of needs. It was palpably unfair that H is in a much better position than W when there is a dispute as to the use of *Granville*, which W says was used as a second "*family home*", not rented out, and which W views as a matrimonial asset. It is unfair to rely upon W selling off her home or raising a mortgage or having to rent, when H would not be in that position. Mr HARLEY maintained that the adult child of W does require further monetary input and it is unsafe to assume W's father will continue to make that provision, or that W will inherit from him in due course.

68. In turn, Mr GILCHRIST for H submitted that per *Radmacher* – only "*material*" disclosure needs to have occurred – and that is exactly what happened here. The disclosure did not need to be forensic or in greater detail beyond the parties agreeing that the pension was "*susbtantial*" – this was highly indicative in the context of professional people entering into this agreement in the terms they did. He said I should take the PNA on the face of it and not find that the basis was unsafe, and noted that throughout the caselaw are examples of even lay people being bound by the terms of a PNA without legal advice.

69. Mr GILCHRIST suggested that there is no such thing as a "*family*" home in specific terms in the law, there is a "*matrimonial* home" and that the parties spending some time at *Granville*, in terms of weekends and holidays, is not conclusive evidence that the property is "*matrimonial-ised*" per se.

70. It was conceded that there are several pensions held and added to by H during the marriage, which amount to roughly £57,500 in today's money, but the property held in the name of H can all be traced back to pre-marital assets, and are caught by the operative paragraphs in the PNA. It was put that agreements which were fair at the time should be upheld now.

71. It was submitted that I can take note of the support that has been offered throughout the last decade and a half by the father of W toward her child in terms of funding his tuition and maintenance, and that W is an only child, so an assumption can be made that when her father passes away, she stands to inherit from his estate, such that her financial needs will not be in question.

72. Moreover, Mr GILCHRIST submitted that the terms of the PNA, the tracing of the provenance of funds and the rough division of assets now held on the basis of approximately 65/35% were not inherently unfair as against the framework, and that I should not go behind that division now, save perhaps for a balancing payment being made in due course for assets accrued during the marriage, as above.

Findings

73. As to construction first: I found that as a matter of simple construction, paragraphs 9-11 set out the various assets held before the marriage, the intentions of the parties thereafter and a guarantee against seeking pension sharing orders on divorce. Those paragraphs underpinned the use of the word "aforementioned" in paragraph 18, and the word "conversion" carries its ordinary meaning, i.e. if I can trace the provenance of an asset acquired post-marriage to a pre-marital source, then it would not, on the face of it, be caught by the second part of paragraph 18, and would be ringfenced.

74. As to the quality of the Agreement and the factual circumstances when it was signed: As to the point that the two parties are lawyers but did not have specialist skill in the area of matrimonial finance, I accept this. I do not accept that as a matter of interpretation of the caselaw or the circumstances here, they should not be bound by the terms because of an agreed choice not to seek legal advice.

75. I note that in other cases, lay people have been bound by agreements absent legal advice, and the risk of making the choice they did would have been abundantly clear to any lawyer

in that position. I do not accept that the proximity between signing and the marriage is such that it would cause undue influence or emotional haze, as it was put, not least because I heard evidence that the agreement was drawn up at least a month prior. I also find as a matter of fact that W was the one who drafted the agreement, albeit with input from H, and that they ought to take joint credit for it and equally to be jointly bound by its terms, freely entered and not on the face of it perverse.

76. I found that the two houses in dispute, albeit purchased in 2013 and 2021, were from assets 'converted' by H from his pre-existing and pre-earned assets, namely from an endowment dating back to 1986 and a pension dating to his time in private practice, from 1976 onwards. That places them squarely within the protection afforded by paragraph 18 as assets that the person who holds them would keep.

77. In respect of the somewhat novel argument that the property purchased in 2013 is somehow "*matrimonialised*" due to the parties spending time there as a "second family home" I find this to be misconceived. I take the view that when one accepts that the provenance of funds used by H to purchase *Granville* in 2013 was from his pre-marital assets, then in turn the straightforward term "conversion" in the PNA at paragraph 18 is conclusive. To argue that the asset was somehow brought outside of the protection afforded by paragraph 18 by virtue of the family spending time there is to ignore the purpose and scope of the PNA. Indeed, if that were correct then surely H would by extension seek a share in the London Flat, as he would argue it was matromonialised by virtue of the parties mainly treating is as their "*primary* family home".

78. Turning to the consideration of the s.25 conditions as against the facts of this case, and noting that the PNA may be otherwise set aside in certain circumstances, i.e. in needs cases. I find that on a strict interpretation of the framework, this is not a needs case. Albeit with a lesser share – on around 35% of the assets held by W- on the face of it those assets

amount to around £900,000. This is not the type of case where a party would be left homeless or impecunious with that sort of share.

79. W on her own evidence and pursuant to the assets she held at the start of the marriage is not in any different of a position from 2010. Granted, she is older and closer to retirement, but I am not persuaded that she needs to imminently stop working and the evidence I have is from someone who is highly experienced and competent in their field. Instead, I found that even with 35% of the total nominal "pot", W would have enough now and in the future for her needs, and when she does decide to retire, there would be an argument she would then be over-housed and could downsize, as appears to always have been the plan and indicated from the PNA itself.

80. The fact that W has failed to build a pension pot in 40 years of adulthood perhaps belies a reliance on the beneficence of her parents, first in buying the flat in London for her in 2003 and then later in paying for her child to go to private school and now to university. That is not something which H ought to be penalised for, as a matter of law, but it is invidious. W made the point that aged 44 when the marriage began she was "not thinking about retirement" whereas now at 58 she is from her own evidence. Respectfully, the indication from the PNA is that her intention was always to downsize or otherwise treat the London flat akin to a pension. I cannot comment on the financial merit of this approach, it is one she was free to follow as an adult.

81. There are no minor children to account for and the evidence is that the adult child of W is supported by the grandfather. Neither party has any medical evidence of a specific condition or disability which would cause them to stop working immediately.

82. W has a lower income on paper, but I am persuaded that she ought to be able to increase it, noting her years of call in the field, and other outside work available such as in training. I do not accept that because she is working in a set which doesn't provide a lot of profitable

work, she cannot think about other avenues: i.e. working for a local authority in the care field with her experience would provide a higher income than this and indeed a local government pension, or simply looking to change to a different set and diversify into areas of work (including, as it says on her web page, matrimonial finance) which would supplement her income.

83. Further, I note that the Bar Council's annual report into gross earnings at the Bar in November 2023[1] suggests a median gross income for a female barrister in family work at the independent bar of around £150,000. I of course note this is not universal, and "family" will include higher paid areas of work than care, and will also not account for chambers rent and other overheads, but it is indicative. In short, I find that it is more likely that W is not taking steps to maximise her income and ought to do so.

84. In turn, W is younger than H and has longer to work and save until retirement. Her housing needs are in fact met and exceeded. In summary I can find no compelling evidence in support of the PNA being 'unfair' in respect of the inherent safeguards at S.25 of the Act in this case.

85. I note that separately there may still be some liability from H to W for post-marriage accrued assets, including investments or cash. That is a matter for the parties separately from this hearing.

86. My judgment therefore is as sought by H, namely in terms:

i. I declare the prenuptial agreement should be upheld;
ii. I make a clean break order (to effect the agreement in practical terms); and
iii. I find costs are at large and will be addressed on the quantum

[1] At https://www.barcouncil.org.uk/resource/barrister-earnings-by-sex-and-practice-area-november-2023.html

DDJ Nahal-Macdonald

18 July 2024

KREMEN v AGREST (FINANCIAL REMEDY: NON-DISCLOSURE: POSTNUPTIAL AGREEMENT) [2012] EWHC 45 (Fam)

Family Division

Mostyn J

19 January 2012

Financial remedies – Non-disclosure – Husband had consistently failed to provide full disclosure – Assessment of estimated wealth

Financial remedies – Postnuptial agreement – Whether the wife had been offered independent legal advice prior to the agreement – Weight to be given to agreement

In chronic and complex matrimonial proceedings the wife applied for financial orders under Part III of the Matrimonial and Family Proceedings Act 1984. The Russian husband and wife were married for 16 years and had three children, two of whom were of school age and were still dependant on the wife. After 10 years of marriage the couple entered into a postnuptial agreement in Israel but there was no evidence that the wife had been offered independent legal advice and the solicitor who drew up the agreement was a relative of the husband. When the marriage ended the husband failed to comply with an interim maintenance order and fled the jurisdiction. Findings were made during proceedings that the husband's disclosure had been deficient: the wife claimed that the husband had funds in the region of £100m while the husband asserted he had lost all his wealth and now earned £150 pm working in Russia. The husband belatedly claimed the marriage had not been valid due to his already being married at the time of their wedding. The Russian court granted an annulment but under the Matrimonial and Family Proceedings Act 1984, the wife's claim was unaffected. It was likely that the wife would have great difficulty in enforcing a financial order of a sum over £1m which was the amount of money held within the jurisdiction, but that could not affect the assessment of what would be a fair award.

Held – awarding the wife £12.5m –

(1) Where the disclosure given by one party was materially deficient, the court should attempt a realistic and reasonable quantification, even in the broadest terms, of the hidden funds, taking into account direct evidence including documentation and observations of the other party as well as the scale of business activities and lifestyle. The non-discloser could not be permitted to benefit from his non-disclosure. The husband had been found on a number of occasions to be a serial non-discloser who was determined to 'do down his wife by foul means'. Having regard to the hard evidence, scope of business activities and lifestyle an estimation of the husband's fortune at between £20m and £30m was reasonable (see paras [6], [35], [62]).

(2) It could only be in an unusual case where it could be said that, absent independent legal advice and full disclosure, a party could be taken to have freely entered into a marital agreement with a full appreciation of its implications. The wife had entered into an agreement as a result of pressure from the husband and there was a material absence of independent legal advice and disclosure. It would be grossly unfair to the wife to hold her to an agreement which deprived her of her fair share of a fortune of which she had, in her own way, equally contributed. Moreover the agreement would not remotely meet her reasonable needs and grossly prejudiced the needs of the children (see paras [73]–[75]).

Statutory provisions considered
Matrimonial Causes Act 1973, ss 25, 37
Charging Orders Act 1979, s 1(5)
Senior Courts Act 1981, s 49(2)
Matrimonial and Family Proceedings Act 1984, ss 16(2)(d), 18, 23, Part III
Children Act 1989, Sch 1
Civil Procedure Rules 1998 (SI 1998/3132), Part 7

Cases referred to in judgment
Agrest & Another v Kremen [2011] EWCA Civ 259 (unreported) 24 January 2011, CA
Al-Khatib v Masry [2001] EWHC 108 (Fam), [2002] 1 FLR 1053, FD
Austin-Fell v Austin-Fell [1990] Fam 172, [1990] 3 WLR 33, [1990] 2 All ER 455, FD
Ben Hashem v Al Shayif [2008] EWHC 2380 (Fam), [2009] 1 FLR 115, FD
Everclear Limited v Agrest and Kremen [2011] EWCA Civ 232, [2011] 2 FLR 506, [2011] All ER (D) 106 (Mar), CA
Harman v Glencross and Another [1986] Fam 81, [1986] 2 WLR 637, [1986] 2 FLR 241, [1986] 1 All ER 545, CA
Haines v Hill & Another [2007] EWCA Civ 1284, [2008] 2 WLR 1250, [2008] 1 FLR 1192, [2007] BPIR 1280, [2007] NPC 132, CA
Kremen v Agrest [2011] EWCA Civ 1014 (unreported) 13 April 2011, CA
Llewellin v Llewellin (unreported) 30 October 1985, CA
Miller v Miller; McFarlane v McFarlane [2006] UKHL 24, [2006] 2 AC 618, [2006] 2 WLR 1283, [2006] 1 FLR 1186, [2006] 3 All ER 1, HL
Mullard v Mullard (1982) 3 FLR 330, CA
NG v SG (Appeal: Non-Disclosure) [2011] EWHC 3270 (Fam), [2011] All ER (D) 180 (Dec), FD
Paulin v Paulin [2009] EWCA Civ 221, [2009] 2 FLR 354, [2009] BPIR 572, CA
Radmacher (Formerly Granatino) v Granatino [2010] UKSC 42, [2010] 3 WLR 1367, [2010] 2 FLR 1900, [2011] 1 All ER 373, SC
Van den Boogaard v Laumen (Case C-220/95) [1997] ECR I-1147, [1997] QB 759, [1997] 3 WLR 284, [1997] 2 FLR 399, [1997] All ER (EC) 517, ECJ
Z v Z sub nom *Z v Z (No 2) (Financial Remedies: Marriage Contract)* [2011] EWHC 2878 (Fam), [2011] All ER (D) 112 (Dec), FD

John Hamilton and *Christopher Stirling* for the applicant
The respondent did not appear but was assisted by *James Beck* acting as his *McKenzie* friend
Francis Feehan QC for the intervener

Cur adv vult

MOSTYN J:
[1] This should, but probably will not, be the final chapter of this chronic and complex piece of matrimonial litigation. It is the hearing of the application by Janna Kremen (W) for financial orders under Part III of the Matrimonial and Family Proceedings Act 1984 (MFPA) against her former husband Boris Agrest (H). W was granted leave to make this claim by Mr J Cohen QC on 12 February 2009. There is also before me an application by Georgi Chesnokov (GC) for a charging order absolute and a wide-ranging application by Leonid Fishman (LF) which includes, among other extravagant claims, a request that he be paid $10m in satisfaction of a debt owed to him by H.
[2] On 14 February 2011 the final hearing of W's application came before Holman J. He adjourned it and made a number of orders which included the

discharge of an outstanding warrant of committal issued against H. He also, clearly and unambiguously, ordered that both H and W personally attend this hearing. Although on 19 October 2011 the Court of Appeal allowed an appeal by W against the discharge of the warrant by Holman J, I imposed at W's request a stay on its execution, thereby removing any impediment to H's attendance. H has nonetheless not attended, claiming that he cannot afford the air fare and hotel costs, which, as will be seen, is a false excuse. On all previous occasions he has sent his McKenzie friend Mr Beck to court to protect his interest. Strictly speaking it is not proper to allow a McKenzie friend into court if the party whose friend he is, is absent; after all the whole point of the 'McKenzie friend' procedure is the provision of quiet assistance to a litigant in person who is actually there arguing his own case. The same situation presented itself to Holman J in February 2011 and he sent Mr Beck away stating in para [36] of his judgment of 15 February 2011:

> 'A McKenzie Friend is a person who is permitted to sit beside a litigant-in-person in court in order quietly to assist that person in a range of ways fully described in various authorities, and indeed now very fully in the President's Guidance of 14 October 2008, now reproduced at page 2882 of the 2010 edition of the Family Court Practice (the Red Book). All those authorities and everything in that President's Guidance clearly contemplate that a McKenzie Friend is somebody who has a very important role in relation to a litigant-in-person who is himself personally present in the courtroom. There is absolutely nothing in any authority of which I am aware, and certainly nothing in that President's Guidance, to suggest that a McKenzie Friend is somebody who in some way can come to court without the presence at all of the litigant-in-person, but in some way to appear as a representative or advocate on his behalf. Before that can happen, an application has to be made for a case specific grant of a right of audience under the relevant statutory provisions, and no such application has been made to me, or so far as I am aware, to the court.'

[3] However, I have allowed Mr Beck to be in court and to lodge written submissions from H, which were highly abusive both of W and of the court. I have been prepared to read these submissions, albeit with some misgivings, as there is a strongly arguable case that H, being in such blatant disregard and contempt of the extremely clear order of Holman J requiring his personal attendance, has forfeited the right to have any document put in and read on his behalf.

[4] W has complied with Holman J's order and is represented by Mr John Hamilton and Mr Christopher Stirling of counsel. GC is represented by Mr Frank Feehan QC. LF has not attended and is not represented and has lodged an application for the adjournment of his application.

[5] I myself have given three previous judgments in this matter on 16 April 2010, 15 October 2010 and 3 December 2010. The last two are reported at [2011] 2 FLR 478 and [2011] 2 FLR 490. I explained that the background could be collected from the earlier judgments of His Honour Judge Hughes QC dated 16 May 2008, of Mr J Cohen QC of 12 February 2009 and of Thorpe LJ of 16 July 2009. Since my last judgment of

3 December 2010, the following further judgments (in addition to the judgment of Holman J to which I have referred) have been given and can be read on Bailii:

(i) *Agrest & Another v Kremen* [2011] EWCA Civ 259 (unreported) where Black LJ dismissed the applications by H and Mr Fishman for permission to appeal my judgment of 15 October 2010.
(ii) *Everclear Limited v Agrest and Kremen* [2011] EWCA Civ 232, [2011] 2 FLR 506 (9 March 2011), where Mr Chesnokov's appeal against my judgment of 3 December 2010 was dismissed (Wall P, Sedley and Arden LJJ). Mr Chesnokov's application for permission to appeal to the Supreme Court was dismissed on 27 June 2011.
(iii) *Kremen v Agrest* [2011] EWCA Civ 1014 (unreported) (13 April 2011) where Black LJ granted W permission to appeal the order of Holman J dated 14 February 2011.
(iv) *Kremen v Agrest* [2011] EWCA Civ 1482 (19 October 2011) where the Court of Appeal (Thorpe and Arden LJJ) allowed W's appeal from the order of Holman J dated 14 February 2011.

[6] A central factual question for me to decide is whether H is guilty of material non-disclosure, and, if so, what conclusions as to the scale of his resources should be arrived at. In my recent decision of *NG v SG (Appeal: Non-Disclosure)* [2011] EWHC 3270 (Fam) I attempted to summarise the case-law on this topic and stated at para [16]:

> 'Pulling the threads together it seems to me that where the court is satisfied that the disclosure given by one party has been materially deficient then:
>
> (i) The Court is duty bound to consider by the process of drawing adverse inferences whether funds have been hidden.
> (ii) But such inferences must be properly drawn and reasonable. It would be wrong to draw inferences that a party has assets which, on an assessment of the evidence, the Court is satisfied he has not got.
> (iii) If the Court concludes that funds have been hidden then it should attempt a realistic and reasonable quantification of those funds, even in the broadest terms.
> (iv) In making its judgment as to quantification the Court will first look to direct evidence such as documentation and observations made by the other party.
> (v) The Court will then look to the scale of business activities and at lifestyle.
> (vi) Vague evidence of reputation or the opinions or beliefs of third parties is inadmissible in the exercise.
> (vii) The *Al-Khatib v Masry* [2001] EWHC 108 (Fam), [2002] 1 FLR 1053 technique of concluding that the

non-discloser must have assets of at least twice what the claimant is seeking should not be used as the sole metric of quantification.

(viii) The Court must be astute to ensure that a non-discloser should not be able to procure a result from his non-disclosure better than that which would be ordered if the truth were told. If the result is an order that is unfair to the non-discloser it is better that than that the Court should be drawn into making an order that is unfair to the claimant.'

[7] A further key question, which is a mixture of fact and exercise of discretion, concerns the treatment to be given by me to a postnuptial agreement signed by the parties in Israel on 15 May 2001, which was approved by an Israeli court on 3 July 2001 and which was re-confirmed when an Israeli court pronounced a divorce on 13 August 2003. This will require me to consider the judgments of the Supreme Court in *Radmacher (Formerly Granatino) v Granatino* [2010] UKSC 42, [2010] 3 WLR 1367, [2010] 2 FLR 1900, but viewed through the lens of s 16(2)(d) of the MFPA. An added complication is that H now argues that the Israeli court had no jurisdiction to approve a separation agreement or to pronounce a divorce because he and W were never validly married as he was, at the time of the ceremony of marriage, in fact already validly married to a Russian lady, and indeed has in 2010 obtained an annulment from a court in Moscow of his marriage to W. As Black LJ stated in her judgment of 24 January 2011 at para [29]: '… Mr Agrest's case now seeks to say that the Israeli orders were invalid because he was already married and therefore there was no marriage to provoke a divorce in Israel or a separation agreement …'. Of course, this aspect makes no difference to W's claims under Part III, as the jurisdiction is equally exercisable after a foreign annulment. As Holman J stated in his judgment of 14 February 2011 'at the very most the husband's very late assertion that the marriage between these parties was a nullity might require only the relatively technical formality of amendment to the wife's underlying application under Part III and amendment to the language of the grant of leave to apply'.

[8] My task is to make a fair financial award having regard to my findings in relation to the above mentioned matters as well as all the other circumstances of the case as specifically mentioned in s 25 of the Matrimonial Causes Act 1973 (MCA), which is applied by s 18 of the MFPA. In so doing I will apply the familiar distributive principles of needs and sharing, giving first consideration to the welfare of the minor children of the family. The principle of compensation, as an independent ground for distribution, is not applicable to this case, and indeed in the vast generality of cases will not be applicable, it likely being confined only to the exceptional kind of case exemplified by *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24, [2006] 2 AC 618, [2006] 2 WLR 1283, [2006] 1 FLR 1186.

[9] I adopt the same starting point as Holman J who stated in paras [8]–[9] of his judgment of 14 February 2011:

> '… my starting point (albeit I stress that I base it entirely on the judgments of others) is one of enormous sympathy for the plight and position of the wife in her titanic struggle to obtain any justice and any significant funding from her former husband and the father of her children. … At paragraph [29] of his judgment of 16 April 2010 Mr Mostyn described the husband as "a very rich man". Yet this wife and mother has struggled remorselessly to obtain even small sums from him.'

Narrative

[10] The background has been set out in the previous judgments at some length. H is 51; W is 44. They are both Russian and were married in Moscow in 1991. As stated above, H now asserts that the marriage was invalid as he was not at that time divorced from his first wife. On 1 June 1991 their son, G, was born. He is married, has a baby boy and is a student at university in New York. W believes that his expenses are met by H and by his father-in-law. In March 1997 their son, V, was born. He is 14 and is at Charterhouse. His fees are about £34,000 pa and are presently paid by W from the ever-diminishing sums held by the court. In March 2004 their son M was born in Canada. It can be seen that W was pregnant with him at the time of the Israeli divorce. M is at a prep school and his fees are £14,000 pa. W intends that he should follow V to Charterhouse. H does not contribute to the school fees or to the maintenance of the younger boys even though he has been ordered to do so. I do not believe he has much in the way of contact with them.

[11] Although Russian, H obtained Israeli citizenship by virtue of the law of return in 1995, and W likewise as his spouse. In 1994 the parties had also acquired Greek citizenship in circumstances of which I am not aware. I believe that W also has Canadian citizenship. At no time during their marriage did the parties live in Israel or Greece for any appreciable period.

[12] In July 1992 the family moved to Vienna and a family home was purchased in W's name. In 1999 the former matrimonial home, Whitecliff, St George's Hill, Weybridge was purchased for about £2,500,000, mortgage free, in the sole name of W. H and W moved permanently to the UK, and Whitecliff was their main home. It was in relation to a charge dated 25 January 2008 over Whitecliff in favour of LF that my judgment of 15 October 2010 was concerned.

[13] In January 2004 W went to Canada where M was born. In May 2004 she returned here and resumed cohabitation with H.

[14] In May 2007 the marriage was in desperate straits. H commenced proceedings in Israel against W to enforce the postnuptial agreement. As Thorpe LJ put it in his judgment of 16 July 2009 'in the face of that application the wife capitulated and transferred the matrimonial home into the husband's name'. On 8 May 2007 H subjected W to the appalling tirade referred to in para [4] of my judgment of 15 October 2010 and in para [6] of my judgment of 3 December 2010, in which he threatened to leave her destitute. In that latter judgment I explained how it was at about this time that H set about buying for £2.1m the property South Lodge in the name of his close friend Mr Kinigopoulo.

[15] On 14 September 2007 the litigation in this jurisdiction commenced when District Judge Bowman granted W a non-molestation and an occupation

order excluding H from Whitecliff. On that day W also applied for financial relief for the children under Sch 1 of the Children Act 1989. The litigation has ground on unremittingly since then. In my judgment of 16 April 2010 I stated:

> 'This matter first came before the court in, I believe, late 2007. Since then there have been approximately 50 court orders made. The demands that this dispute has made of the family justice system has been prodigious and disproportionate.'

[16] Since then the rate of applications to the court has continued, if anything more furiously.

[17] On 28 April 2008 a 5-day hearing took place before His Honour Judge Hughes QC where W sought:

(a) residence and contact;
(b) a set-aside of the transfer by her to H of Whitecliff;
(c) the sale of Whitecliff;
(d) non-molestation/occupation orders;
(e) orders under Sch 1 of the Children Act 1989.

The set-aside application failed, and in the course of her comprehensive judgment of 16 May 2008, His Honour Judge Hughes QC made some important findings to which I will later refer.

[18] On 21 February 2009 Mr J Cohen QC rendered a comprehensive judgment in which, among other things, he ordered that:

(i) The non-molestation and occupation orders against H were renewed for 12 months.
(ii) W was granted leave to bring proceedings under Part III.
(iii) An interim maintenance order was made in the Part III proceedings that H pay W £8,000 a month and the children's school fees.
(iv) In event of Whitecliff being sold, the proceeds were to be held by the conveyancing solicitors to the order of the court.
(v) Everclear and H were restrained from dealing with or mortgaging Whitecliff. It is this order to which I referred in paras [28]–[32] of my judgment of 3 December 2010.

[19] On 23 February 2009 at Kingston County Court, EFG Bank was granted a possession order in respect of Whitecliff. The property was repossessed on 15 May 2009 when W and the children moved into a two bedroom rented flat in Hersham. Whitecliff was sold on 21 September 2009 to Kendastar Ltd for £3,910,000; after redemption of the EFG mortgage the proceeds amounted to £1,053,720 which were paid into court. W has received various sums pursuant to orders of me and of Holman J; there is as at 16 December 2011 £653,979.60 held by the court funds office.

[20] H failed to pay the maintenance order and a judgment summons came before me on 16 April 2010. I refer to my judgment on that occasion, where I sentenced H to 35 days imprisonment suspended on terms that he paid the sums due. In my judgment at para [35] I found that:

> 'I have come to the clear conclusion that, as regards his obligations to maintain his wife and his children, the husband is actuated by extreme malice towards the wife. He has the means to pay but he refuses to do so.'

[21] Rather than pay, H decided to flee the jurisdiction. It would appear that since that time he has either been in Russia or in Israel. The warrant for his committal was duly issued but as I have explained above, it has been stayed and so there was no impediment to his participating in the final hearing before me. An appeal by H against the committal order made by me was dismissed by the Court of Appeal on 17 September 2010.

[22] Meanwhile there was much activity concerning the validity of the parties' marriage. On 23 July 2009 H's application to the Moscow District Court for the annulment of his marriage to W on the ground that he was already married was granted. W appealed. H also applied to the Israeli court to set aside his divorce to W on the basis of the annulment of his Russian marriage. The Russian Appeal Court set aside the district court order annulling the marriage and remitted H's application to the district court. On 15 January 2010 the Russian District Court annulled the marriage between the parties once again. On 6 May 2010 the Russian Appeal Court dismissed W's appeal against the (re)-annulment of the marriage. On 16 January 2011 the Israeli court refused H's application that his divorce from W be set aside on the basis that his marriage to her had been annulled by the Russian court.

[23] On 15 October 2010 I gave my judgment granting W's application to set aside LF's legal charge over Whitecliff. H's application made in his absence to stay all proceedings pending his application to set aside the parties' Israeli divorce was dismissed. On 24 January 2011 Black LJ refused LF and H permission to appeal.

[24] On 3 December 2010 I gave my judgment granting W's application to set aside the purchase by GC of the shares in Everclear Ltd which owned South Lodge from Mr Kinigopolou (in reality H). GC's appeal was dismissed by the Court of Appeal on 9 March 2011 and his application for permission to appeal to the Supreme Court was dismissed on 27 June 2011. Undaunted, GC then sued H in the Queen's Bench Division on 5 July 2011 for £1,197,774 and interest of £262,526. Judgment in default of defence was awarded on 26 August 2011 and an interim charging order over South Lodge was granted on 19 September 2011. The application for a final charging order has been transferred by the Master to me for adjudication.

[25] On 15 February 2011 Holman J discharged the warrant for committal and made the orders, including adjournment of the final hearing, to which I have referred. W's appeal against the discharge of the warrant was allowed by the Court of Appeal on 19 October 2011, but at W's request its execution was stayed by me on 25 October 2011 when I expressed the view that the whole exercise of appealing Holman J's order seemed totally pointless and futile.

[26] Meanwhile W had formed the view that the purchaser of Whitecliff was a front for H. I granted her an ex parte freezing order and the joinder of Kendastar Ltd on 6 May 2011. She produced some evidence that satisfied me, at least prima facie, that it was arguable that Kendastar was a front for H. Kendastar produced copious affidavit and other documentary evidence which conclusively proved that this was not the case. In so doing it incurred

significant costs in excess of £70,000. Faced with this body of evidence W inevitably had to concede that the order of 6 May 2011 should be set aside and she should pay costs. On 5 July 2011 I ruled that those costs should be assessed on the indemnity basis and further ordered that the sums in court should not be paid out to W pending satisfaction of the costs award or further order. Kendastar's solicitors have apparently produced a costs bill of £107,000; W has employed a costs lawyer who estimates that the sums due will tax out at £38,000.

[27] On 15 October 2011 LF filed an application which sought:

(i) Provision to be made for the imposition of a freezing injunction against [H] and Everclear Ltd whether by themselves, their servants, agents or otherwise that they shall be restrained from taking or permitting any step to be taken that leads to a charge, sale or any disposition or transferring out of the jurisdiction or otherwise dealing with any kind of property including South Lodge, Burhill Road, Surrey, moneys standing to the credit of the court funds office and other bank accounts with intent to defeat a claim for recovery of the debts by the applicant under Part 7 of the CPR as well as the creation of any tenancy of that property save with the written permission of [LF] or order of this court.

(ii) Provision to be made for the imposition of a charge on the South Lodge as well as moneys standing to the credit of the court funds office and any other property items of Mr Agrest located in the United Kingdom for securing the payment of any money due or to become due under the judgment or order.

(iii) Provision to be made for the payment of the debt of Mr Agrest amounting to US$ 10 million (or £6,397,953 calculated at the exchange rate GBP/USD=1.563 as of 6 December 2011) to [LF].

(iv) The net proceeds of sale of the South Lodge, Burhill Road, Walton-on-Thames, Surrey as well as net proceeds of sale of any other property items of Mr Agrest located in the United Kingdom to be released to [LF].

[28] On 28 October 2011 I gave final directions for trial. These provided, among other things, the following:

(i) The application by GC for a charging order absolute made in proceedings numbered HQ11X02561, which proceedings have been transferred to the Family Division by the Queen's Bench Division, shall be heard on 12 December 2011 at the same time as the hearing of the applicant's substantive claim for a financial remedy. …

(ii) The application of LF dated 19 October 2011 shall also be heard on 12 December 2011 at the same time as the hearing of the applicant's substantive claim for a financial remedy. The court, however, notes that the application appears to seek a civil judgment and should properly have been issued pursuant to the

CPR in the Queen's Bench Division. LF is, therefore, put on notice that his application is liable to be struck out for not adopting the correct procedure or venue.

(iii) …

(iv) As to the respondent's various applications contained in his faxed letter of 28 October 2011:

(a) The application that the court pay for his travel and hotel expenses for the hearing on 12 December 2011 is refused as being totally without merit;

(b) The application that £300,000 be released to him from the funds in court, which was not supported by any sworn evidence as to his means, is refused as being totally without merit;

(c) …

(d) The application that the court provide him with a translator at public expense is refused as being totally without merit, the court being satisfied that his command of the English language is highly proficient; and

(e) His application that Mostyn J be recused from the final hearing is refused as being totally without merit. …

[29] It can be seen that H had made a number of untenable applications, all of which were refused.

The means of the parties

[30] Within this jurisdiction there is £653,979.60 with the court funds office. South Lodge has subsided in value since my judgment of 3 December 2010. It may be worth £1.9m. The mortgage is £1.46m. After sale costs it is improbable that there is more than £500,000 to hand. Mr Feehan QC says that there is no more than £400,000, at best. So there is only a little over £1m here in total.

[31] To set against that are the sums owed to Kendastar Ltd, somewhere between £38,000 and £107,000. W has additional debts of £163,464. Although H asserts that W has undisclosed assets comprising land and chattels I am satisfied that she has no other assets of any consequence.

[32] H states that he now has no assets whatsoever, and that he works for a Russian business earning in roubles the monthly equivalent of £150. By contrast, W maintains that he is a very rich man indeed. In para 22 of Mr Hamilton's skeleton argument he writes:

> 'It is submitted there is ample evidence upon which the Court may properly conclude that the respondent has is a very wealthy man indeed. It is impossible to assess his wealth accurately because he has chosen to hide the truth. The logical inference to be drawn is that chooses to do this because he is, as the applicant claims, a very wealthy man. In all the circumstances it is submitted an estimate of his worth as at least £100,000,000, would not be unreasonable on the evidence available.'

[33] On 1 February 2011 W made an open proposal to settle this case for a lump sum of £10m in respect of herself and the children.

[34] Although W will face formidable difficulties in enforcing any sum in excess of £1m there is ample authority to support the obvious proposition that the spectre of these difficulties should not affect my assessment of what is a fair award.

[35] There have already been a number of judicial findings that H is a serious and serial non-discloser who is determined to do down his wife by 'foul means', as Thorpe LJ has put it. Obviously, I must make my assessment anew but the litigation history and judicial findings along the way are plainly relevant to my appraisal.

[36] I am completely satisfied that H has not made a true disclosure to this court. Rather, he has set out from the start actively to mislead both W and this court. His motivation is a mixture of a wish selfishly to protect his fortune for himself, even at the expense of his children, and a desire to inflict the maximum economic harm to W. The view I formed of H in April 2010 has been well fortified in this trial.

[37] Inevitably where a court is conducting the inferential exercise that it is constrained to undertake in a non-disclosure case, the evidence is far from perfect. It is likely to amount to a series of scraps or straws in the wind. This is hardly surprising given that the motive of the non-discloser is to conceal as much as possible from the court and the claimant. In this case it is H's positive case that he was at the time that the family came to England a rich man, but that he has lost everything since. In an affidavit dated 5 February 2009 H stated:

> 'I have not worked since 1998. Having earned approximately US$10m by that time I stopped working as I wanted to devote all my time to my children.'

In an affidavit dated 6 May 2009 he stated:

> 'As previously stated in this affidavit, my financial situation deteriorated rapidly in 2007. I do not dispute that when I came to England I was a man of significant means.'

In an affidavit dated 8 October 2009 he stated:

> 'As earlier in my life I was a successful businessman, I retired in 1998. Since 1998 I have no office and was a passive investor in a few companies. But in 2007 my investments became practically zero due to the actions of Russian Government and wrong business decisions.'

[38] Certainly H advanced himself as of great means in a letter dated 18 June 2004 sent to the authorities here by solicitors, Gherson and Co (who have confirmed they were instructed by him), in which investors' visas were sought for the whole family. This letter stated:

> 'Mrs Kremen-Agrest is able to demonstrate that she owns personal net assets of a value exceeding the sum of £2 million in the form of Whitecliff, Horseshoe Ridge, St George's Hill, Weybridge, Surrey a property, which was purchased in September 1999 for £2,100,000

which has been recently valued at £3,250,000 and which is held in her sole name. We are instructed that there are no outstanding charges or liabilities in respect of the property.

The funds used to purchase this property were derived from her husband's varied entrepreneurial activities which is confirmed in the letter enclosed from Banque Safdie, Mr Agrest's Swiss bankers since 1994. In particular, Mr Agrest began his career in 1982 as an engineer at the Rosgiprovodhoz Institute. In 1984 he commenced work for the Moscow Management Office of "Circus on the Stage" as head of the staging section. He was very successful in this post and by 1986 was promoted to the position of Director of Special Events of the Roskontsert Festival Department. In 1987, when private concerts were permitted in the USSR, he became the Director of the Nautilus Pompilius Group – the most popular group in the USSR at that time.

In approximately 1988, we are instructed that Mr Agrest established a Co-operative in Kazakhstan which was to concentrate on the production of promotional merchandise for the stars on the Soviet stage at that time, having previously obtained exclusive rights to trade such merchandise at their performances.

In 1989, in partnership with others, Mr Agrest established a company called "Red Line Moscow". This company entered into a number of diverse ventures. For example, it opened one of the first independent publishing houses in Moscow, established factories producing and manufacturing permanent magnets using rare metals, headlights and steel-wedded girders for theatrical/concert lighting. The company also engaged in concert based activities and opened an advertising agency. In addition, the company had departments dealing with trade in textiles from China and footwear and furniture from Italy.

We are instructed that a considerable amount of income was generated by the company and its owners by exploiting the difference between credit interest rates and inflation and trading in clearing currencies of countries of the former COMECON (Council for Mutual Economic Assistance).

From approximately 1994, we are instructed that Mr Agrest began to engage in projects connected with oil, for example, settlement of accounts of oil companies and NGDU with energy specialists.

Contemporaneously Mr Agrest was a co-owner of a company called "Slavtek" in Nizltnevartovsk. From 1996 to 1998 he was also a co-owner of the Business-Paritet Bank in Moscow and actively participated in the placing of promissory notes belonging to the company "Interural" for the total sum of US$l50 million.

We are instructed that Mr Agrest, also undertook projects connected with property and was and continues to date to be a co-owner of the company "BioMix" which was concerned with wholesale trade in yoghurts and has investments in the woodworking industry.

From 1998 onwards, we are instructed that Mr Agrest began to limit his involvement in business activities to enable him to devote more time to his family. Since this time, he and Mrs Kremen-Agrest have supported their family with the dividends received from moneys

invested in the companies above, property as well as incomes generated from activities on the bonds markets.'

[39] Further insight into the nature and scale of H's business activities at this time can be derived from the agreements summarised in para [15](i)–(iv) of my judgment of 15 October 2010 which I repeat for convenience:

(i) On 20 January 1997 an agreement, handwritten and unwitnessed, that LF would have the use of all companies registered in H's name in Liechtenstein for 5 years.

(ii) On 21 January 1997, again handwritten and unwitnessed, an agreement that H would pay to LF 'US$500,000 annually within three years (sic) starting from the day of execution of this note'. This was in respect of LF's 'share in profit of the STA Bank Inc., registered in Aiwo, Nauru'.

(iii) On Saturday, 1 February 1997, again handwritten and unwitnessed, an agreement, said to be supersessory of the agreements referred to above, which provided for:

  (a) Transfer by LF to H all of his (LF's) 50% share in all businesses outside Russia including an Austrian entity called BAST, as well as the Liechtenstein firms and the Nauru bank referred to above.

  (b) A current valuation of LF's interests in these businesses of US$2.5m.

  (c) An agreement that H would pay US$5m for LF's interests no later that 1 February 2007.

(iv) On Saturday, 1 February 1997 an agreement, this time typed up and witnessed by four witnesses namely Messrs Dubinin, Klimashevskiy, Frolov and Sheynin. This agreement relates to the Russian businesses of H and LF. It is basically the same as agreement (iii) above. LF was to transfer his 50% share in the Russian businesses to H; that 50% share was valued at $2.5m; but H was given until 1 February 2007 to pay $5m for that 50% share.

[40] Mr Hamilton's chronology also establishes in this period the following events:

(i) July 1992: family moves to Vienna. Family home is purchased in W's name.

(ii) 1997: H buys land in Austria in W's name.

(iii) 1997: flat in Israel purchased in W's name.

(iv) 28 November 1997: H buys land in Russia.

(v) 4 June 1998: H buys flat in Novopodmoskovny, Moscow.

(vi) 26 October 1998: land in Greece bought in W's name.

(vii) 1999: former matrimonial home, Whitecliff, purchased for about £2,500,000 (mortgage free) in the sole name of W.

(viii) 1999: H buys a flat in Herzlia, Israel in W's name.

(ix) 9 April 1999: H establishes Arenta Liechtenstein Stiftung (Arenta). Bank statement shows nearly CHF10 million in the foundation.
(x) 4 July 1999: STA Ltd and STA Aviation Management Services incorporated. H is a director of both.
(xi) 1 September 1999: STA Ltd agrees to buy Grantley Place Esher (6 plots/properties) for £5,375,000.
(xii) 31 December 1999: statement from Arenta Liechtenstein shows foundation has a value of CHF 9,639,546.57. Statement from Pitaro Stiftung Liechtenstein, (of which H is trustee), shows foundation has a value of almost CHF 10m.
(xiii) 17 August 2001: GCC Investments Incorporated. H appointed director.
(xiv) 15 July 2003: H buys 18901 Collins Avenue, Unit 2404, Sunny Isles Beach, Florida 33160.

[41] The picture that emerges of H's means and entrepreneurial activities as at 1999 when the family moved to England, and as at 2004 when the Gherson and Co letter was written, is one of a rich man indeed, albeit perhaps not of the 'mega' variety (as Munby J (as he then was) put it in *Ben Hashem v Al Shayif* [2008] EWHC 2380 (Fam), [2009] 1 FLR 115 at para [68]). There is no evidence of aeroplanes, or yachts moored at Cannes, or of stables of race-horses, or a grand country estate. But there is evidence of considerable wealth, likely to be measured in tens rather than hundreds of millions of pounds.

[42] The core question is whether all this turned to dust in 2007, as H claims. I have noted above that H asserts that since 1998 he has been only a 'passive investor' in businesses. This is certainly untrue.

[43] I turn to consider Jolima Ltd. This company's notepaper gives its address as an office block in Nicosia, Cyprus, but its bank as the St Petersburg bank in Moscow. It is registered in Cyprus but its shareholder is a British Virgin Islands company called Harpendene Ltd. It was incorporated on 26 April 2007.

[44] Mr J Cohen QC referred to Jolima at para [31] of his judgment and described H as the beneficial owner. I myself referred to Jolima as H's alter ego in para [14] of my judgment of 3 December 2010. These findings were well justified. Although we have only the merest glimpses it is plain that Jolima has been used by H to transact very substantial business deals way beyond those of passive investment. I refer to the following:

(i) In the transcript of the dialogue with Mr J Cohen QC H explained how Jolima was the middle-man between a steel production company and the bank. He stated:

> 'If, let's say, if this deal we are working with now successful, which should be, the price of the company should be let's say $100 million … let's say £75 million. … Then my share, because I sold the company I can't receive but I think if they have now renegotiated because now [inaudible] second is available, we are thinking the company has to have about 25

> … Let's say 15% to be on the safe side, it means £15 million and my share should be £15 million if it successfully goes though'.

(ii) In my judgment of 16 April 2010 at para [31] I referred to a letter which purported to describe H's role as a mere employee within Jolima. While I am sure that it was false for the author to have thus portrayed H, the letter demonstrated huge and varied business activity by Jolima. It stated:

> 'Decisions about necessity or business trips are made solely by the company management on the basis of economic expediency. I would like to state that Boris Agrest's business trips are highly effective. Typically 20% of negotiations result in making deals. Boris Agrest's performance is about 90%. Specifically, his business trip to Mauritius resulted in joining a large electric grid company as a founding shareholder, while his business trips to India and Austria resulted in signing profitable contracts with Russian and Norwegian fishing companies. Boris Agrest's trips generate considerable profit for our company, far exceeding their costs. We are going to continue sending Boris Agrest on these business trips that we regard as expedient.'

(iii) In my judgment of 3 December 2010 I referred in para [14], [17](iv), [22] and [24] how Jolima was used to enter into tenancy agreements of South Lodge on and after 27 March 2008.

(iv) In that same judgment at para [25] I described how on 1 March 2009 GC entered into an agreement with Jolima whereby Jolima agreed to act as his agent/consultant in the sale of an ailing Kyrgyzstani bank owned by GC called Akylinvest Bank.

(v) In the EFG memo dated 13 May 2010 referred to in para [10] of my judgment of 16 April 2010 H is described as having investments in Los Angeles and in Russian Banks and described the nature of his business as 'energy/investments'. It is reasonable to suppose that this was largely transacted through Jolima.

[45] H has asserted that Jolima was in fact owned as to 25% by Harpendene and as to 75% by an Austrian company Petrocommerce Invest Consulting. He claims to have no interest in the latter and that he had a one half-share in the former, but that he sold his share for $150,000 to Mr Dubinin on 5 May 2008. As will be seen later, it was in this period that H was doing all he could to divest himself of ownership of assets of which W was aware. Jolima's involvement in the purchase of South Lodge and with Ayklinvest Bank show that H's divesting actions were not genuine.

[46] H has produced a letter from Mr Dubinin written on Jolima notepaper dated 27 May 2010 which describes himself as 'Senior Partner' and which states:

> 'Hereby I confirm that Mr Boris Agrest since 15 May 2010 no longer works as a Representative of Jolima Holdings Ltd. Jolima Holdings Ltd wishes great success in Mr Agrest career and personal life.'

[47] I do not remotely accept that H was ever in fact a mere employee of Jolima or that he has authentically severed his links with it.

[48] Jolima is not the only off-shore company used by H in this period. In my judgment of 3 December 2010 I explained at para [7] that:

> 'On 6 June 2007 contracts were exchanged in relation to South Lodge with H named as purchaser. The purchase money derived from off-shore entities called Garry Trading Inc, Gratex Finance Ltd and Tricommerce SA. On 1 August 2007 South Lodge was transferred into the name of Everclear Ltd as H had earlier assigned the benefit of his contract to buy South Lodge to Everclear upon completion. Thus Everclear was the nominee H decided to use at the time of purchase.'

[49] Although little is known about these entities it is clear that they were used as repositories of H's funds. Gratex Finance Ltd is (or was) a Belizean company; Tricommerce SA is sited in Panama. The EFG memo of 13 May 2008 to which I have referred states 'he has ensured that his newly acquired UK assets are all held in offshore structures and nominees so his ex will not be able to prove his solvency'.

[50] There can be little doubt that these entities are owned by H and contain considerable sums.

[51] In his judgment Mr J Cohen QC referred to two booming business ventures of H's whereby he had a near monopoly on the provision of snack machines in thousands of Russian schools and the provision of some 250 gaming machines at separate sites. He held at para [31]:

> 'He says that although he has been very rich his business activities have suffered greatly. He told me that his first fortune was made by operating some 250 gaming machines which 10 years ago were bringing him in the enormous sum of £40,000 a month. The second fortune was by the provision of snack machines in over 2000 Moscow schools. But he says changes in legislation have brought both those businesses to an end. I have seen no documents about the businesses, their profitability or their demise and I cannot form a view about it. He says that he is now worth nothing and that all his money has gone.'

Within his position statement produced by Mr Beck, H stated that a company called Makensa was set up for participation in the snack machine project. He stated that:

> 'Only three payments were made from the bank account of this company since 16 December 2005 till 7 June 2006 to the total amount of US$45,502.86, as a payment of office rent. This company wasn't used anymore. I have no information about it further destiny.'

[52] In contrast W has unearthed some information about Makensa by virtue of the industry of her private investigator. In his report he wrote:

> 'Our research identified that Makensa Holdings limited was found to be part of the Starpoint Group of Companies. This is a specific network of associated companies involved in the Financial Services sector. Starpoint Trading is a commercial vehicle created to introduce and allow Cypriot and Russian registered businesses to do work with each other. The following information has been obtained on Starpoint Trading:
> Starpoint Trading – Part of the Starpoint Group and Starpoint International Network.
> This company has three main offices located in North America (New York) Contact details being E-mail: nyWistarpoinLhk, Europe (Moscow) The International Center for Logistics BFG-Trans Grant, 25212 Moscow, Russia and China (Hong Kong) Starpoint Trading Limited, Dina House, Ruttonjee Central, 11 Duddell Street, Hong Kong – CEO gp@starpoint.hk. There were over 40 separate businesses making up the Starpoint Group from Russia alone, any one of which could have further connections to the subject of inquiry.'

[53] In October 2005 Dimitry Dubinin was granted power of attorney by Makensa Holdings Ltd.

[54] A further indicator of the utter falsity of H's claim that he was a mere passive investor in a few businesses after 1998 is his admitted participation in a Russian Open Joint Stock Company called Acrylate. According to information publicly available H was a director of this company in September 2009. It was founded in 1999 and is based in Dzerzhinsk, Russian Federation. It produces acrylic acid and monomers. Its products include acrylic acid of E and P grade, and butyl, ethyl, methyl, 2-ethylhexyl acrylates. The company serves Russia and CIS countries. For the first quarter of 2009 the company reported a net loss of 255 million roubles. Sales amounted to 123 million roubles. At that point the company had announced plans to upgrade the existing acrylic acid facility to 60,000 tonnes per year and to build a new $160 million terephthalic acid facility by 2014.

[55] In his position statement H admits that he was a member of the board of this company from May 2004 to November 2006 but claims to have received no payments for his activity. He produced a letter purportedly from the company dated 2 September 2010 written in Russian which apparently confirms this. By contrast a recent printout of company information from Bloomberg Businessweek states that H remains a director. W maintains that by virtue of statements made to her by H that he is, or was, a 20% owner of the company.

[56] At this time very large sums were available to H. On 31 March 2005 H's UBS fixed income non-discretionary portfolio showed a total value of £850,614.95. On 12 September 2005 a statement from the Russian International Bank for H's dollar account showed a balance of US$3m. On 12 October 2005 shares in EFG Bank to the value of £2,599,998 were purchased in the name of H and W. On 12 December 2005 H's Credit Suisse Statement of Investments showed a total value of CHF1,679,777. On

22 December 2006 H received an email from David Hall of EFG Fund Administration Ltd concerning the distribution of £7,095,120 between unit holders in the access feeder unit trust. In May 2007 H received $38,500 half yearly interest on a $700,000 investment into his Credit Suisse current account.

[57] And so it goes. Mr Hamilton's chronology describes many other business ventures and transactions. It would be, as Munby J stated in *Al-Khatib v Masry* at para [49], 'both tedious and a work of supererogation to subject the whole of it to detailed analysis'. In her evidence W told me how H used to boast of his fortune and of how he was in competition to be as rich as his friend Alexander Shishkin who was worth $1bn. She described to me the numerous business trips made by H to Moscow, Zurich, Geneva and Vaduz.

[58] H's case as to the loss of his considerable fortune coincides, unsurprisingly, with the collapse of his marriage to W. Following the abusive tirade of 8 May 2007 H set about divesting himself of assets as detailed in the chronology of Mr Hamilton while at the same time taking steps to buy through nominees the property at South Lodge, as described in my judgment of 3 December 2010.

[59] In a submission put in by Mr Beck dated 11 December 2011 (which was copied to the European Court of Human Rights, the Office for Judicial Complaints, the Financial Ombudsman, the House of Lords and the Daily Mail) H wrote:

> 'Ms Kremen in her court bundle made a claim without any proof that I have control of assets worth 100 min GBP. Relying on support of Mr Mostyn, she made such claims now not only without any proof but clearly contradicts her own signed documents which she submitted to the Home Office, UBS, EFG Banks and where she claimed my total wealth was 10 min. GBP. I categorically deny any ownership over the companies mentioned by Ms Kremen. As she makes such claims without any proof and to stop wasting the Court time I am ready to sign documents Re transfer of ownership of LUKOIL, Petrocommerce Bank, Deutsche Bank Ukraine, Makensa, Kendastar, Hallmark etc to Ms Kremen as well as BP, Sheil (sic), GAZPROM, Dresdner Bank etc.'

[60] In *Al-Khatib v Masry*, Munby J (as he then was) was faced with a similar situation to that with which I am confronted. At para [96] he found:

> 'I do not accept Mr Mostyn's submission that the materials I have seen justify the inference that the husband's wealth amounts to the $200 million which the wife believes it to be. I am not saying that it does not. All I am saying is that the materials I have seen do not properly justify an inferential finding that it does. But Mr Mostyn does not have to go that far. The inference which in my judgment I can properly draw, and which I do draw, is that the full extent of the husband's present wealth is such as will very comfortably justify on a *White v White* basis the kind of award which the wife is seeking. If a figure needs to be put to it I would draw the inference, and do, that the full extent of the family assets (that is the assets of both the wife and the husband) is very comfortably in excess of £50 million and probably

significantly more than that figure. Reference to *White v White* and the size of the wife's claim apart there is, I accept, no process of purely mathematical calculation that can be prayed in aid to arrive at or justify such a figure. But there is one valuable cross-check which can be deployed. I ask myself this question: bearing in mind

(i) my findings as to the continuing scale of the husband's business activities and

(ii) the evidence, summarised in paras [63]–[67] above, as to the size of the commissions the husband can be shown to have been capable of earning, is it reasonable or unreasonable to conclude that the husband over a period of some 20 years was able to amass a fortune of this size? Far from being unreasonable, such a conclusion is in my judgment entirely reasonable.'

[61] Similarly in *Ben Hashem v Al Shayif* he found at para [68]:

'It is quite clear from the wife's evidence, which I accept, that she and the husband enjoyed a very high standard of living, just as it is quite obvious that the husband, whatever his origins, is now a man of significant wealth. But the picture must be kept within the bounds of reality. Whatever the wife's belief – and I neither dispute the honesty of her belief nor dispute that it *may* be correct – the evidence before me does nothing to support her case that the husband's wealth is to be measured in hundreds of millions. Their lifestyle was undoubtedly grand, but it was not marked with the opulence or extravagance one might have expected if the husband was really worth what she says, nor is she able to point to tangible assets remotely approaching in value what she says he is worth. It *may* be that there are hundreds of millions invested in intangibles – I am certainly not finding that there are not – but the picture I have does not suggest it. Theirs was not, for example, a lifestyle characterised by yachts and private jets, nor is there anything to suggest that the husband ever engaged in the kind of expensive hobbies and pastimes one often associates with the mega – or even the very – rich'.

[62] Having worked through the discipline I set myself in para [6] above I stand back and similarly attempt an assessment of H's present fortune. I take notice of the fact that the world economy is in crisis; this must have impacted on the scale and value of H's assets. Having regard to the hard evidence, the scope of H's business activities and lifestyle, I conclude that H's fortune lies in the bracket of £20m–£30m.

The postnuptial agreement

[63] I have given an outline to this piece of the history in para [7] above. H has produced an unsigned statement from a Mrs Damsky dated 16 March 2008 who states that W approached her in February 2001 to draw up an 'Agreement of Marital Separation'; and that the parties attended before an Israeli judge on 3 July 2001 who approved it. Further, in 2003 W approached Mrs Damsky again to represent her in a divorce; and that on 13 August 2003

the parties were divorced in Israel where the court again approved the agreement. Mrs Damsky states that she is not a cousin of H's but W has stated to me that she is a distant relative. Mrs Damsky did not attend to give oral testimony to me.

[64] The agreement is dated 15 May 2001 and provides, in summary, the following:

(i) H will pay in full for the children's education until each achieves 25 years of age.
(ii) W will retain all real estate outside England in her name.
(iii) W will transfer all real estate in England in her name to H.
(iv) $1m will be paid to W.
(v) Any sums in accounts in excess of $1m will go to H.
(vi) 'Contemporaneous to the performance of the conditions of this contract, the spouses affirm that they will not bring against one another any claims or legal actions of any kind resulting from and/or relating to their marriage and in contravention of the terms of this contract.'

[65] In her statement Mrs Damsky stated:

> 'In February 2001, Mrs Janna Agrest turned to me with a request to draw up an agreement of Marital Separation (hereinafter: "the Agreement") and children education, to the case if she will decide to separate from her husband and live apart. Mrs Janna Agrest asked me to represent her, and draw such an agreement, that in a case of their separation, it will guarantee her material situation, and she herself stated me her demands about dividing the mutual property. Mr Boris Agrest agreed to all her demands, mentioned that he does not planning a separation or divorce, and signed the Agreement.'

In her oral testimony W firmly denied this account and stated that the entire arrangement was instigated by H. That evidence was not challenged and I accept it. What is striking about Mrs Damsky's evidence is what she does not say. She does not say that she gave any legal advice to W as to the content of the agreement and as to what rights under English, Israeli or any other law she was giving up.

[66] At the time that the agreement was entered into, the only land in W's name outside England was in Austria and worth about €500,000. W states that in 2005 H used emotional duress to influence her to give a power of attorney to a friend of his who sold the property and kept the proceeds. W in fact lodged a criminal complaint about this in Austria which appears to have got nowhere. H denies this and says that on the sale of the property W received €530,000. I have no doubt that W's evidence is true, and that she received nothing on the sale of the Austrian property.

[67] Following this agreement nothing was done at all to implement it until May 2007. As explained in the judgment of Mr J Cohen QC and in my judgment of 15 October 2010 at para [25] H did pay to W the $1m but

prevailed on her to give it back to him almost immediately, since when the money has disappeared. In his judgment at para [23] Mr J Cohen QC described H's stance thus:

> 'The husband was due to pay the money back by 31 December 2007 with interest. He has not paid any of it back, save for £10,000. He says he cannot pay it back. It has all gone. So the wife finds herself having handed over the property, which is very valuable, and lost virtually every penny of the million dollars that she was due to receive. The husband shrugs his shoulders and says: well, I have lost much more than that over the last year or so. She is bound, he says, by the 2001 Israeli agreement. She made a bad investment when she lent it to me. Too bad. She is stuck with it. That, to me, is at least at first sight a deeply unappealing argument.'

[68] I should mention two prior findings concerning the agreement and later divorce. In her judgment His Honour Judge Hughes QC found at para [21] that:

> 'Although the wife seeks to say that it was the husband's idea to seek the 2001 agreement following a violent attack by him upon her (see B4) that is not supported by Mrs Damsky's account to which I have already referred. Mrs Damsky says it was the wife who approached her and the husband went along with the terms and, of course, the 2001 agreement was approved by the Israeli Court and incorporated into the 2003 divorce. I am not in the least persuaded that the documents were in Hebrew or that the wife did not understand them or the divorce proceedings at the time. I do not believe for one minute that the wife did not know until the spring of 2007 that the parties had been divorced in Israel in 2003.'

In contrast Mr J Cohen QC found:

> '[14] On 13 August 2003 in the presence of both parties the marriage was dissolved in Israel. There are several bizarre aspects about this. The wife says that she did not know that the marriage had been dissolved and Judge Hughes did not believe her on this. But before the judge there was not the document which appears in my bundle at 2:53, a document which the husband might have claimed privilege about but was happy for me to see, which shows that he consulted solicitors in 2007 about proposed divorce proceedings, and they had trouble finding out where the marriage certificate was, but the note says that he confirmed there is one in the safe. The solicitors were asking subsequently whether he had found out whether there had been proceedings in Israel and he said that he had not yet found out. So it appears that he was uncertain as to whether or not there had been a divorce.
> [15] Even stranger than that, the parties have lived together as man and wife at all times, both before the agreement and its registration in 2001, and the divorce in 2003. Indeed, in August 2003 the mother was pregnant with M, although it is not clear that she knew that she was at

that time. The purpose of the divorce is completely lost on me. Indeed the husband said to me he did not really know what the purpose of it was either. He thought it was some sort of parlour game that she was playing, while she said that she was unaware of it happening at all. They went together from their jointly occupied home to court and back again and continued as if nothing had ever happened. No steps whatsoever were taken to implement the agreement of May 2001.'

[69] I adopt and endorse the general finding of His Honour Judge Hughes QC at para [15]:

'… it is an inescapable conclusion that the husband has the capacity to be very aggressive indeed and to dominate the wife. On that point I accept the evidence of the wife that he was on his best behaviour in Court and I accept the evidence of the housekeeper and driver that he was very aggressive towards the wife at home and frequently denigrated her, that he was the boss and what he said happened irrespective of the wishes of the wife or others in the household.'

[70] My factual findings about the agreement and divorce are as follows:

(i) For reasons to do with asset protection H decided in 2001 to prevail on W to enter into a marital agreement that was highly disadvantageous to her. An agreement which gave W only about $1.5m out of a huge fortune accumulated during the marriage is likely to be unfair, whether viewed from a needs or sharing perspective.
(ii) Although W would have had some idea of the scale of H's wealth, there was no prior disclosure by H.
(iii) While W had some help from H's relative Mrs Damsky she did not receive truly independent advice.
(iv) While W would have understood the literal words of the agreement she did not know what rights under English law she was foregoing by the agreement. Her agreement was, therefore, not an informed one.
(v) The exercise was in fact a charade, and was made doubly so by the parlour game divorce obtained in 2003.
(vi) H has not complied with the agreement. He is not paying for the children. While he formally paid the $1m he almost immediately prevailed on W to give it back.
(vii) H has repudiated the whole legal basis for the agreement in Israel.

[71] By s 16(2)(d) of the MFPA I must have particular regard to:

'any financial benefit which the applicant or a child of the family has received, or is likely to receive, in consequence of the divorce, annulment or legal separation, by virtue of any agreement or the operation of the law of a country outside England and Wales.'

[72] In *Radmacher (Formerly Granatino) v Granatino* the Supreme Court gave definitive guidance as to the treatment of a nuptial contract in proceedings for ancillary relief following a domestic divorce. The guidance contained in the judgment of the majority delivered by Lord Phillips of Worth Matravers can be summarised as follows:

(i) The court should give effect to a nuptial agreement which is freely entered into by each party with a full appreciation of its implications unless in the circumstances prevailing it would not be fair to hold the parties to their agreement (para [75]).

(ii) In determining whether an agreement has been '*freely entered into by each party with a full appreciation of its implications*' there is no absolute black and white rule for full disclosure or independent legal advice. Rather, the question is whether in the individual case there is a *material* lack of disclosure, information or advice. Each party must have all the information that is material to his or her decision that the agreement should govern the financial consequences of the marriage coming to an end. An absolute rule would only be necessary if the agreement were to be contractually binding, but this is not the case as there is a safety-net of (un)fairness (para [69]).

(iii) The presence of any of the standard vitiating factors of duress, fraud or misrepresentation will negate any effect the agreement might otherwise have (para [71]). Further, unconscionable conduct such as undue pressure (falling short of duress) will likely eliminate the weight to be attached to the agreement (ibid). Other unworthy conduct, such as exploitation of a dominant position to secure an unfair advantage, will reduce or eliminate the weight to be attached to the agreement (ibid). The court may take into account a party's emotional state, and what pressures he or she was under to agree, as well as their age and maturity, and whether either or both had been married or been in long-term relationships before (para [72]). The court may take into account foreign elements to determine whether or not the parties intended their agreement to be effective (para [74]).

(iv) In determining whether '*in the circumstances prevailing it would not be fair to hold the parties to their agreement*':

  (a) The agreement cannot be allowed to prejudice the reasonable requirements of any children of the family (para [77]).

  (b) Respect should be accorded to the decision of a married couple as to the manner in which their financial affairs should be regulated, particularly where the agreement addresses existing circumstances and not merely the contingencies of an uncertain future (para [78]). This is likely to be so where the agreement seeks to protect pre-marital property (para [79]). By contrast it is less likely to be so where the agreement leaves in the hands of one spouse rather than the other the most part of a fortune which each spouse has played an equal role in their

different ways in creating (para [80]). If the devotion of one partner to looking after the family and the home has left the other free to accumulate wealth, it is likely to be unfair to hold the parties to an agreement that entitles the latter to retain all that he or she has earned (para [81]).

(c) It is likely to be unfair to hold the parties to an agreement which leaves one spouse in a predicament of real need, while the other enjoys a sufficiency or more (para [81]). However, need may be interpreted as being that minimum amount required to keep a spouse from destitution. For example, if the claimant spouse had been incapacitated in the course of the marriage, so that he or she was incapable of earning a living, this might well justify, in the interests of fairness, not holding him or her to the full rigours of the ante-nuptial agreement (para [119]).

[73] It seems to me that it will only be in an unusual case where it can be said that, absent independent legal advice and full disclosure, a party can be taken to have freely entered into a marital agreement with a *full appreciation* of its implications. After all, almost every common law country that has legislated in this field has as a key pre-condition these requirements *as well as* a safety-net where the agreement is judged to be 'unfair' (eg British Columbia) or 'unjust' (eg New Zealand) or 'unconscionable' (eg Australia). It would surely have to be shown that the spouse, like Mr Granatino, had a high degree of financial and legal sophistication in order to have a *full appreciation* of what legal rights he or she is signing away. Equally, it seems to me that there would have to be clear evidence of significant economic capacity on the part of the claimant spouse before the assessment of needs was suppressed to that minimal level imposed on Mr Granatino. There would surely have to be an equivalent finding to that in para [119], viz 'on the evidence he is extremely able, and has added to his qualifications by pursuing a D Phil in biotechnology'. I have noted that in the recent decision of *Z v Z* sub nom *Z v Z (No 2) (Financial Remedies: Marriage Contract)* [2011] EWHC 2878 (Fam), which concerned a French prenuptial agreement, Moor J generously assessed the wife's needs to include the outright ownership of valuable property and a *Duxbury* fund to provide a high level of income for the remainder of her life. There was no question of imposing on her an arrangement akin to an award under Sch 1 of the Children Act 1989.

[74] On my factual findings I have no hesitation in concluding that:

(i) W did not freely enter into the agreement with a *full appreciation* of its implications. It was the product of pressure from H and there was a material absence of independent legal advice and disclosure.

(ii) Moreover, it is doubtful that the parties ever actually intended that the agreement should govern the financial consequences of the marriage coming to an end.

(iii) It would be grossly unfair to hold W to an agreement which deprived her of her fair share of a fortune to the formation of which she has, in her own way, equally contributed.

(iv) Moreover, the agreement did not then, nor does it now, remotely meet her reasonable needs.
(v) And the agreement grossly prejudices the needs of the children.

[75] Accordingly, I accord the agreement no weight whatsoever and discard it from my assessment of the fair award to be made in W's favour.

Assessment of W's award
[76] I apply first the distributive principle of need. W needs a reasonable home. Having regard to the scale and value of Whitecliff I assess that she needs a housing fund of £2m. In relation to her revenue needs, having regard to the marital standard of living and the scale of assets available to H, I judge that she needs an annual income of £200,000. This capitalises using the *Duxbury* formula at £5.481m. W needs to have her debts of £163,000 paid. I do not allow as a reasonable need her costs debt to Kendastar Ltd.
[77] W is entitled to receive the maintenance needs of V and M on a capitalised basis as I judge there being no prospect of H paying these sums periodically. I judge their general maintenance needs to be £20,000 pa each. In addition school fees must be provided for.
[78] My application of the needs principle is, therefore, as follows:

W housing	2,000,000
W *Duxbury* at £200,000 pa	5,481,000
W debts	163,000
V maintenance at £20,000 pa	80,000
V school fees	102,000
M maintenance at £20,000 pa	220,000
M school fees	254,000
Total	8,300,000

This amount of £8.3m I certify as constituting 'maintenance' for the purposes of any enforcement action that W may take under the EU Maintenance reg 4/2009 (see *Van den Boogaard v Laumen* (Case C-220/95) [1997] ECR I-1147, [1997] QB 759, [1997] 3 WLR 284, [1997] 2 FLR 399 at paras [128]–[129]).
[79] It follows that W needs every last penny of, and a great deal more than, the £1m within this jurisdiction (see para [30] above).
[80] I turn now to the sharing principle. In my judgment W is entitled to an equal sharing of the fortune to the formation of which she equally contributed, in her own way. This leads, in my judgment, to an award of £12.5m, which is, of course, inclusive of the maintenance or need component of £8.3m referred to at para [78] above.

The application of LF
[81] My direction clearly stated that this application would be adjudicated. Section 49(2) of the Senior Courts Act 1981 specifically enjoins me to take steps to avoid a multiplicity of proceedings. I have been given no reason why

Mr Fishman has not appeared to pursue his application or why he seeks an adjournment. It is in any event wholly meritless and appears to seek a reversal of my judgment of 15 October 2010 in circumstances where he was denied permission to appeal. His application is, therefore, dismissed.

The application by GC for a final charging order

[82] I have set out an outline to this application at para [24] above. In effect GC seeks entirely to undo my judgment of 3 December 2010 in circumstances where his appeal was dismissed and his application to appeal further to the Supreme Court was denied.

[83] By s 1 of the Charging Orders Act 1979 I am given a general discretion to grant a charging orders in relation to a judgment debt and by s 1(5) I am required to consider all the circumstances of the case in exercising my discretion as to whether to do so, or not.

[84] Mr Feehan QC relies on the decision of the Court of Appeal in *Harman v Glencross and Another* [1986] Fam 81, [1986] 2 WLR 637, [1986] 2 FLR 241. He submits by reference to that, and other, decisions:

(i) When considering an application to make a charging order final the court should bear in mind that a judgment creditor seeking to enforce a judgment debt is justified in expecting that a charging order will be made in his favour (p 99E–F)

(ii) Where a charging order is sought to be made final after there is an application in train for financial relief the family court should hear both applications (p99C–E); however, that does not mean that the wife's claims have priority over those of the judgment creditor (see *Austin-Fell v Austin-Fell* [1990] Fam 172, [1990] 3 WLR 33); the application remains one for a charging order and is not to be treated as if it is an application by the wife for a disposition of the husband's property for her and any children's benefit (p 105E–H). Nevertheless the court will take into account all of the circumstances of the parties.

(iii) Where there is sufficient money in the case to rehouse the wife and children adequately, albeit at a lesser level than when in the marriage, the charging order should be made (p 99C; *Llewellin v Llewellin* (unreported) but see reference at 99C); p 99F; see also *Austin-Fell v Austin-Fell*).

(iv) Where there is insufficient equity to rehouse the family adequately, a *Mesher* type order ought to be made or a condition attached so as to prevent enforcement until the youngest child is 18 (p 99G).

(v) Only in exceptional circumstances should there be an outright transfer to the wife with no charging order granted (p 100A).

[85] In considering the decision of *Harman v Glencross and Another* it is interesting to observe that two members of that court (Balcombe and Fox LJJ) were also members of an earlier constitution which heard the case of *Mullard v Mullard* (1982) 3 FLR 330 where it was held:

> 'While it is perfectly true that this court has to take into account any liabilities that a party to the marriage may have, it does not seem to me right that the court, exercising this particular jurisdiction, should necessarily prefer the claims of the creditors to those of the wife and children, and the order, which the registrar made and the judge affirmed, which requires a sale of the house and therefore the forced move of the home and the family, seems to me to result in a preference being given to the creditors over the claims of the wife and the children.'

See also *Paulin v Paulin* [2009] EWCA Civ 221, [2009] 2 FLR 354, [2009] BPIR 572, CA where Wilson LJ (as he then was) stated at para [54]:

> '… although I accept that in proceedings for ancillary relief a court will strive to quantify its award to a wife upon a basis which will enable the husband to meet all his liabilities as well, of course, as to maintain himself, it by no means follows, particularly where money is in short supply, that, whether in the context of capital or in that of income provision, the interests of the husband's other creditors *always* take precedence over those of the wife …'

[86] It is also interesting to observe that one factor which may have influenced the view of the Court of Appeal in *Harman v Glencross and Another* was the submission that a refusal of a charging order might well be futile as the creditor could make the debtor bankrupt and the transfer of property order would then likely be void against the trustee in bankruptcy. But that argument is now impossible given the decision of the Court of Appeal in *Haines v Hill & Another* [2007] EWCA Civ 1284, [2008] 2 WLR 1250, [2008] 1 FLR 1192, [2007] BPIR 1280.

[87] I also consider it implausible that when formulating its decision the Court of Appeal intended that the claims of the wife and children that overreached those of the creditor were solely those for short-term housing but not the means to pay for their daily bread.

[88] In my judgment where a transaction has been avoided under s 37 of the MCA or s 23 of the MFPA and the disponee then comes along seeking to reverse that very order by these means, then the court is clearly in an exceptional situation quite outwith the situation where a bona fide creditor is seeking to recover his judgment debt.

[89] Mr Feehan QC argues that no stain has been cast on GC's integrity by my judgment of 3 December 2010. I do not agree with that. I found that GC had not given me truthful evidence and that he was complicit in H's machinations (see paras [17], [23]–[26], [28]–[32] and [36]). Moreover, I found that GC would have no difficulty in recovering the Kyrgyzstani bonds from H (see para [39]). That finding was challenged in the Court of Appeal and was dismissed by Wall P (see paras [24]–[26] of his judgment). Indeed, there is no evidence that GC has even asked H for the bonds back or otherwise to indemnify him for his losses. Mr Feehan QC stated that this was because GC did not know where H was but this is obvious nonsense as in August 2011 his solicitors were in detailed email correspondence with H concerning the negotiation of a consent order which provided for the sale of South Lodge.

[90] In my judgment Mr Stirling is right to characterise this application as an abuse of process. In his judgment Wall P quotes Sedley LJ as having said of GC's purchase of South Lodge 'he bought a pig in a poke'. His attempts to prevent a reversal of the transaction all failed, and this latest attempt must be dealt with in the same way. In any event I am satisfied that the equity of South Lodge is urgently needed to meet the needs of W and the children. Just as the considerable means of GC were relevant to the exercise of my discretion last time round, so they are this time. In para [13] of my judgment of 3 December 2010 I recorded him as having means of £16.5m. It would be a travesty, if in the exercise of my discretion, I were to make the charging order final immediately or even on a deferred *Mesher* basis.

My disposition

[91] My disposition is, therefore, as follows:

(i) H will pay W a lump sum of £12.5m.
(ii) Of this, £8.3m is certified as constituting 'maintenance'.
(iii) As a credit against the lump sum W will be paid the net proceeds of sale of South Lodge. I will hear further argument in relation to the form of the order concerning South Lodge, specifically as to whether there should be an immediate order for sale or whether the property should be transferred to W subject to its mortgage.
(iv) GC's application for a final charging order is dismissed and the interim order discharged.
(v) As a further credit against the lump sum W will be paid the sums held in court save for £80,000 which will remain frozen pending assessment of Kendastar Ltd's costs.
(vi) There will be no separate order for child maintenance or school fees.
(vii) LF's application is dismissed.
(viii) On payment in full of the lump sum there will be a clean break between the parties.
(ix) I will hear counsel as to the form of the order and as to costs. My provisional view is that W is entitled to an order for indemnity costs against H and to an order for indemnity costs against GC in relation to his application.

Order accordingly.

Solicitors: *Richardson Smith & Co* for the applicant
Horne Engall & Freeman for the intervener

SAMANTHA BANGHAM
Law Reporter

IPEKÇI v McCONNELL
[2019] EWFC 19

Family Court

Mostyn J

4 April 2019

Financial remedies – Non-matrimonial resources – Prenuptial agreement signed in New York – Wife beneficiary of family trusts – Agreement made little provision for husband – 12-year marriage – Whether wife's trusts could fund an order made in favour of the husband – Whether husband should be held to the terms of the prenuptial agreement

The wife's great grandfather was the founder of the Avon Products business empire. Together with others, she was the beneficiary of various trusts in the US which held $65m in total. The husband and wife had signed a prenuptial agreement in New York stipulating that, in the event of the breakdown of the marriage, the husband would only be entitled to an equal share of the increase in value of the wife's three properties and would not be entitled to maintenance or any other provision. However, in the current circumstances there was no increase to be divided. It was specifically provided that the agreement was to be governed exclusively by New York law. Prior to signing the agreement, the husband had been provided with legal advice by the wife's English solicitor, who had no competence to advise on New York laws. The couple married, had two children, now 11 and 7, and enjoyed a high standard of living in London. The husband worked in the hospitality sector throughout the marriage and contributed to the household expenditure. He earned £35,000 p a as head concierge at a London hotel and, in reliance on the wife's resources, had made no provision for himself either by way of savings or pension. The family was predominantly funded by the wife's resources. After 12 years of marriage, the relationship broke down and the husband applied for financial remedies. During the hearing a trustee of one of the trusts, established in 1964, wrote to the court stating that the wife had no power or control over the trust assets and that were she to give the trustees a direction to make payment from the trust assets the trustees would have no power to do so. It was also stated that the wife was not the only beneficiary of the trust.

Held – awarding the husband a lump sum of £1,333,500 to include a *Duxbury* fund of £445,500 and a housing fund of £750,000, conditional upon him executing a charge over the property in favour of the wife of £375,000 enforceable on his death, and making no order for costs against either party –

(1) It was clear that in relation to the various trusts, the wife was solely and beneficially entitled to the substantial trust assets. On the balance of probabilities, the trustees would make those funds available to the wife for the purposes of satisfying a judgment against her (see para [12]).

(2) On the facts of the case it would be wholly unfair to hold the husband to the prenuptial; no weight would be given to it. This was because, in the circumstances, the agreement was governed by New York law and as such was defective because it did not have a duly authenticated certificate that it conformed with the local law in its attestation; it would be wholly unjust to attribute weight to the agreement when under the law that the parties elected it would be afforded no weight; the husband could not be said to have had a full appreciation of the implications of the agreement when he had no legal advice at all about the impact of New York law; and the agreement did not meet any of the needs of the husband (see paras [27]).

(3) Since all of the assets in the case derived from non-matrimonial resources the financial application would be determined solely on a needs basis. The assessment of needs was a pure exercise of discretion. The width of discretion was not limitless but it

was wide. It was in the children's interests that their father had a reasonable home. A sum of £750,000 was reasonable to meet the husband's housing needs subject to a charge in the sum of £375,000 (expressed as a percentage of the value of the new property) to be executed by the husband in favour of the wife or her estate which would be enforceable on his death pursuant to r 4.1(4) of the Family Procedure Rules 2010 (FPR 2010). A further sum of £186,500 would be paid to the husband to cover the costs of SDLT, costs of purchase, new furniture and to pay off his debts (see paras [28]–[32]).

(4) It would not be reasonable to expect the husband to support himself from his earnings especially while the children were so young. It would create an unhappy and divisive disparity between the standards of living of the two parents. A reasonable net income need of the husband was £50,000 pa falling on his retirement, at age 67, by 40% to £30,000. Gross earnings of £35,000 pa were attributed to him until retirement. That gave rise to a *Duxbury* calculation of £445,500 (see para [33]).

Per curiam: there had been wholesale non-compliance by both legal teams with FPR 2010, PD 27A and the Efficiency Statement of 1 February 2016. Two bundles were delivered to the court in blatant breach of the one-bundle rule. Those bundles contained many duplicated documents but omitted possibly the most important ones, namely the deeds of trust. The bundles contained no preliminary documents. There was no agreed schedule of issues, no agreed asset schedule and no chronology. No attempt was made to agree an asset schedule during the hearing. The chronology produced only on the third day of the hearing had important events missing. Those omissions and defaults were completely unacceptable especially considering that the wife had been charged £252,331 in financial remedy costs and the husband £235,669. The parties' advisers must ensure that in no case in the future did such non-compliance recur (see para [39]).

Statutory provisions considered

Matrimonial Causes Act 1973, s 25
Children Act 1989
Child Support Act 1991
Civil Evidence Act 1995, s 3
Family Procedure Rules 2010 (SI 2010/2955), Part 25, rr 4.1(3)(g), 4.1(4), 23.4, PD 27A

Cases referred to in judgment

Granatino v Radmacher (Formerly Granatino) [2010] UKSC 42, [2011] 1 AC 534, [2010] 3 WLR 1367, [2010] 2 FLR 1900, [2011] 1 All ER 373, SC
KEWS v NCHC [2013] 2 HKLRD 314, (2013) 16 HKCFAR 1, HK CA

Alexander Thorpe QC for the applicant (instructed by *Kay Georgiou*)
Michael Glaser QC for the respondent (instructed by *Family Law in Partnership*)

Judgment was reserved.

MOSTYN J:

[1] I shall refer to the applicant as 'the husband' and to the respondent as 'the wife'. This is my judgment on the husband's financial remedy claim following his divorce from the wife.

[2] In 1886 David H McConnell was a door-to-door salesman of books to New York housewives. He decided to sell perfumes rather than books. From that decision, and from that modest origin, sprang the mighty Avon Products business empire. It is now the fifth-largest beauty company and the second-largest direct-selling enterprise in the world. The wife, now aged 45, is

the great-granddaughter of David H McConnell. The vast amount of money generated by the business for the McConnell family means that, along with other relatives, she is the beneficiary of trusts in the USA with an overall value of at least $65m.

[3] Specifically, the wife's trust interests are as follows.

[4] On 20 October 2004, well before the marriage or cohabitation of the parties, the wife settled $4.5m of her own money deriving from a predecessor trust into a US grantor trust. On 22 February 2019 the trust had a value of $667,344. However, since then, certain further payments have been made or are due to be made. Further, the liquidation of the investments held by the trust has given rise to US capital gains and income tax. Net of all actual and potential liabilities the trust has now a value of just under $30,000.

[5] The wife and her four siblings, as well as their descendants, are beneficiaries of a discretionary trust established by her father Neil A McConnell on 21 September 1964. The original trustees were Douglas F Williamson Jr and Bankers Trust Company (later acquired and replaced as trustee by Deutsche Bank Trust Company). On 30 November 2017 the trust had a market value of just under $17m. The wife is paid 20% of the net income of this trust. In 2017 this was just under $37,000. Thus 100% was $185,000. Accordingly, in that year the trust achieved a net income return of 1.1%, which suggests that the present investment strategy is to accrue capital growth rather than income yield.

[6] The trust agreement stipulates that the net income shall be applied to the use of the beneficiaries. However, by virtue of the fifth article of the agreement the trustees are authorised, in lieu of applying such income, to accumulate all or part of it in 'a separate fund for the beneficiary to whom such income shall have been allocated or to whose use such income might have been applied'. The fifth article goes on to provide that on the death of the beneficiary to whom income has been accumulated in a separate fund, the income accumulated in such separate fund shall be paid over to such beneficiary's issue, who survives him or her, per stirpes, or such issue failing, to the estate of such beneficiary.

[7] The sixth article provides that each such separate fund shall be deemed to be a separate trust, and that each such separate trust shall be 'held, administered, transferred and paid over in accordance with all of the other applicable provisions of this agreement'. I am satisfied that this provision does not mean that the separate fund is subject to the wide discretion in favour of the entire class of beneficiaries, which the agreement provides for in respect of the income and capital of the main trust generally. Rather, it is a provision which stipulates that the administration of such a separate fund should be in accordance with the provisions of the agreement.

[8] Such a separate fund has been created for the wife. It is called 'The Neil McConnell 1964 Trust for Morgan A McConnell'. In a letter dated 13 December 2017 Brandi Goldenberg, a director of Deutsche Bank Trust Company stated: 'this trust was created for your benefit per the terms of the Neill McConnell 1964 trust'. In an email dated 16 May 2018 she stated:

> '… the Neil McConnell 1964 trust for Morgan McConnell was created under the 1964 trust document. There is not a separate trust instrument for this trust. This was created as an income accumulation account for

> Morgan's benefit. It is not a sub-account. It has its own taxpayer identification number and files its own income tax return (a subaccount would be an account which is part of the main trust and organised under the main trust's tax ID #).'

In my judgment this could not be clearer. Brandi Goldenberg is describing the position where the cestui que trust is solely and beneficially entitled to the trust assets. On 30 November 2017 the market value of this separate fund was $4.45m. The trustees pay the wife each year 2.5% of the market value of the trust and have made significant further advances of capital to her. Nobody else has benefitted.

[9] On 26 March 2019, the second day of the hearing before me (the first day having been a reading day), I entered court to find on the bench a letter addressed to me dated 22 March 2019 written by Mr Williamson, one of the trustees of the 1964 trust. It is headed 'Morgan A McConnell Trust U/A September 21, 1964'. 'U/A' means 'under agreement'. In the letter, Mr Williamson argued that the wife has no power or control over the trust assets and that were she to give the trustees a 'direction' for a payment from trust assets then compliance would clearly be beyond the powers of the trustees. The letter goes on to state that 'crucially' the wife is not the only beneficiary of the trust. Her descendants and her father's other descendants are also beneficiaries whose interests both the trustees and the New York courts are obligated to protect.

[10] This letter was discussed in court on 26 March 2019 and it was pointed out that its terms were completely inconsistent not only with the provisions in the agreement of 21 September 1964 (as referred to above) but also with the letter and email of Ms Goldenberg (again as referred to above). This provoked a yet further letter which I was given on the third day of the hearing, 27 March 2019. In it, Mr Williamson states:

> 'I do not understand your apparent puzzlement about who the beneficiaries of Morgan's trust are. The trust was created for Morgan's initial benefit, to be sure; it exists for her lifetime; and it carries her name as shorthand identification. But it is necessary for a trust agreement to specify who becomes entitled to succeed to the ownership of the trust's principal assets when *the income beneficiary* dies. In this instance, as previously detailed, the next takers (or "*remaindermen*") of Morgan's trust are her surviving descendants ("issue"), and if none, the then surviving descendants ("issue") of her father. All these people are beneficiaries of the trust, entitled to have the trustees and the courts protect their interests. There is no substantive inconsistency between Ms Goldenberg's description and mine. The provisions of the December (sic) 21, 1964 trust agreement are applicable to Morgan's trust.' (Emphases added.)

[11] I completely reject this evidence. It is not expert evidence. To qualify as expert evidence, it would have had to have been the subject of a properly formulated application under Part 25 of the Family Procedure Rules 2010 (FPR 2010). If granted, expert evidence about New York law in relation to this separate fund would have been directed to have been given by an independent

single joint expert. It is evidence of fact given far too late in the day. While admissible under the Civil Evidence Act 1995, its weight, if any, is a matter for me. In deciding to attribute no weight to it I take into account the fact that the husband and his advisers have been deprived from seeking an order under s 3 of the Act and FPR 2010, r 23.4 that Mr Williamson be cross-examined. Further, by virtue of the deplorable lateness of the evidence they had been deprived of adducing their own evidence in response. It is worth pointing out that this case began as long ago as 18 August 2017. Of itself, the lateness of the evidence justifies no weight being attributed to it. However, my main reason for rejecting the evidence is that it is obviously incorrect. To characterise the wife as no more than a life tenant, or a mere income beneficiary of this fund, and that there exist formal interests in remainder is, frankly, totally untenable and I have to wonder why such misleading and partial evidence is being given on the wife's behalf. In his final submissions, Mr Glaser QC was careful to emphasise that he was not himself arguing that the wife was a formal life tenant of this fund.

[12] My finding is that in relation to this separate fund the wife is a cestui que trust solely and beneficially entitled to the trust assets. I am further satisfied on the balance of probabilities that the trustees would make those funds available to the wife for the purposes of satisfying a judgment against her. This is not an exercise in 'judiciously encouraging' anybody. It is a judgment based on a finding of a future fact. I agree with the Chief Justice of Hong Kong that the concept of 'judicious encouragement' in cases of this type should be abandoned: see *KEWS v NCHC* [2013] 2 HKLRD 314, (2013) 16 HKCFAR 1, at para [53].

[13] The wife is a member of the class of beneficiaries of a discretionary trust created by her father on 22 July 1968. She is presently being paid 20% of the trust's net income. In 2017 that amounted to $7,702. Thus 100% was $38,510. The market value of the trust on 30 November 2017 was $5,436,000. Accordingly, in that year the trust achieved a net income return of 0.7% which, again, suggests that the investment strategy is to secure capital growth rather than income yield.

[14] The wife is a beneficiary of the trusts created by the will of her father dated 24 June 1992. Her father died on 11 February 1994. The will refers to an impressive collection of Impressionist paintings by, among others, Monet, Gaugin, Cezanne, Sisley and Renoir. However, the wife told me that these were all sold at auction following her father's death.

[15] The will created two separate trusts. First, $1m went to a generation-skipping transfer tax exemption trust. The wife and her four siblings and their issue are beneficiaries of this trust. On 30 November 2017 its value was $2.8m. All of the income generated by this trust is capitalised and added to the principal. There is no reason to suppose that money from this trust could not be made available to the wife should she reasonably require it.

[16] Neil McConnell left his widow Sandra, the wife's stepmother, a life interest in his residuary estate with power to advance capital limited to $2m. The remainder was left equally to his five children. Sandra is aged 76, and according to the life tables has a life expectancy of just over 13 years.[1]

1 This is taken from table 10 of *At A Glance* (FLBA, 2019), which is a UK life table. Although Mr Thorpe QC asserted, without producing anything, that US life tables would

The market value of this fund on 30 November 2017 was about $36.5m. Clearly, in the foreseeable future the wife will receive substantial benefit from this trust.

[17] In addition to her trust interests the former matrimonial home, a four-bedroom semi-detached house in Barnes, is held in the sole name of the wife. Its value is £1.675m and its equity after deduction of the mortgage on it is £1.074m.

[18] The husband, who is aged 45, is the head concierge of the London Hilton Metropole hotel, earning about £35,000 gross inclusive of shared gratuities. He has no capital apart from a 50% interest in his mother's house in Turkey. That interest is worth just under £50,000. He has debts of just over £100,000.

[19] The parties met in New York in the autumn of 2003. At that time the husband was working as a concierge at Le Parker Meridien in New York. He had no money beyond his earnings; indeed, I was told that he had been made bankrupt. The wife was living in London. She was married to someone else and in November 2002 her eldest son had been born to her. I am not given any details about the end of the wife's first marriage. At all events the husband and wife developed their relationship and began cohabitation in January 2005. They agreed to marry. Unsurprisingly, given that the wife was a wealthy American heiress a prenuptial agreement was suggested. An agreement was drafted by the wife's private client lawyer. A lawyer was found to give the husband independent legal advice. This lawyer happened to be the solicitor who acted for the wife in her divorce from her first husband. The husband met this lawyer for the first time on 3 November 2005. By then the marriage had been fixed to take place on 26 November 2005. The lawyer took the husband through the draft agreement. The husband must have been very surprised by what it contained. First and foremost, it provided that the agreement was deemed to have been made under the laws of the State of New York and that its validity and effect and construction should be determined in accordance with those laws regardless of where either party resided or was domiciled at the time of death or divorce or separation. Secondly, it provided that the parties wished any proceedings relating to the marriage to be determined in accordance with the laws of the State of New York and that they submitted to the exclusive jurisdiction of the courts of that State.

[20] Quite apart from his obvious lack of independence, having previously acted for the wife in her divorce from her first husband, the lawyer provided to the husband was an English solicitor and had no competence to advise on New York law relating to the enforceability of prenuptial agreements.

[21] The substantive provision to be made to the husband, in the events which have occurred (ie the marriage lasting for more than 3 years, and there being two children born to them), was that any increase in the value of three properties in the name of the wife sited in respectively Barnes, Hanwell and New York would be divided equally between the parties on divorce. Further, the husband would not be entitled to claim any alimony or any other money from the wife. In the agreement those three properties were attributed with a

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put the expectancy of a 76-year-old at under 7 years, it is clear that in fact under such tables the figure would be virtually the same: https://www.cdc.gov/nchs/data/nvsr/nvsr67/nvsr67_07–508.pdf.

value of $1.6m or, at today's exchange rate, £1.24m. It has not been possible definitively to establish what happened to the proceeds of the three named properties, but it has been assumed that they were rolled over into the existing family home in Barnes. As explained above, this has a net value of £1.074m. Thus, there has been no increase in value for the parties to share, and under the agreement the husband gets nothing at all.

[22] The husband was advised that the agreement was slanted heavily in favour of the wife. Nonetheless, he signed it on 11 November 2005 and the parties were duly married 15 days later.

[23] Two children were born to the parties during the marriage a boy now aged 11 and a girl now aged 7. The parties enjoyed a reasonably high standard of living. They separated in November 2016; the husband moving to very modest rented accommodation.

[24] The husband worked throughout the marriage, mainly in the hospitality sector but sometimes in other fields. His money contributed to the household economy but that was funded predominantly by the resources available to the wife. The husband, in reliance on the security of his wife's substantial resources, did not make any provision for himself either by way of savings or pension.

[25] In *Granatino v Radmacher (Formerly Granatino)* [2010] UKSC 42, [2011] 1 AC 534, [2010] 3 WLR 1367, [2010] 2 FLR 1900, at para [75] Lord Phillips of Worth Matravers, for the majority, enunciated the guiding principle where a prenuptial agreement existed as follows:

> '*The court should give effect to a nuptial agreement that is freely entered into by each party with a full appreciation of its implications unless in the circumstances prevailing it would not be fair to hold the parties to their agreement*.' (Emphasis in original.)

He continued at para [81]:

> 'Of the three strands identified in *White v White* and *Miller v Miller,* it is the first two, needs and compensation, which can most readily render it unfair to hold the parties to an ante-nuptial agreement. The parties are unlikely to have intended that their ante-nuptial agreement should result, in the event of the marriage breaking up, in one partner being left in a predicament of real need, while the other enjoys a sufficiency or more, and such a result is likely to render it unfair to hold the parties to their agreement.'

[26] On the facts of that case the Supreme Court agreed with the Court of Appeal that the earning capacity and future potential of someone as financially sophisticated as Mr Granatino meant that he did not need to have his needs met after his children were grown up. At para [119] Lord Phillips of Worth Matravers stated: 'on the evidence he is extremely able, and has added to his qualifications by pursuing a D Phil in biotechnology'.

[27] I have no hesitation in deciding on the facts of the case before me that it would be wholly unfair to hold the husband to the agreement that he signed. This is for the following reasons:

(i) The parties specifically contracted that the agreement will be governed by New York law. The evidence of the single joint expert is that the agreement suffers from a fatal defect under New York law. This is because the agreement was not accompanied by a duly authenticated certificate that it conformed with the local law in its attestation. The opinion of the single joint expert was crystal clear. This defect would mean that the agreement would, in New York, have 'minimal weight, if any'. She cited a case on comparable facts where the New York Appeal Court held that the document would carry 'no legal force save for the minor impact of its historical voice'.

(ii) It seems to me that, speaking metaphorically, if the parties have made their bed in New York they must lie in it. In my judgment it would be wholly unjust to attribute weight to this agreement when under the law that the parties elected it would be afforded no weight.

(iii) Further, it is plain to me that the husband cannot be said to have had a full appreciation of the implications of the agreement when he had no legal advice at all about the impact of New York law. Further still, I am not satisfied that the solicitor who gave the advice was not compromised by virtue of having acted previously for the wife in her first divorce. It was, so it seems to me, a clear situation of apparent bias.

(iv) The agreement does not meet any needs of the husband. I do not take the language used by the Supreme Court, namely 'predicament of real need' as signifying that needs when assessed in circumstances where there is a valid prenuptial agreement in play should be markedly less than needs assessed in ordinary circumstances. If you have reasonable needs which you cannot meet from your own resources, then you are in a predicament. Those needs are real needs.

(v) In the circumstances of this case I attribute therefore no weight to the prenuptial agreement.

[28] All of the assets in this case either are or have their origin in non-matrimonial property. Therefore, the claim will be decided solely by reference to the principle of needs. Neither counsel has argued otherwise.

[29] The assessment of needs is a pure exercise of discretion, one of the few remaining exercises in the field of family law that can be properly described as truly discretionary as opposed to the formation of a qualitative decision. The width of the discretion is not limitless, but it is wide.

[30] The following are relevant considerations in determining the reasonable needs of the husband:

(i) This was a 12-year cohabitative relationship.

(ii) As a result of the way that the parties organised their married life the husband has made no provision for himself from his earnings either by way of savings or pension.

(iii) The standard of living, whilst not by any means a determinative factor, is relevant and was in this case reasonably high.

(iv) It is in the interests of the two children of the marriage that their father has a reasonable home in which they can stay with him comfortably and that they do not perceive him as being in some way the poor relation.

(v) The husband will not be making any contribution to the maintenance of the children or to their school fees – they will be supported entirely by the wife save in respect of those incidental expenses met by the husband during the time that the children spend with him.

(vi) In respect of the sum allowed for the husband's housing, it is not necessary for all of it to be provided to him outright. There was agreement at the Bar that it would be reasonable for half of the housing sum awarded to be charged back in favour of the wife (or her estate) on the death of the husband.

[31] The initial housing particulars provided by the parties were at polar extremes. I ordered that particulars demonstrating the cost of a three-bedroom property within a mile of the matrimonial home should be supplied. Those have been provided to me and I have considered them carefully. It is very much a buyers' market in these difficult economic and political times. I have concluded that the sum of £750,000 is a reasonable sum to be provided for the husband's rehousing. This part of the award is subject to a condition which I apply pursuant to FPR 2010, r 4.1(4) that a charge in the sum of £375,000 (expressed as a percentage of the value of the new property) will be executed by the husband in favour of the wife or her estate which will be enforceable on his death. That charge will be transferable to a substitute property at full value.

[32] In addition, I award to meet capital needs the sum of £27,500 for stamp duty land tax (SDLT); the sum of £2,000 for the costs of purchase; the sum of £25,000 as an allowance to purchase more furniture; the sum of £28,000 to meet credit card and bank debts; the sum of £5,000 to meet another debt; the sum of £31,000 to meet unpaid Children Act 1989 costs';[2] and the sum of £68,000 to meet unpaid financial remedy costs. These total £186,500.

[33] I now turn to the husband's income requirements. In one sense he could be expected to support himself from his earnings, but I am persuaded that this would not be reasonable especially while the children are so young. It would create an unhappy and divisive disparity between the standards of living of the two parents. I have considered carefully the revised budget advanced on his behalf by Mr Thorpe QC. I conclude that a reasonable net income need of the husband is £50,000 pa falling on his retirement, at age 67, by 40% to £30,000 (in today's money). I attribute to him gross earnings of £35,000 pa until retirement. This gives rise to a *Duxbury* calculation of £445,500.

[34] My assessment of the husband's needs can therefore be tabulated as follows:

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2 I allow this sum notwithstanding that it does not appear as a debt in the asset schedule prepared by Mr Thorpe QC. It was, however, mentioned in the husband's statement under s 25 of the Matrimonial Causes Act 1973. The existence of this debt was not disputed by Mr Glaser QC.

House purchase	£750,000
SDLT	£27,500
Purchase costs	£2,000
Furniture allowance	£25,000
Bank and credit card debt	£28,000
Other debt	£5,000
Unpaid legal fees	£99,000
Duxbury fund	£445,500
	£1,382,000
Less Turkish property	(£48,500)
	£1,333,500

Of this sum, £375,000 will be the subject of the charge-back and so the outright cost to the wife is £958,500.

[35] I am in no doubt that £1,333,500 (subject to the charge-back) would be a reasonable and just sum for the wife to be ordered to pay the husband. It corresponds to just over $1.7m. If paid from the Neil McConnell 1964 Trust for Morgan A McConnell, then $2.75m would be left there. In addition, the wife has her other trust interests as mentioned above, as well as the former matrimonial home. And, of course, nearly $500,000 will eventually be returned to the wife or her estate by virtue of the charge-back.

[36] I therefore award the husband the lump sum of £1,333,500 of which £375,000 will be subject to the charge-back as detailed above. On payment in full a clean break between the parties will come into effect. This order is made on the basis that the wife will not pursue the husband for child support under the Child Support Act 1991. I award and decree an indemnity in the husband's favour in the event that she should do so.

[37] Each party has obtained an order for costs against the other. I stay both such orders pursuant to FPR 2010, r 4.1(3)(g). The husband's paid costs have been provided by virtue of a legal services payment order and my award covers his unpaid costs. To enforce his order would therefore result in a double recovery by him. I am not satisfied that it would be just to allow enforcement of the order for costs obtained by the wife as I do not think that she was nearly as cooperative as I had intended when relieving her from the obligation of procuring production of the grantor trust bank statements.

[38] I will hear counsel as to issues such as time to pay and whether the lump sum should be secured pending payment.

[39] I conclude by expressing my great disquiet and dismay at the wholesale non-compliance by both legal teams with FPR 2010, PD 27A and the efficiency statement of 1 February 2016 (*Statement on the Efficient Conduct of Financial Remedy Hearings Allocated to a High Court Judge whether Sitting at the Royal Courts of Justice or Elsewhere* (Judiciary of England and Wales, 2016). On 21 March 2019 two bundles were delivered to the court in blatant breach of the one-bundle rule. Those bundles contained many duplicated documents but omitted possibly the most important ones, namely the deeds of trust. The bundles contained no preliminary documents. There was no agreed schedule of issues, no agreed asset schedule and no chronology. No attempt was made to agree an asset schedule during the hearing. When I insisted that a chronology be produced, the one which I was given (on the third day of the hearing) did not state the dates of the 1968 trust, the wife's father's will or death, the prenuptial agreement or even the

marriage. Mr Glaser QC's skeleton was not filed by the deadline; he blamed the delay on the late delivery to him of the bundles by the husband's solicitor. These omissions and defaults are completely unacceptable especially when you consider that the wife has been charged £252,331 in financial remedy costs and the husband £235,669. The parties' advisers must ensure that in no case in the future does such non-compliance recur.

[40] That concludes this judgment.

Order accordingly.

SAMANTHA BANGHAM
Law Reporter

CUMMINGS v FAWN
[2023] EWHC 830 (Fam)

Family Division

Mostyn J

14 April 2023

Financial remedies – Xydhias agreement – Whether court erring in approach to husband's non-disclosure of inheritance

Some years after the breakdown of the marriage, the husband and wife entered into a *Xydhias* agreement (*Xydhias v Xydhias* [1999] 1 FLR 683) in February 2022, recorded in a signed draft consent order which compromised the financial remedy claims of the wife against the husband. The agreement provided that the wife would retain £33,750 which had been paid by the husband under a legal services payment order, but which had not been spent; £173,240 being the retained portion of the net proceeds of sale of a jointly owned investment property; and two lump sums totalling £362,000. The capital received by the wife totalled £568,990. The wife then repudiated the agreement. She wrote to the judge asking for a hearing to determine whether the agreement was fair as she claimed it did not meet her needs. She later added an allegation that the husband had been guilty of material non-disclosure, in failing to disclose an inheritance of £4.2m from his parents' estate in 2020, which should act to negate the agreement completely. The court held that the agreement had not been negated by the husband's non-disclosure, that it was fair and that it should be made an order of the court. The judge found that the husband had failed to disclose but that his non-disclosure was 'not operative'; the wife knew the amount that the husband was likely to inherit and had failed to make her own enquiries through a questionnaire to find out about the inheritance. The wife was ordered to pay £19,000 towards the husband's costs, to be deducted from the lump sum payment. The wife obtained permission to appeal. The issues before the court were: (i) whether the court had erred in its approach to the husband's non-disclosure of the inheritance by concluding that it was not operative; (ii) whether the court had failed to properly assess how the wife's financial needs could be met through the agreement and had failed to take into account her liabilities; and (iii) whether the court had erred in its decision to order that the wife should pay part of the husband's costs by failing to apply sufficient weight to the husband's non-disclosure.

Held – allowing the appeal on two grounds; setting aside the judge's order save for the parts already implemented; transferring the financial remedy application from the Family Court at Barnet to the FRU at the Central Family Court for retrial; making a costs order –

(1) The non-disclosure by the husband had been deliberate and fraudulent, intended to result in financial or personal gain. The principles in *Sharland v Sharland* [2015] UKSC 60, [2015] 2 FLR 1367 applied to a consent order procured by fraud but equally applied to a *Xydhias* agreement which had not been converted into a consent order. There was no duty of due diligence imposed on the victim of a fraudulent deception to have to make their own enquiries. Those principles had to be applied rigorously where non-disclosure was proved. Litigants had to understand that if they practised non-disclosure then the almost invariable consequence would be a set-aside with costs. Any exceptions had to be construed very narrowly. The husband had not come close to discharging the onus on him to show that a reasonable person in the position of the wife at the time of the *Xydhias* agreement, in February 2022 but possessed of full disclosure of the size of the husband's inheritance, would have

nonetheless made the same agreement (see paras [65], [67], [68], [69], [73], [76]–[78]); *Cathcart v Owens* [2021] EWFC 86, *Sharland v Sharland* [2015] UKSC 60, [2015] 2 FLR 1367 applied.

(2) The judge had been wrong in that she failed to make findings as to: (a) which of the wife's debts were more likely than not to require repayment, (b) the sum that the wife would reasonably need for alternative accommodation and (c) the sum which she could raise by way of mortgage. Those matters were key factual elements in the exercise of the discretion under s 25 of the Matrimonial Causes Act 1973. The judge could not lawfully exercise that discretion without having made findings, on the balance of probabilities, as to those matters. Her failure to do so vitiated her decision to uphold the agreement (see paras [54]–[56]).

(3) The general rule of no order as to costs laid out in FPR, r 28.3(5) did not apply to an application that a concluded agreement be made an order of the court. Accordingly, if the judge's findings had been correct then there was no good reason why the principle should not have been applied and the wife be ordered to pay costs. However, as the judge's findings had not been correct, the husband would be ordered to pay the wife's costs as a litigant in person for the hearing and the present appeal (see paras [39], [81]); *T v T* [2013] EWHC B3 (Fam), *Baker v Rowe* [2009] EWCA Civ 1162, [2010] 1 FLR 761 and *LM v DM (Costs Ruling)* [2021] EWFC 28, [2022] 1 FLR 393, considered.

Statutory provisions considered

Matrimonial Causes Act 1973, ss 25, 25A
Children Act 1989
Family Procedure Rules 2010 (SI 2010/2955), rr 28.3(5), 30.3(5), 30.12(3)(a)

Cases referred to in judgment

B (A Child) (Care Proceedings: Threshold Criteria), Re [2013] UKSC 33, [2013] 1 WLR 1911, sub nom *Re B (Care Proceedings: Appeal)* [2013] 2 FLR 1075, [2013] 3 All ER 929, SC
Baker v Rowe [2009] EWCA Civ 1162, [2010] 1 FLR 761, [2009] All ER (D) 91 (Nov), CA
Biogen Inc v Medeva plc [1996] UKHL 18, [1997] RPC 1, (1997) 38 BMLR 149, HL
Cathcart v Owens [2021] EWFC 86, [2021] All ER (D) 26 (Nov), FC
Clarke v Clarke [2022] EWHC 2698 (Fam), [2023] 2 FLR 1, FD
FF v KF [2017] EWHC 1093 (Fam), [2017] All ER (D) 94 (May), FD
Goddard-Watts v Goddard-Watts [2023] EWCA Civ 115, [2023] 4 WLR 20, [2023] 2 FLR 735, [2023] All ER (D) 51 (Feb), CA
Granatino v Radmacher (formerly Granatino) [2010] UKSC 42, [2011] 1 AC 534, [2010] 3 WLR 1367, sub nom *Radmacher (Formerly Granatino) v Granatino* [2010] 2 FLR 1900, [2011] 1 All ER 373, SC
Ipekçi v McConnell [2019] EWFC 19, [2019] 2 FLR 667, FC
LM v DM (Costs Ruling) [2021] EWFC 28, [2022] 1 FLR 393, FC
Park v CNH Industrial Capital Europe Ltd (trading as CNH Capital) [2021] EWCA Civ 1766, [2022] 1 WLR 860, [2022] 3 All ER 867, [2022] 2 All ER (Comm) 415, [2021] All ER (D) 104 (Nov), CA
Sharland v Sharland [2015] UKSC 60, [2016] AC 871, [2015] 3 WLR 1070, [2015] 2 FLR 1367, [2016] 1 All ER 671, SC
T v T [2013] EWHC B3 (Fam), FD
Takhar v Gracefield Developments Ltd and Others [2019] UKSC 13, [2020] AC 450, [2019] 2 WLR 984, [2019] 3 All ER 283, [2019] 3 LRC 501, SC
WC v HC (Financial Remedies Agreements) (Rev 1) [2022] EWFC 22, [2022] 4 WLR 65, [2022] 2 FLR 1110, [2022] All ER (D) 62 (Apr), FC
Xydhias v Xydhias [1999] 1 FLR 683, [1999] 2 All ER 386, CA

The appellant appeared in person
Paul Infield (instructed by *Laurus Law*) for the respondent

Judgment was reserved.

MOSTYN J:

[1] In this judgment I shall refer to the appellant as 'the wife' and to the respondent as 'the husband'. The wife has appeared before me in person, although her appeal notice, her grounds of appeal, and her skeleton argument, were drafted by leading counsel directly instructed by her. The husband is represented by Mr Infield.

[2] On 10 February 2022 the parties reached a '*Xydhias*' agreement,[1] recorded in a signed draft consent order, compromising the financial remedy claims of the wife against the husband. On the same day the parties signed a completed Form D81. The agreement provided, inter alia, that the wife would retain £33,750 which had been paid by the husband under a legal services payment order, but which had not been spent; would receive £173,240 being the retained portion of the net proceeds of sale of a jointly owned investment property; and would be paid two lump sums totalling £362,000.

[3] On 22 February 2022 the wife repudiated the agreement. On that day she wrote to Her Honour Judge Jacklin QC[2] ('the judge') asking for a hearing to determine whether the agreement was fair, as she claimed it did not meet her needs. She later added to this unfairness ground an allegation that the husband was guilty of material non-disclosure which should act to negate the agreement completely.

[4] Remarkably, this was the third time that the wife had entered into an agreement and then shortly thereafter backed out of it. She did this in August 2020, when the lump sum to be paid to her was agreed to be £230,000; and she did it again in September 2021 when the lump sum was again agreed at £230,000.

[5] No consent order was ever made by the court. In August 2020 the wife did not in fact sign the draft order and it was not sent by her to the court. Although she signed the draft orders in September 2021 and February 2022 and sent them to the court, in each instance she had notified the court that she no longer consented before the draft order in question had been placed before a judge for approval.

[6] On 2 March 2022 the judge recorded in a recital to an order made that day:

> '[the wife] informed the court that she agreed that the consent order (*sic, semble* draft consent order) of 10 February 2022 is a concluded agreement and is not challenged on this basis and that she was asking the court to determine whether the consent order was fair.'

[7] The order went on to provide:

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1 *Xydhias v Xydhias* [1999] 1 FLR 683, [1999] 2 All ER 386.
2 I refer to Her Honour Judge Jacklin as a *QC* as that was her status on all those days in this matter when events occurred which concerned her.

> '7. The court determined that, in the light of the Consent Order, all directions in the order of 12 January 2022 specific to the respondent's earlier applications for notice to show cause (agreements of August 2020 and September 2021), should be discharged.
>
> 8. The court determined that it did not have the information necessary to determine what was fair at this hearing.
>
> 9. The hearing dates on 25 and 26 April remain listed to consider the fairness of the agreement entered into on 10 February 2022 and whether the court will endorse the draft consent order.'

[8] On 25 and 26 April 2022 the judge heard the matter and reserved judgment.

Agreement cases: procedure and principles

[9] The only elemental difference (and this can of course be significant) between a prenuptial, postnuptial, separation or '*Xydhias*' type of agreement is the closeness in time of the agreement to the hearing that determines whether it should be upheld. Clearly, the starting point should be the same whatever the type of agreement.

[10] The core characteristic of the court's disposal of an application about an agreement is that it is a final hearing of the parties' respective financial remedy applications where the court will consider and give due weight to the agreement. The starting point is that the court should give effect to an agreement that is freely entered into by each party with a full appreciation of its implications unless in the circumstances prevailing it would not be fair to hold the parties to their agreement (see *Granatino v Radmacher (formerly Granatino)* [2010] UKSC 42, [2011] 1 AC 534, sub nom *Radmacher (Formerly Granatino) v Granatino*, [2010] 2 FLR 1900 (at para [75])). This is hardly surprising. The rule of law, on which all social order depends, insists on contracts being generally upheld.

[11] Where no negating factor such as duress, mistake or fraud is alleged, and where the repudiation of the agreement is based on the imprecise, inchoate ground that it is 'unfair' the court is not obliged to consider the financial evidence in granular detail. It is not obliged to tabulate all the assets and liabilities and to work out the precise quantitative or relative outcomes for each party under the agreement. Instead, in a fairly summary manner, the court can instead stand back, survey the evidence broadly, and decide if the agreement meets the standard of basic fairness.

[12] The usual argument that is advanced to demonstrate unfairness is that it does not meet the needs of the challenging party. In *Granatino v Radmacher* Lord Phillips of Worth Matravers PSC stated at para [81]:

> 'Of the three strands identified in *White v White* [2001] 1 AC 596 and *McFarlane v McFarlane* [2006] 2 AC 618, it is the first two, needs and compensation, which can most readily render it unfair to hold the parties to an ante-nuptial agreement. The parties are unlikely to have intended that their ante-nuptial agreement should result, in the event of the marriage breaking up, in one partner being left in a predicament of

a real need, while the other enjoys a sufficiency or more, and such a result is likely to render it unfair to hold the parties to their agreement …'

[13] In *Ipekçi v McConnell* [2019] EWFC 19, [2019] 2 FLR 667 (at para [27](iv)) I stated:

b '(iv) The agreement does not meet any needs of the husband. I do not take the language used by the Supreme Court, namely "predicament of real need" as signifying that needs when assessed in circumstances where there is a valid prenuptial agreement in play should be markedly less than needs assessed in ordinary circumstances. If you have reasonable needs which you cannot meet from your own resources, then c you are in a predicament. Those needs are real needs.'

On reflection I do not consider that this was at all well-expressed by me. In every needs case there is a range of possible future standards of living of the applicant within which the court can alight in a pure exercise of discretion immune from appellate review. In *FF v KF* [2017] EWHC 1093 (Fam), d [2017] All ER (D) 94 (May) (at para [18]), I said, surely uncontroversially:

'So far as the "needs" principle is concerned there is an almost unbounded discretion …'

[14] Imagine that the discretionary range is a line of books on a shelf e bracketed left and right by book-ends. The book-ends may be quite far apart. The right book-end represents a comfortable, perhaps even luxurious, life-style. The left book-end represents a spartan lifestyle catering for not much more than essentials. The space in between is the discretionary range. When the Supreme Court says that it may not be fair to uphold an agreement which leaves the applicant in a predicament of real need, it is clearly saying f that if the result of the agreement would place the applicant in a standard of living to the left of the left-hand bookend, then that would be unfair. It is also saying that to make the agreement fair it should be augmented by no more than is necessary to move the applicant's lifestyle just to the right of that left-hand bookend.

This case

g **[15]** In this case, on 30 May 2022 the judge read out a judgment[3] in which she held that the agreement was not negated by the husband's non-disclosure; that it was fair; and that it should be made an order of the court. She ordered the wife to pay £19,000 towards the husband's costs, such sum to be deducted from the lump sum payment.

h **[16]** Before me the wife sought to argue that the agreement should be regarded as negated or vitiated by virtue of undue influence or by other oppressive conduct by the husband aggravated by inefficiency by the Court. In the proceedings below this argument was not pleaded or otherwise

3 There is no approved official transcript of the judgment. Counsel who appeared at the hearing below agreed a record of the judge's oral reasons which the judge has approved. It is that note of judgment which has been the subject of this appeal.

prefigured in writing. As stated above, the recital to the order of 2 March 2022 specifically records that the wife did not challenge the agreement on the ground that it was not legally concluded, ie that it was vitiated. Certainly, there is no mention of such an argument in the judgment, and nothing was said about it in the wife's appeal notice or grounds of appeal.

[17] The wife told me that she raised this orally before the judge, although Mr Infield, counsel for the husband, disputes this. I am satisfied that this aspect of the wife's case has never before been raised. The wife is a highly intelligent person, until February 2018 a Professor of International Relations, fluent in five languages, who knows exactly what is and is not procedurally permissible. I have to say that I regard her raising of this inflammatory allegation for the first time before me as being an example of a fixated approach to this litigation against the husband, which has endured for 7 years. However, I will explain that I consider that this fixated approach is not entirely unjustified.

[18] On 20 June 2022 the wife issued her notice of appeal against the judge's order and judgment dated 30 May 2022.

[19] The notice of appeal had 12 separate grounds. On 19 January 2023 Morgan J granted permission in respect of Grounds 1 to 6 and refused permission on Grounds 7 to 12. The wife has not sought to renew at a hearing the refused grounds pursuant to FPR, r 30.3(5). Morgan J refused a stay of execution, with the result that the financial payments due under the order of 30 May 2022 have been implemented.

[20] The Grounds for which permission were granted are:

> '1. The court erred in its approach to the Respondent's non-disclosure of an inheritance worth at least £4 million net, by concluding that it was "not operative".
>
> 2. The court's assessment of the Appellant's earning capacity was not based on a proper assessment of evidence, and the court's approval of a clean break in this case was plainly wrong.
>
> 3. The court failed in its judgment to adequately compute (a) the assets, (b) the Appellant's liabilities, or (c) the net effect of the agreement.
>
> 4. The court failed to properly assess how the Appellant's financial needs could be met through the agreement and failed to take into account the Appellant's liabilities.
>
> 5. The court approved an outcome, the unfairness of which should have been manifest.
>
> 6. The court erred in its decision to order that the Appellant should pay part of the Respondent's costs by failing to apply sufficient weight to the Respondent's non-disclosure.'

[21] The single appellate criterion is that the decision was wrong: FPR, r 30.12(3)(a).

[22] I will deal first with those Grounds which I consider to have no substance, namely Grounds 2, 3 and 5.

Ground 2: The court's assessment of the appellant's earning capacity was not based on a proper assessment of evidence, and the court's approval of a clean break in this case was plainly wrong

[23] The judge heard the wife give oral evidence under cross-examination and held that:

> '[49] Her engagement in the litigation is inconsistent with a person who has conditions that prevent them from working. She has drafted numerous applications and statements in support and has represented herself at numerous hearings.
>
> [50] In her oral evidence she accepted that she has an earning capacity but reprised this theme of her health. On more than one occasion, she said she was tired of litigation which has been going on for six years and she really wants it all to be over. But she accepted that she had the capacity to think it through but she acted impulsively.
>
> …
>
> [76] W was professor of international relations with specific focus on Central Asia until February 2018. I'm not aware of why that employment came to an end. She speaks Russian, French, Italian, Danish. She's highly intelligent. She's also a highly able person, as is seen from the documents she has produced during this litigation.
>
> [77] She says she has attempted to become a consultant. I've seen no evidence about that. In oral evidence, she said she was offered job as consultant by a company in Singapore.
>
> [78] In his position statement, Dr Fields said W is endeavouring solely to return to work in training to become a therapist. She anticipates that after three to five years, she could generate an average income of around £35,000 per year. This will require an investment in training and marketing her new business. There's nothing in her written statement about this, which is surprising.
>
> [79] In her oral evidence, more information was teased out, although it was confusing and somewhat contradictory. My understanding from what she said is that she's achieved a diploma in stress management and resilience. She has clients who at one stage she said "are paying" but at another stage she said "were about to start paying". She intends to charge £70/hr. She also said she will deliver training in that area. She says she is training to be a psychoanalyst and is working full time in that field but she's not being paid and is actually in training. She plans to publish in the area of psychoanalysis and has various ideas for publications but she no figure [*sic*] on what she expects to earn and when.
>
> [80] I was left confused and unsure about what she is actually earning at the moment.
>
> [81] A person with her background training experience and gifts and skills is highly employable. She said she is not suggesting that she's not employable.

…

[98] She has been spending between £2800 to £3900 per month on rented accommodation in some of the most expensive areas of London at a time when she was not working, not realising her earning capacity when she should have been doing so.

…

[104] In my judgement, the children are secure in housing and education, and they are the most important matter. W must develop her earning capacity which I think she accept [*sic*].

…

[109] W has for no good reason failed to realise her earning capacity, has run up enormous debts, which have been exacerbated by her choice of accommodation in one of the most expensive areas of London.'

[24] In her skeleton argument the wife submits that the court erred by:

(i) approaching the question of her earning capacity in terms of what she should do rather than what she reasonably could do, based on the evidence, to reasonably increase her income;
(ii) failing to make clear factual findings in relation to why she had been out of work for four years; why she left her previous job; what her current income was; when she should be able to return to work and increase her income; what sort of jobs she might reasonably undertake and in what sector of the economy; what she might reasonably earn, and how she might reasonably meet her outgoings or achieve financial independence;
(iii) failing to take into proper account her mental health problems and the difficulties a woman aged 54 might likely face, returning to work after a period of 4 years.

[25] In response, Mr Infield makes the following points:

(i) The wife signed draft consent orders which dismissed her income claims in August 2020, September 2021 and February 2022. It must follow that she thereby accepted that she had the ability swiftly to exploit her earning capacity.
(ii) In proceedings under the Children Act 1989, the wife stated in a witness statement dated 9 March 2018:

> 'I am no longer employed by the University. I have had several meetings in and around the London area with major Financial, Commercial, Research and Educational Organisations and I have understood that my specific linguistic aptitudes, teaching skills and diplomatic experience, along with areas of expertise obtained over the past 25 years, will be in significant demand. Although I will need to focus on various personal matters in the coming weeks and months, I intend to set myself up as a consultant and am developing end liaising with a list of potential London clients and users who I believe will be keen to take advantage of my services.

> Whilst I will no longer benefit from the many perks of an academic life, including enormous flexibility in location and long periods of non-teaching out of term and regular research Leave, I expect that I will quickly earn a higher salary than in my academic career.'

(iii) The wife adduced no evidence as to why this was no longer true.
(iv) There was no medical evidence which demonstrated that her earning capacity was impaired.
(v) She admitted in oral evidence that she was carrying out voluntary work and was training to be a psychotherapist. She had failed to produce her own tax returns so that it was not possible to see exactly what she had been earning.
(vi) She did not seek to adduce any objective evidence about the extent of her earning capacity.
(vii) In the circumstances the judge was entitled to make robust findings about her earning capacity.

[26] The judge's assessment of the wife's earning capacity was a mixture of findings of primary fact and the evaluation of those primary facts. In *Re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] UKSC 33, [2013] 1 WLR 1911, sub nom *Re B (Care Proceedings: Appeal)* [2013] 2 FLR 1075 Lord Neuberger PSC held at para [53] that an appeal against findings of primary fact can only succeed where the finding had no evidence to support it; or was based on a misunderstanding of the evidence; or was one no reasonable judge could have reached. An appeal against an evaluation of primary facts as found or undisputed can succeed only for the same reasons although applied perhaps with 'somewhat less force': Lord Neuberger at paras [57]–[58], citing Lord Hoffmann in *Biogen Inc v Medeva plc* [1997] RPC 1 (at para [54]). A 'degree of reticence' on whether to interfere with the evaluation is warranted: Lord Kerr JSC at para [110].

[27] The judge found that the wife has an unhindered earning capacity which she had, for no good reason, failed to exploit. That finding was based on the gold standard for the proof of facts, namely oral evidence given by a witness under cross-examination. The wife had failed to produce any, or any sufficient, countervailing documentary evidence.

[28] I have to say that in her submissions to me the wife did not begin to scratch the surface of persuading me that the judge's finding was wrong for want of evidence to support it, or because it was based on a misunderstanding of the evidence, or that it was a finding that no reasonable judge could have reached.

[29] As for the judge's decision to impose a clean break, it seems obvious to me that the judge must, at least subconsciously, have applied principle (xvii) with which I augmented Peel J's compendium of principles in *WC v HC (Financial Remedies Agreements) (Rev 1)* [2022] EWFC 22, [2022] 4 WLR 65, [2022] 2 FLR 1110 (at para [21]) by my decision in *Clarke v Clarke* [2022] EWHC 2698 (Fam), [2023] 2 FLR 1 (at para [36]). That principle states:

> '(xvii) Where an application for spousal periodical payments is actively pursued the court must diligently apply s 25A and consider whether the

> application can be dismissed and an immediate clean break effected. If the court concludes that a substantive order is needed to meet the applicant's needs the court should only make the award in such amount and for such a period as to avoid the applicant suffering undue hardship. The applicant must show good reasons why a non-extendable term maintenance order should not be made. The court's goal should be to achieve, if not immediately, then at a defined date in the future, a complete economic separation between the parties. The same principles apply, mutatis mutandis, where the court considers an application by a payer of spousal periodical payments for the variation or discharge of the order. The burden will be on the payee to justify a continuance of the order, and if so, for how long: *SS v NS (Spousal Maintenance)* [2014] EWHC 4183 (Fam), [2015] 2 FLR 1124, *Quan v Bray & Ors* [2018] EWHC 3558 (Fam), [2019] 1 FLR 1114.'

[30] I would suggest that this case amply demonstrates that the FRC judiciary is now asking itself the right question whenever it is suggested by an applicant that a clean break should *not* be imposed. That question is 'Has the applicant demonstrated by clear and cogent evidence good reasons why there should not be a clean break?' and not 'Has the respondent demonstrated why there should be a clean break?' I emphasise that, in order to comply with the terms of s 25A Matrimonial Causes Act 1973, a decision not to impose a clean break must be seen very much as the exception to the rule. The onus is on the applicant distinctly to prove by clear and cogent evidence that there should not be a clean break.

[31] The judge was right to answer the correct question negatively. The wife adduced no evidence, let alone clear and cogent evidence, which distinctly proved why, having regard to the finding concerning her earning capacity, a clean break should not be imposed.

[32] For these reasons Ground 2 is refused.

Ground 3: The court failed in its judgment adequately to compute (a) the assets, (b) the appellant's liabilities, or (c) the net effect of the agreement

[33] In her judgment the judge did not draw up a table which sets out the nature of the assets and liabilities, their values and the precise net amount each party would be left with upon implementation of the agreement. Instead, she dealt with the figures in a narrative way. This is not at all surprising as the judge gave an oral judgment in which she referenced the Form ES2 before the Court.

[34] I will deal with her treatment of the wife's debts under Ground 4.

[35] The preparation of a table is a matter of judicial choice even in a mainstream financial remedy case. Some judges prefer to deal with the facts in a more discursive than numeric way. I have set out above that the function of the court when considering the fairness of an agreement is to act summarily, deploying a broad-brush and avoiding a granular dissection of the figures. The judge's decision to act in this way cannot in any circumstances be characterised as an appealable error. Ground 3 is therefore refused.

Ground 5: The court approved an outcome, the unfairness of which should have been manifest

[36] I asked the wife to identify to me an aspect of unfairness of outcome which was not captured by her complaints about both the process and the outcome identified in her other grounds. She was unable to do so. This showed that this ground was no more than a makeweight. It adds nothing to her other complaints. Ground 5 is therefore refused.

[37] I now turn to the other grounds. I will address these grounds in reverse order.

Ground 6: The court erred in its decision to order that the appellant should pay part of the respondent's costs by failing to apply sufficient weight to the respondent's non-disclosure

[38] I have noted above that the core characteristic of the hearing before the judge was that it was a final hearing of the wife's claims for financial remedies. As such, the general rule of no order as to costs laid out in FPR, r 28.3(5) ought to apply to the proceedings. However, it has been held, in authority which I should follow unless there are powerful reasons not to, that the rule does not apply to an application that a concluded agreement be made an order of the court: *T v T* [2013] EWHC B3 (Fam). Accordingly, a soft costs-follows-the-event principle will be applied: see *Baker v Rowe* [2009] EWCA Civ 1162, [2010] 1 FLR 761 and *LM v DM (Costs Ruling)* [2021] EWFC 28, [2022] 1 FLR 393.

[39] The judge's finding was that the non-disclosure alleged by the wife occurred but was held to be 'not operative'. The judge also found that the wife, with due diligence, could have found out for herself the matters which the husband failed to disclose. I will be considering the correctness of these findings later in this judgment. If the judge's findings are correct there is no good reason why the principle should not be applied and the wife ordered to pay all, or at least part of the husband's costs, subject to the court being satisfied that she has the means to pay them. On the other hand, if the judge's findings are not correct then it will be difficult for the husband to resist an order that he pay the wife's costs as a litigant in person. Therefore, the outcome of this ground depends entirely on my decision on Grounds 1 and 4.

Ground 4: The court failed to properly assess how the appellant's financial needs could be met through the agreement and failed to take into account the appellant's liabilities

[40] The wife's assets, following implementation of the agreement were stated in the ES2 before the judge, and recorded by her, as follows:

(i) Retained portion of the proceeds of an investment property: £173,240
(ii) The second investment property: £45,000–£145,000 (see below)
(iii) Savings: £19,450
(iv) Unused LSPO: £33,750
(v) Lump sum: £362,000

The assets as recorded by the judge therefore had a value in the bracket £633,440–£733,440. In addition, the wife had claimed that she had liabilities of £246,199. Further, the wife had a pension fund worth £391,000.

[41] The wife complains that the husband's figure for the value of the second investment property held by her was not vouchsafed by any evidence. The Zoopla appraisal placed before the judge related to a different property altogether. She says that in using the husband's figure, as well as her own, the judge arrived at a bracket of value for the asset in question the top end of which was false.

[42] In para [71] of the judgment the judge said:

> 'This means she has roughly as a result of this agreement £745,000 and her pension.'

[43] The rough assessment by the judge of £745,000 is to be compared to the mathematically correct figure of £733,400 for the top end of the bracket for the wife's assets. Use of this rough figure of £745,000 means that the judge must have found:

(i) that the husband's figure of £145,000 for the net value of the second investment property was the correct figure and would be used;

(ii) that the entirety of the wife's debts of £246,199 would be ignored. Inferentially, the judge's finding must have been that they were so soft that it was more likely than not that none has to be repaid.

[44] I address these findings in turn.

[45] The judge stated at para [66]:

> '[The second investment property is] owned by W in her sole name also has a dispute re value. It was purchased in March 2016 for £416,000. H says that it must now be worth at least £500,000. W says it's worth £397,000 based on paper valuations from agents she instructed without reference to H.'

[46] In order to have made the finding in para [71] to which I have referred above, the judge must have used the husband's figure of £500,000 for the value of this property. In my judgment to have done so on the evidence before her was an appealable error.

[47] The wife had stated that she had debts totalling £246,199. In the ES2 these were broken down as follows:

Payment of inheritance to nieces	60,000
Loan from sister	10,000
Santander Retail Account	4,903
Santander Personal Loan	5,227
Santander Retail Card	3,241
Santander Personal Loan	18,458
Loan from friend (school fees)	6,861
Loan from friend (immediate needs)	10,000
Outstanding costs to solicitors firm1	74,142
Outstanding costs to solicitors firm 2	21,768
Debt to mother	20,000

CGT on investment property	4,000
Debt to HMRC/DWP	2,549
Igloo energy	792
Nationwide credit card	777
Eviction fee	3,481
Total debts	246,199

[48] The judge made the following findings about the wife's debts:

> '[82] W has significant debts but the evidence about them is again, not completely clear. She says that she owes money to 2 firms of solicitors. £74,000 to one firm and another £122,000 (sic, semble £22,000) to the other. The only evidence that she provided to the court attached in her recent disclosures were letters dating back to 2019. In oral evidence, when she was asked about this, it transpired that she issued proceedings against one of these firms herself in July 2019, which was at a time when she had claimed earlier in her evidence that she was bedridden on and off from July to Oct 2019 with CFS.
>
> [83] A subsequent email set out the history of that litigation which has been going on for some time. It transpires that W's claims was struck out as being totally without merit. W has sought to set aside but neither W nor D has heard from the court.
>
> [84] On the second day of this hearing, W also produced an email exchange with the other solicitors to whom she owes funds. It seems that W emailed the firm on the morning of the second day of this hearing saying "haven't heard from you since my email the 28th of January 2020. Requesting clarification on how you wish to proceed. I require confirmation whether you intend to pursue the fees or not". The reply was 14 minutes later. "I confirm that we do still seek payment of your outstanding fees. Let me know when you will be in a position to make payments".
>
> [85] This creates a very curious picture. Difficult to understand why these solicitors have not been more proactive if they are owed £95,000 (sic, semble £96,000).
>
> [86] There are also several personal loans with Santander. There are various debts in terms of energy bills, credit card, estimates for capital gains on the sale of 520 buildings, eviction fees outstanding to landlords.
>
> [87] She says that she had extensive loans from her family. There are sums which she says she still owes to nieces, £60,000, and £10,000 to her sister. I am not satisfied that I have a true picture of what is truly owed to family. There are loan agreements attached to her updating disclosure. On 5/11/19 a loan from her nieces of £15k each, ie £30k carrying 7% interest. Then other loan agreements in 2021, in May an agreement re W's mother gifting £60k to each of her 3 daughters, whereby the daughters of the deceased sister are owed £60k by W and she owes £10k to the other sister. Then there is another loan agreement later that month for £35,600 from W's mother. In December 2021 there

is a loan agreement for an additional £15k from her nieces, making a total of £45k owed to them carrying 7% interest.

[88] In her oral evidence W said her mother had given her £130k over a few years from when she lost her employment as a Professor at St Andrew's University in Feb 2018. It seems that retrospectively it was decided that the money given to W had to be treated as £60,000 to each of the 3 daughters so W owed her nieces £60k and her other sister £10k. and W says there were other loans along the way from her mother.

[89] What is apparent from the bank statements is that on the day that completion of the sale of 520 took place half of the proceeds went into W's account and she paid out a total of £175,500 within the next few days.

[90] £75,760 was spent on securing the two year tenancy of the property which she is now in with the children, also £5k plus for a short term let for the period between when she would have to leave the flat she was in and take up occupation of the flat she currently occupies.

[91] She says she paid her mother £20,000 being part of the money she owes her; nearly £50,000 to her nieces; loan from her brother in law £9,300; loan from another friend of £6,250; £12,320 pounds in respect of service charge arrears on 508.

[92] The totality of the other outstanding debts, she says, is £246,000.

[93] With the £362,000 that she is due from H under the agreement and the other £173,000, totalling £535,000, she will have a little under £300k if she has to pay off all those debts. She says this is not enough to purchase a home.'

[49] This final finding is very difficult to understand. The judge had earlier found in para [71] that the wife had, apart from her pension funds, assets worth about £745,000 (see my para [42] above). But here in her para [93] the judge is ignoring the value of the second investment property (which she had taken at the husband's figure of £145,000) together with the wife's savings and the unused LSPO. Further, it is not clear what finding the judge is making as to the likelihood of the wife having to repay all (or indeed any) of her debts. Although she expresses scepticism as to the debts due to the solicitors and to members of her family, it is unclear whether she is saying that, on the balance of probability, she is satisfied that the debts will not have to be paid.
[50] The judge went on to say:

'[95] H says that even if all of the debts are payable, W, she is still able rehouse [*sic*] because she'll have in addition to the remains of the capital sums, the property at 508 and there are properties in London, which she could purchase for herself. Which I'm sure there are but they're not in the area where she would wish. H has no such need.

[96] W did live in a six bedroom property in St Andrews. One could understand that she would want to buy something comparable to that property.

> [97] Difficulty with the W's position is that she has put herself into this position for no good reason.
>
> [98] She has been spending between £2800 to £3900 per month on rented accommodation in some of the most expensive areas of London at a time when she was not working, not realising her earning capacity when she should have been doing so.'

[51] At this point in her reasoning the judge appears to recognise that it is at least possible that all of the debts will have to be repaid.
[52] She then concluded:

> '[104] In my judgment, the children are secure in housing and education and they are the most important matter. W must develop her earning capacity which I think she accepts.
>
> [105] Even if she doesn't develop a mortgage capacity, she will be able to rehouse herself in a property using the remains of the capital sums provided to her under this agreement.
>
> [106] She could, for example, reduce the mortgage on 508, and occupy that property herself, thereby saving herself a considerable amount of money in sale, purchase costs and the risk of not being able to achieve a mortgage.
>
> [107] There are options available to her.
>
> [108] I do not see that this agreement is unfair in the particular circumstances of this case.
>
> [109] W has for no good reason failed to realise her earning capacity, has run up enormous debts, which have been exacerbated by her choice of accommodation in one of the most expensive areas of London.
>
> [110] A major part of her debt is as a result of the monies that she has spent on rent, which totals about £160,000.
>
> [111] In those circumstances, I find that this agreement is fair and I grant the husband's application and I shall endorse the consent order.'

[53] I assess the gravamen of these findings of the judge to be that:

(i) she does not need to find whether the debts are repayable, because even if they are
(ii) the wife will have sufficient money, when combined with a mortgage raising capacity, to enable her to rehouse herself and the two children then aged 18 and 16, and, even if she cannot raise a mortgage;
(iii) she and the children can live in the one-bedroom investment property; and that
(iv) if this causes her hardship it is her fault as she has spent unreasonably and has not exploited her earning capacity.

[54] In my judgment these findings contain appealable errors. Fundamentally, in my judgment the decision of the judge was wrong in that she failed to make findings:

(i) as to which debts were more likely than not to require repayment,
(ii) as to the sum that the wife would reasonably need for alternative accommodation,
(iii) the sum which the wife could raise by way of mortgage.

[55] These matters were key factual elements in the exercise of the discretion that the judge had to exercise under s 25 of the Matrimonial Causes Act 1973. In my judgment the judge could not lawfully exercise that discretion without having made findings, on the balance of probability, as to these matters. Her failure to do so vitiates her decision to uphold the agreement.
[56] The appeal on Ground 4 is therefore allowed.

Ground 1: The court erred in its approach to the respondent's non-disclosure of an inheritance worth at least £4 million net, by concluding that it was 'not operative'

[57] The husband's parents were Canadian. His mother died on 18 March 2020 and his father died 5 days later on 23 March 2020. The husband was the sole beneficiary of their estates and was the executor of their wills. He was granted probate on 24 June 2020. Subject to death duties the estates were worth over C$7m (£4.2m).
[58] The wife had commenced her financial remedy application in October 2016. In March 2020 the proceedings were unresolved and mired in interlocutory manoeuvring. But the proceedings were very much alive and on the death of his parents the husband was fixed with a duty to give a full, frank and clear disclosure of the expected post-tax value of his inheritance. Unfortunately he did not do so. His lack of candour was not confined to *suppresio veri* but extended to *suggestio falsi.* He even instructed Mr Infield to write this in a position statement for a hearing on 15 July 2020:

> 'The husband's parents have both died very recently. The probate process in Canada will take some time and it is currently not known how much, if anything, the husband will inherit.'

Mr Infield was instructed to repeat this in a position statement for a hearing on 31 March 2021.
[59] The Forms D81 signed by the husband on 30 September 2021 and 10 February 2022 each say 'I believe that the facts stated in this Statement of Information for a consent order are true and I have made full disclosure of all relevant facts'. Yet neither form makes any mention at all of the husband's inheritance. These forms were not merely misleading; they were untrue.
[60] In her judgment the judge found:

> '[54] [The husband's] position has been misleading because he is the only child and is the executor. He knew the size of the gross estate as at June 2020. In evidence he finally accepted that the accountants had offered an opinion on the likely taxation on the estate. Even if he had

not accepted that, I would readily have inferred that anyone in his position would want to have an outline of what was likely to be due in terms of taxation.

[55] I do not accept the picture he presented as someone who was not aware or not interested. I am satisfied that he held back from disclosing his inheritance is what it is. I suspect it's more than £4 million as we have approximate values from 2020 and these are notoriously low.

[56] He obviously had the information and schedules and assets in the probate application from June 2020. In his own evidence, he did accept that he should have been more forthcoming.'

[61] However, the judge went on to find that the non-disclosure was 'not operative'. Her finding was:

'[57] Having said that, I reached the conclusion that this lack of openness was not operative as far as this agreement was concerned or regarding the conduct of the litigation because W knew the size of the estate. She also had the means to require H to provide the information through a questionnaire. She failed to do so. I note the assertion in her recent statement that the DJ in July 2020 dismissed a request for updating disclosure. That is not accurate at all. The DJ directed questionnaires.'

[62] As to the wife's knowledge her finding was:

'[51] She also said that in, respect of H's inheritance, she knew the amount that he was likely to inherit. She had calculated that his parents were worth about £5 million.'

[63] The wife explained to me that her 'knowledge' derived from a telephone conversation with the husband's paternal aunt and her general awareness during the marriage that her parents-in-law were well off. When she entered into the agreement on 10 February 2022 she had received no disclosure whatsoever from the husband about his inheritance. She says that for the judge to have fixed her with 'knowledge' of the size of the estate was irrational.

[64] In my judgment the wife plainly did not have knowledge in the sense of having received objective evidence about the estates; at its highest she had a vague subjective belief based on the opinion of her father-in-law's sister and her general awareness.

[65] In *Cathcart v Owens* [2021] EWFC 86, [2021] All ER (D) 26 (Nov) I went into the law concerning the impact of non-disclosure in financial remedy proceedings in some detail. I stated at para [30]:

'Fraud is classically defined as wrongful deception intended to result in financial or personal gain. In the field of ancillary relief the traditional grounds for seeking the set-aside of a final order are conventionally stated to include both fraud and non-disclosure: see for example FPR PD 9A para 13.5. Deliberate non-disclosure is, of course, a species or

> subset of fraud for both in law and morality *suppressio veri*, *suggestio falsi*. The reason for separately identifying fraud and non-disclosure as grounds for a set-aside is that there are some rare cases whether the material non-disclosure is inadvertent and therefore not fraudulent.'

[66] There is no doubt that the non-disclosure by the husband in this case falls within this definition of fraud. The fixated approach by the wife to this litigation is therefore to some extent understandable.

[67] Notwithstanding that there is some inconsistency with the later decision of *Takhar v Gracefield Developments Ltd and Others* [2019] UKSC 13, [2020] AC 450, [2019] 2 WLR 984 the Supreme Court decision in *Sharland v Sharland* [2015] UKSC 60, [2016] AC 871, [2015] 2 FLR 1367 is binding on me. At paras [32]–[33] Baroness Hale DPSC held:

> '[32] … But this is a case of fraud. … A party who has practised deception with a view to a particular end, which has been attained by it, cannot be allowed to deny its materiality. Furthermore, the court is in no position to protect the victim from the deception, or to conduct its statutory duties properly, because the court too has been deceived …
>
> [33] The only exception is where the court is satisfied that, at the time when it made the consent order, the fraud would not have influenced a reasonable person to agree to it, nor, had it known then what it knows now, would the court have made a significantly different order, whether or not the parties had agreed to it. But in my view, the burden of satisfying the court of that must lie with the perpetrator of the fraud. It was wrong in this case to place on the victim the burden of showing that it would have made a difference.'

[68] Strictly speaking the principles set forth in *Sharland v Sharland* apply to a consent order procured by fraud. In my judgment they apply equally to a *Xydhias* agreement (or for that matter an *Edgar* separation agreement) which had not been converted into a consent order by the time that the balloon went up. Mr Infield did not argue otherwise.

[69] I have set out above the judge's second reason for holding that the husband's non-disclosure was non-operative. She held that the wife should have made her own enquiries to find out about the inheritance, thereby saving herself from the effect of the husband's deception. But the law is clear that there is no such duty of due diligence imposed on the victim of a fraudulent deception: see *Takhar v Gracefield Developments Ltd and Others* per Lord Sumption at paras [54]–[66]. This has recently been confirmed in *Park v CNH Industrial Capital Europe Ltd (trading as CNH Capital)* [2021] EWCA Civ 1766, [2022] 1 WLR 860, [2022] 3 All ER 867. At para [56] Andrews LJ stated:

> 'The Supreme Court held that in a case where the alleged fraud was not in issue in the previous proceedings, even if the previous judgment has been entered after a trial on the merits, the person seeking to set aside the judgment is not obliged to show that the fraud could not have been discovered before the original trial by reasonable diligence on his or her part. The requirement in *Henderson v Henderson* (1843) 3 Hare 100

a

> that "a litigant should bring forward his whole case" in the first set of proceedings does not apply in such circumstances, and there are no good policy reasons to allow the fraudulent party to rely upon the passivity or lack of due diligence of his opponent.'

[70] Mr Infield did not seek to uphold this second reason for holding that the husband's non-disclosure was non-operative.

b

[71] None of the above authorities were cited in the judge's judgment. I do not believe that they were even discussed in argument before her.

[72] The judge's first reason does not, with respect, come close to satisfying the stringent test in *Sharland*. That the wife had a vague subjective belief that the husband had inherited a sizeable estate (all of which was admittedly non-matrimonial property and could only be taken into account to meet the wife's needs claim) could not possibly, in my judgment, have led a trial court rightly to conclude that:

c

> (i) on 10 February 2022 a reasonable person in the position of the wife, having that vague belief, would have nonetheless reached that agreement in the absence of any proper disclosure of the size of the inheritance; and
>
> d
>
> (ii) it would have made exactly the same order when considering the proposed consent order if the Form D81 had stated that the husband was going to receive an inheritance of over C$7.5m (£4.2m) subject to death duties.

e

[73] In my judgment the principles in *Sharland* should be applied rigorously where non-disclosure is proved. Non-disclosure is a bane which blights far too many financial remedy cases. Litigants must understand that if they practise non-disclosure then the almost invariable consequence will be a set-aside with costs. The exceptions should be construed very narrowly indeed.

f

[74] If I were to accept the argument that the non-disclosure in this case was completely non-material because the wife held a vague belief that the estate was substantial then I would blow an enormous hole in this field of jurisprudence.

[75] Therefore, where the court is dealing with an application to set aside a consent order, (or, as here, an application that a draft consent order should be rejected) on the ground of fraudulent non-disclosure, the court should not

g

entertain any argument that the victim of the non-disclosure could, with due diligence, have discovered the material facts, and should apply stringently the principle that the consent order, and the underlying agreement, must be set aside unless the non-discloser can show by clear and cogent evidence that a reasonable person in the position of the victim of the deception would, if she had full knowledge of the facts, have reached the same agreement.

h

[76] If the court is dealing with an application to set aside a judgment reached after a fully contested hearing on the ground of non-disclosure, then the court should apply the principle that the judgment will not stand unless the non-discloser can satisfy the court with clear and cogent evidence that had it known all the undisclosed facts it would nonetheless have reached the same decision.

[77] In this case the husband has not come close to discharging the onus on him to show that a reasonable person in the position of the wife on 10 February 2022, but possessed of full disclosure of the size of the husband's inheritance, would have nonetheless made the same agreement.
[78] For these reasons the appeal on Ground 1 is allowed.

Disposal

[79] The judgment and order of the judge of 30 May 2022 are therefore set aside, although there will not be any reversal of those parts of the order which have been implemented. The wife's claims for financial remedies for herself will have to be retried. I transfer the financial remedy application from the Family Court at Barnet to the Central Family Court. I direct that the matter be fixed for directions before a judge of the FRC sitting at the Central Family Court on the first available date with a time estimate of one hour. No later than 7 days before that hearing the parties are each to file a note specifying the directions that they seek, including, but not limited to, directions about:

(i) financial disclosure by the husband;
(ii) the wife's earning capacity and mortgage raising capacity;
(iii) the wife's debts and their repayability; and
(iv) the wife's housing needs.

[80] It seems to me, in the light of *Goddard-Watts v Goddard-Watts* [2023] EWCA Civ 115, [2023] 4 WLR 20, [2023] 2 FLR 735, that the retrial will require a hearing of all issues *de novo*.

Costs

[81] In my judgment the wife should recover her costs as a litigant in person of the hearing before the judge and of this appeal. I have received a statement of costs from her for the appeal, but I have not had one in relation to the proceedings before the judge. She should file that statement within 2-working days of receipt of this judgment in draft. The husband may file a very short note containing his submissions on the reasonableness of the wife's claim for costs. I will then, without a hearing, summarily assess the costs that the husband should pay the wife in respect of the proceedings before the judge and the appeal before me.

Order accordingly.

AMARJIT ATWAL
Law Reporter

AH v BH
[2024] EWFC 125

Family Court

Peel J

7 June 2024

Financial remedy – Family proceedings – Weight to be accorded to pre-marital agreement – Assessment of needs of wife and children – MCA 1973, s 25

The period of cohabitation and the marriage of the parties lasted 5½ years. The value of the assets was £50m, almost all in the husband's name and built up through his business ventures prior to the parties' relationship. The wife's assets were £291,000. At the start of the relationship the wife was financially independent and worked prior to the birth of the first child. She had had a mortgage-free flat which she sold in 2019 and some of the proceeds were used to renovate the matrimonial home purchased in the husband's name. In 2020, the first of the parties' two children was born. At the time of the judgment, the children were aged 2 and 4-years old. In September 2022, the parties separated. The wife and children continued to live in the former matrimonial home (FMH). Under the terms of a child arrangements order the wife was the primary carer. In 2018, 28 days prior to their marriage, the parties had signed a pre-marital agreement (PMA), designed to protect the husband's wealth. The PMA provided inter alia that on marriage breakdown jointly owned property would be divided equally; each party would retain their separately owned property; there should be a review upon the birth of the first child (which review never took place); and for capitalised spousal maintenance depending on the years of marriage. At the final hearing of the financial remedies proceedings, the husband proposed that the FMH (worth £5m gross) be sold and the wife receive 40% (£1.9m) to purchase a property on a Sch 1 Children Act 1989 (CA 1989) basis; a lump sum of £818,025 for the wife in accordance with the PMA; child maintenance starting at £30,000 per child, scaling down to £18,000 after 2025, until the youngest child reached secondary education and Child Maintenance Service rates thereafter. The wife sought transfer of the FMH; a £1,867,522 income fund comprising £250,000 per annum (pa) for 10 years reduced by estimated earning capacity, to be offset by £200,000 of her own funds; child maintenance of £30,000 pa per child. The wife did not assert any vitiating factor such that the PMA should be disregarded. The essential dispute was whether (according to the wife) the PMA should be departed from to the extent necessary to achieve a just outcome by reference to needs, or whether (according to the husband) she should be held to the terms of the agreement which both parties had considered to be fair and appropriate at the time and was a necessary condition for their marriage.

Peel J defined the principal issue before the court as the interplay between: (i) the terms of a PMA which purported to limit severely the wife's own financial remedies claims; and (ii) the financial needs of the wife and children.

Held – dismissing the application in part; awarding the wife a total of £4,051,994 and £20k pa child maintenance per child; making no order for costs –

(1) Concerning the law on PMAs, the court's overarching duty was to achieve a fair outcome, taking into account the criteria in s 25 of the Matrimonial Causes Act 1973 (MCA 1973) and bearing in mind that the children were the court's first consideration. A PMA was one of the relevant criteria but was not the only one. The terms of a PMA had to have been seen in the context of the MCA 1973 s 25 factors and the weight to be attributed to it would vary from case to case: see *HD v WB* [2023] EWFC 2, [2023] 2 FLR 395 at para [44]. A 'predicament of real need' referred to in *Granatino v Radmacher (formerly Granatino)* [2010] UKSC 42, sub nom

Radmacher (Formerly Granatino) v Granatino [2010] 2 FLR 1900 (*Radmacher)* did not mean destitution. Further, needs should not always be assessed in a parsimonious, restrictive way, regardless of the factual context, as it all depended on the facts. The Supreme Court in *Radmacher* and the Court of Appeal in *Brack v Brack* [2018] EWCA Civ 2862, [2019] 2 FLR 234 emphasised the latitude and flexibility available to the judge to meet the demands of fairness in cases involving a PMA. That latitude and flexibility applied to the assessment of needs as much as it applied to the other MCA 1973 s 25 factors. Each case was a highly fact specific evaluation and discretionary exercise. In respect of housing needs, several different approaches had been taken in the balancing exercise, weighing up the agreed PMA terms on the one hand and the needs of the parties on the other. There was no reported PMA case where a primary carer of the children with no significant assets of his/her own had not received a sum of money for housing outright. Courts have not shied away from a capitalised maintenance sum for an income fund. The PMA could have been reflected by limiting the level of maintenance or the length of term (see paras [43]–[45], [46]–[47], [48]–[51], [52]–[54]); *Cummings v Fawn* [2023] EWHC 830 (Fam), [2024] 1 FLR 117, considered.

(2) In analysing the parties' needs claims, the PMA represented a constant influence on the present proceedings. It had been signed with full knowledge of its meaning and consequences and with legal advice. The wife had been aware that her claims on divorce would have been heavily restricted. Future anticipated circumstances included the birth of children. The marriage had been relatively short. The husband had been independently wealthy at the time of signing the PMA, and as the wife acknowledged, had wanted to protect that wealth, particularly his business. All those points weighed in the balance. On the other hand, a factor of magnetic significance and a powerful counterweight to the PMA had been that the wife would be the primary carer for the children. Further, marriage and having children had had a significant impact upon her. She had no longer been an independent woman but had been vulnerable and dependent. She had had no alternative property of her own and her earning capacity had been heavily diminished. The wife had contributed fully to the marriage as wife and mother and had made sacrifices for the sake of the relationship. Those were all material changes since the PMA was entered into. The PMA had provided for review in the event of the birth of children, which had clearly indicated that the parties had contemplated that it might not be a fair document upon children being born. The fact that it had not been reviewed did not prevent the court from considering the overall fairness of the PMA in the light of present circumstances (see paras [61]–[64]).

(3) It would have been unfair for the wife to be restricted to CA 1989 Sch 1 type housing. However, the FMH over-housed the wife and children, and it would be sold. They could have reasonably rehoused for £2.75m plus an additional £300,000 for costs of purchase, stamp duty and renovations. The wife's budget for income needs had been considerably overstated. An appropriate budget had been £110,000 pa for the wife for 10 years and £20,000 each for the children until they had completed tertiary education. The figure of £110,000 pa for the wife would be capitalised over a 10-year period. Further, a clean break was highly desirable, easily achievable and consistent with the statutory objective. The *Duxbury* figure would be rounded up to £910,000, reducing to £710,000 by set-off of £200,000 of the wife's own capital (see paras [65]–[78]).

(4) The total award would be £4,051,944, giving appropriate weight to the PMA, protecting the husband's business interest, restricting the extent of the wife's claims and leaving him with the vast preponderance of the assets, while at the same time reflecting her ongoing long-term responsibilities for the children, the relationship generated impact on her, the extent of the wealth and the family's standard of living (see paras [84]–[85], [88]).

Observed: Had the parties not signed the PMA, the wife might have been entitled to receive on a sharing basis as much as £7.5m, and possibly more. Even on a needs

basis, absent the PMA, her award would likely have been greater; retention of the FMH and a longer *Duxbury* term (perhaps even a whole life term) would have been arguable (see paras [40]–[41], [86]).

Nichola Gray KC (instructed by *Kingsley Napley LLP*) for the applicant
Michael Glaser KC (instructed by *Burgess Mee Family Law*) for the respondent

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media and legal bloggers, must ensure that this condition is strictly complied with. Failure to do so may be a contempt of court.

Judgment was reserved.

PEEL J:

Introduction

[1] The assets in these financial remedies proceedings are, as I find, about £50m, almost all in the name of the husband ('H'). The wife ('W') has very modest resources of about £291,000. The period of cohabitation and marriage lasted about 5½ years. There are two children, for whom W is and will remain the primary carer. The principal issue before me is the interplay between (i) the terms of a pre-marital agreement ('PMA') which purports to limit severely W's financial remedies claims in her own rights and (ii) the financial needs of W and the children.

[2] The parties' open positions at trial are:

(i) H offers:

(a) The FMH to be sold, and W to receive 40% (about £1.9m) to purchase a property on a Sch 1 type basis i e to revert to H at the end of the children's tertiary education. That sum is inclusive of moving costs and SDLT.
(b) H to pay W £818,025, lump sum provision to which she is entitled under the terms of the PMA.
(c) H to pay nursery and school fees.
(d) H to pay child maintenance in the total sum of £60,000pa (£30,000pa per child) until February 2025, then £36,000pa (£18,000pa per child) until the younger child reaches secondary school, and thereafter in accordance with a CMS assessment.
(e) Clean break.

(ii) W seeks:

(a) Transfer of the FMH (valued at £5m gross) to her, to be sold upon the children finishing tertiary education at which point W would receive 50% outright, and H would receive the balance.

(b) £1,867,522 by way of income fund for her, calculated as £250,000pa for 10 years, reduced by estimated earning capacity, and to be offset by £200,000 from her own capital resources.
(c) £60,000pa child maintenance (£30,000pa per child).
(d) H to pay nursery and school fees.
(e) Clean break.

The background

[3] W is 40 years old. She was born and brought up in country A. H is also 40. He was born and brought up in country B.

[4] W has sacroiliac joint dysfunction and anterior pelvic pain, caused by difficult childbirth. In addition, she has mental health issues and has been attending weekly psychotherapy since September 2022. H also has mental health issues and is receiving therapy.

[5] In 2007 H, then about 24 years old, set up a business with a partner. The main operations of the business are in country B, although it has a presence in a number of jurisdictions including the United Kingdom.

[6] In March 2015, the parties met in London. H was living in capital city B, and W in London. W had just handed in notice from her asset management job. In late 2015, she returned to capital city A where she enrolled on a university postgraduate course and worked in the health and wellbeing sector. She bought a flat in capital city A in her sole name, using the proceeds of her London property.

[7] In February or March 2016, the parties' relationship began, by when H was living in London. W moved back to London in early 2017 to live with H, and thereafter worked 3–4 days per week until 2020, when their first child was born, in the health and wellbeing sector.

[8] At the beginning of April 2018 (the precise date was not clear), the parties signed a PMA, and in April 2018 they married.

[9] Pursuant to contractual terms signed shortly before the marriage, H realised €13m net from his business. That capital sum sustained the family through the marriage, along with H's salary.

[10] The family home in North London was bought by H in his sole name in 2018 for £2.79m, funded entirely by H's resources. W sold her flat in capital city A. In December 2019, they moved into the FMH after carrying out approximately £1m of renovations, to which W contributed, I am satisfied, about £100,000 from the sale proceeds of her flat in capital city A . The sale of her flat also generated a stamp duty rebate for H on the purchase of the FMH in the sum of about £84,000. W played a significant role in overseeing the refurbishment project; H said in evidence that W 'put in an amazing amount of work'.

[11] The parties have two sons now aged 4 and 2.

[12] In September 2022, they separated. H moved into rented accommodation, and in October 2023 bought a property in North London for £2,002,223 (inclusive of purchase costs). He did not inform W or her solicitors of the purchase until after the event even though her Form A had been issued some 9 months previously, on 27 January 2023. This was clearly in breach of his

obligation to provide W with frank disclosure of his financial circumstances and intentions; it was an inexcusable failing on his part, and it should not have happened.

[13] H spends time in both London and country B (he told me about one third to 40% of his time is in country B), and he also travels for work.

[14] W and the children continue to live at the FMH. Under the terms of a child arrangements order made by consent, the children are with H during term time for 4 nights a fortnight, and for part of the school holidays. H has flagged up that he would like the children to spend more time with him in school holidays, and he may make an application to court if agreement is not reached.

[15] In September 2023, the older son started at a local pre prep school. The younger child is at nursery school, and it is intended that he too will move to pre prep education in September 2025.

[16] The litigation has followed a reasonably conventional course. In response to W's Form A, H issued a Notice to Show Cause which as a matter of form is before me but is subsumed by the overarching s 25 inquiry.

[17] At the First Appointment on 12 October 2023, W confirmed, as recorded on the face of the order that:

(i) She did not assert a vitiating factor such that the PMA should be disregarded.
(ii) Her claim is based on needs.

[18] The parties' combined costs total £595,517 which is perhaps less eye watering than in some cases, but still represents a very large sum now gone forever from the parties' wealth.

The evidence

[19] Contrary to the case advanced by counsel for H robustly in cross examination, W was not, in my assessment, dishonest or so motivated by hostile animus to H that it infects her entire case. I thought she did her best to tell the truth. In reality, there was never any real issue on the relevant facts, although W at times fell into speculation or guesswork in relation to some financial matters, for example the cost of holidays taken during the marriage. It was apparent to me that W feels hurt and let down by H who she believes is not willing to support her and the children properly, and (as she sees it) uses the PMA to seek to avoid his responsibilities. In my view, she feels vulnerable and dependent. She has next to no assets of her own, no job, and is tasked with bringing up the children. She has given up her flat in capital city A and committed herself to a marriage which did not endure. All of this has created a considerable degree of anxiety, mixed with anger and frustration.

[20] Like W, H seemed to me to be trying to tell the truth. In my view, he is suspicious of W. That was reflected, for example, in his concern that W may make it difficult for him to see the children. I did not think he fully appreciated W's sense of vulnerability and dependency.

Standard of living

[21] The parties are in dispute about the standard of living they enjoyed. I would describe it as a comfortable, but not extravagant, lifestyle, commensurate with their wealth. They lived in a £5m house in London.

The children are in private education. They ate out regularly although I think W exaggerated the frequency of trips to the finest London restaurants. They had access until 2019 to H's rented flat in capital city B, and a country house in country B co-owned by H and his business partner. They had regular holidays including to destinations such as Mauritius, the Seychelles, Sri Lanka and Marrakesh (sometimes travelling business class). W has produced a schedule which estimated the total cost of holidays from 2017 to 2022 (which includes the Covid pandemic era) at an average of about £50,000pa. She acknowledged in cross examination that many of the figures were estimated. Although H has had that schedule since January 2024, he did not substantially challenge it in his written evidence. On the first attended day of the trial his counsel attempted to produce a detailed schedule of H's comments on the figures which purport to demonstrate that the overall holiday expenditure was far less than W claimed. I refused to allow that schedule, into the evidence. In any event, as I understood it, no underlying evidence to support H's comments (e g hotel bills or credit card statements) was produced. It therefore seemed to me that H's oral evidence on these matters was inevitably deficient to some degree. I am left with uncertainty about the actual cost of the holidays, although a cross reference to actual, disclosed bank statements showed that W's estimates for 2021 and 2022 of about £30,000pa (lower than previous years because of Covid and the birth of the children) were reasonably accurate. What is not in doubt is that the holidays did indeed to take place, and, certainly in the pre Covid years, on 7 or 8 occasions each year. My sense overall is that the cost of the holidays was not as much as suggested by W, but these sorts of holidays will nevertheless have come at reasonably significant cost.

[22] W produced an analysis of bank accounts and credit cards of the parties from which she submits that their total expenditure (joint and personal), excluding school fees, during 2021 and 2022 was:

2021	£310,605
2022	£211,513

There were question marks about one or two entries, but I am satisfied that this broadly represented their financial output in that period. In other words, as a family they spent on average about £250,000pa in those two years. A separate question, to which I will return, is whether that is a sound evidential base for W's income needs going forward, as it includes a number of arguably one-off items.

The PMA

[23] W sensibly does not assert that the PMA is in some way undermined by a vitiating factor; it is clear and comprehensive; it was signed (depending on the precise date) about 28 days before the marriage by both parties; it includes unchallenged financial disclosure; each party had independent legal advice; each confirmed that they entered into the PMA freely and voluntarily, without coercion, pressure or duress of any kind; each confirmed that they believed the terms of the PMA to be fair; each acknowledged that the PMA was a pre-condition to their marriage; each confirmed that they fully understood the nature and effect of the PMA.

[24] When W signed the PMA, she was financially independent; she had a mortgage-free flat and employment. I am confident that she did not expect or anticipate that the marriage would break down; as she told me 'I thought we would be married for life'. I doubt she really thought through the potential consequences in the event of marriage breakdown, particularly if children were born. This is, in my experience, true of one or both parties to many PMAs who sign up in the anticipation that it will never need to be referred to. However, the fact is that she did sign it and she fairly said to me that she does not try to escape its provisions on the basis of some vitiating factor.

[25] Her case is that the PMA does not reasonably or adequately meet her financial needs. Accordingly, she says, it should be departed from to the extent necessary to achieve a just outcome by reference to needs. H, by contrast, argues that W should be held to the terms of an agreement which both parties considered were fair and appropriate at the time, and which were a necessary condition for their marriage. That is the essential dispute between the parties at this trial.

[26] The principal dispositive terms of the PMA are:

(i) The parties agree that 'their respective claims in the event of the breakdown of their marriage shall be determined in accordance with the terms of this Deed'.

(ii) Their primary intention is that (a) joint property should be divided equally, (b) neither shall make a claim against the other's separate property and (c) W shall not make any claim against, or by reference to, H's business interests.

(iii) Having regard to their backgrounds, and the approach of the courts of the countries from which they originate to questions of maintenance, neither believes that there should be a periodical payments claim against the other in the event of breakdown of the marriage.

(iv) Joint property is defined as any property held in the joint names of the parties. Separate property is identified as the assets in the schedule to the Deed and all other assets in their respective sole names.

(v) They each acknowledge that they will be bound by the terms of the Deed regardless of the length of their marriage and any changes in the years to come unless superseded by a Supplemental Deed.

(vi) The Deed 'shall be reviewed' upon, inter alia, the birth of the first child. There was in fact no such review.

(vii) The PMA establishes a separate property regime; neither will have a share in the other's separate property and there will be no matrimonial acquest (other than joint property as defined in the PMA).

(viii) The parties agree that the terms of the PMA meet the anticipated reasonable needs of each of them.

(ix) On breakdown of the marriage:

  (a) Joint property shall be divided equally.
  (b) Each party will retain their separate property.
  (c) There shall be a clean break.

(d) In the event that the parties do not have children, neither shall make a payment to the other if the marriage lasts less than 4 years, and thereafter H shall pay W £200,000 for each year of marriage up to a maximum of £4m.
(e) In the event that the parties do have children, should the marriage last less than 7 years H will pay W £600,000 and £200,000 for each completed year thereafter up to a maximum of £4m.
(f) RPI shall apply to the lump sums.
(g) In respect of children, a Sch 1 claim remains open to be made, and the parties will abide by any order made by the court for financial provision for them.

The resources

[27] Before turning to the parties' resources now, I record their resources at the time of the PMA:

(i) H disclosed £972,481 of broadly realisable assets, and a value for his business interest at €45.3m ignoring (a) any discount for lack of control and (b) tax. His income was recorded as £132,000pa gross.
(ii) W disclosed £669,000 of realisable assets (mainly her flat in capital city A). Her self-employed income was recorded as not more than £2,500pm gross.

[28] The net assets now are:

Husband	
FMH	£4,850,000
Primrose Hill property	£1,758,104
Bank accounts	£784,782
Investments	£5,102,574 (principally start-ups and private equity investments)
Business	£38,000,000
Chattels	ignored
Pension	£14,282
Liabilities	(-£341,183)
	£50,168,559
Wife	
Bank accounts	£4,622
Investments	£292,066
Pension	£27,903
Chattels	ignored
Liabilities	-£32,647
	£291,944

[29] I have accepted H's value of his private equity investments, but exclude future capital calls as a liability; they seem to be more in the nature of a need than a liability. I ignore W's car loan liability as I have not included the value of her car.

[30] In respect of H's business interest, in February 2022 it was valued at €99.5m for commercial purposes, without any discount for illiquidity, an increase of some €54m since the PMA figure. By the time of his Form E in July 2023, he said that the value of comparable companies in the sector had dropped, and he accordingly valued his shareholding at about €55m-€65m after a 20% discount for illiquidity. To provide a like for like comparison with the PMA value, and the value ascribed in 2022, adding back the 20% discount gives a pre-tax figure of €68.75m-€81.25m.

[31] I refused W's application for an expert valuation at the PTR. I did not think it was either necessary or proportionate in circumstances where a sharing claim is not pursued and on any view H's overall wealth is more than sufficient to meet the needs claim. Further, it was far too late in the day, being made only a few weeks before final hearing. Nevertheless, it seems to me that I should attempt to place a figure on the business interest in order to establish in general terms the financial context within which these financial remedy proceedings should be determined.

[32] I will take the midpoint figure between €68.75m and €81.25m; that is €75m ignoring tax and any discounts. I accept that some discount should be applied for lack of control/illiquidity and H's suggestion of 20% is not unreasonable. That reduces the figure to about €60m. Capital gains tax on disposal would be 20% or 34% depending on tax residency. I propose to take a midpoint 27% tax liability which brings the figure down to €44m, or about £38m net.

[33] W says that I should take H's share of the business at a value of not less than the €99m gross figure pursuant to the commercial valuation in February 2022. I decline to do so. H has since his Form E consistently said that valuations in the sector are now much lower, and W did not pursue an expert valuation until too late in the day.

[34] By the same token, I reject H's attempt advanced at trial to take a lower figure than the one contained in his Form E, on the basis that valuations in the sector have declined further. This purported lower value post-dated W's application for expert evidence at the PTR, which he had strongly resisted, and I note that he has in fact produced no evidence in support.

[35] Accordingly, I take the figure of £38m net. In so doing, I acknowledge the fragility of any valuation; the figure I adopt is reasonable on the evidence, but is not an iron clad value. The true value, i e what a willing purchaser might offer today for H's shareholding, could be higher or lower.

[36] There was some debate about the liquidity of H's business interest but in the circumstances of this case, I am not persuaded that any lack of liquidity is of particular relevance:

(i) W's claims are limited by reference to needs, and can be met from the non-business resources.

(ii) Illiquidity is already baked in, at least to some extent, by the 20% discount which H seeks.

(iii) The shareholders' agreement entitles H to either: (i) sell his shareholding under a pre-emption right to his business partner or, in default; (ii) force a sale of the entire business. I readily acknowledge that H would not want to take such a course, which might be highly divisive and commercially unwise (sale of shares to his partner would likely have to take place at a hefty

discount, and a forced sale of the whole is rarely the optimum way of realising funds) but that would be a matter for H to manage. However, this is all largely academic as H does not need to follow this course in this case.

[37] As for income, W earns very modest sums (a few thousand pounds a year). She intends to complete her degree and train as a therapist. She estimates that, due to her parenting commitments, she will not be able to exercise a meaningful earning capacity for at least 5 years, at which point she hopes to earn up to £21,000pa gross on a self-employed basis. Although W has a degree, and a Masters, it is, in my judgment, unrealistic to expect her to return to a corporate career, to which she was not suited, which she did not enjoy, and which she would have to dovetail with the children's needs. Moreover, given her mental health problems there is a question mark about whether she would be sufficiently robust to venture back into that high pressured world. With H's encouragement, she did apply for full time finance jobs in 2021, during Covid when she would have been working from home and they had only one child, although I had the sense that her heart was not really in it. Such full-time jobs would no longer be appropriate as the parties are separated, there are now two children and working fully from home is not achievable. In any event, she did not secure any employment and the feedback she received that she had been out of the sector for too long is unsurprising. In my judgment W's own assessment of her earning capacity is a reasonable one to adopt.

[38] H puts his earned income at about £150,000pa gross. But he realised €13m net from the business in 2018 and may in the future seek to extract capital sums. This is not a case where the court looks at payslips alone; the totality of resources, the standard of living, and actual expenditure are much more helpful in painting a true financial picture.

Sharing claim

[39] W by the PMA foregoes any entitlement to a sharing claim. Nevertheless, it seems to me to be instructive to consider what a sharing claim might otherwise have produced for her, as being illustrative of what rights she has conceded. My focus here is principally on H's business interests which on any view increased in value during the marriage; any such increase was not by reference to passive growth but active management by two hard working individuals.

[40] At the time of marriage, H put his business interest at €45.3m gross. On a like for like basis (ie ignoring discounts and tax) it is now about €75m gross. Thus, the increase during the marriage (or at any rate to the Form E, which was less than a year after the separation) was about €30m. Applying the discount of 20% for illiquidity brings that figure down to about €24m. Deducting tax at 27% reduces the figure further to €17.5m, ie about £15m. I appreciate that all of this is hedged with uncertainty, but it at least gives some indication of the net increase during the marriage. It follows that the effect of the PMA may be to deprive W of a claim to 50% of the gain ie about £7.5m. It may also be that she would have been able to establish a sharing claim in other assets, notably the FMH. I accept that I did not have full argument on this, but it was clearly flagged up in W's counsel's opening Note (specifically para 44) and I see no reason why I cannot, or should not,

consider this aspect in broad, but tentative terms. It does not seem to me unreasonable to assume that, had it not been for the PMA, there would have been at least an arguable sharing claim given that, on H's own figures, from marriage to his Form E the business value went up by about €30m gross.

[41] In summary I conclude that:

(i) The value of H's business interest now is about £38m net.

(ii) The increase in value of H's business interest during the marriage was about £15m.

(iii) W's 50% claim under a sharing claim might have been £7.5m (on H's case perhaps less, on W's case perhaps more). I reiterate that this evaluation is indicative and illustrative, rather than definitive.

The law on PMAs

[42] I refer to what I said *HD v WB* [2023] EWFC 2, [2023] 2 FLR 395 at para 44 onwards, with some adaptations.

[43] The court's overarching duty is to achieve a fair outcome, taking into account the s 25 criteria, and bearing in mind that the children are the court's first consideration.

[44] There is no doubt that a PMA is one of the relevant criteria, but it is not the only one. The terms of a PMA must be seen in the context of the s 25 factors. The extent of the weight to be attributed to a PMA will vary from case to case.

[45] The leading authority is, of course, *Radmacher v Granatino* [2010] UKSC 42, [2010] 2 FLR 1900 from which the following propositions can be drawn:

(i) 'If an ante-nuptial agreement, or indeed a post-nuptial agreement, is to carry full weight, both the husband and wife must enter into it of their own free will, without undue influence or pressure, and informed of its implications' (para 68).

(ii) 'What is important is that each party should have all the information that is material to his or her decision, and that each party should intend that the agreement should govern the financial consequences of the marriage coming to an end' (para 69).

(iii) 'The first question will be whether any of the standard vitiating factors: duress, fraud or misrepresentation, is present. Even if the agreement does not have contractual force, those factors will negate any effect the agreement might otherwise have. But unconscionable conduct such as undue pressure (falling short of duress) will also be likely to eliminate the weight to be attached to the agreement, and other unworthy conduct, such as exploitation of a dominant position to secure an unfair advantage, would reduce or eliminate it' (para 71).

(iv) 'The court may take into account a party's emotional state, and what pressures he or she was under to agree. But that again cannot be considered in isolation from what would have happened had he or she not been under those pressures. The circumstances of the parties at the time of the agreement will be

relevant. Those will include such matters as their age and maturity, whether either or both had been married or been in long-term relationships before. For such couples their experience of previous relationships may explain the terms of the agreement, and may also show what they foresaw when they entered into the agreement. What may not be easily foreseeable for less mature couples may well be in contemplation of more mature couples. Another important factor may be whether the marriage would have gone ahead without an agreement, or without the terms which had been agreed. This may cut either way' (para 72).

(v) 'It is to be assumed that each party to a properly negotiated agreement is a grown up and able to look after himself or herself' (para 51).

(vi) 'The reason why the court should give weight to a nuptial agreement is that there should be respect for individual autonomy. The court should accord respect to the decision of a married couple as to the manner in which their financial affairs should be regulated. It would be paternalistic and patronising to override their agreement simply on the basis that the court knows best. This is particularly true where the parties' agreement addresses existing circumstances and not merely the contingencies of an uncertain future' (para 78).

(vii) 'The court should give effect to a nuptial agreement that is freely entered into by each party with a full appreciation of its implications unless in the circumstances prevailing it would not be fair to hold the parties to their agreement.' (para 75).

(viii) Where the ante-nuptial agreement attempts to address the contingencies, unknown and often unforeseen, of the couple's future relationship there is more scope for what happens to them over the years to make it unfair to hold them to their agreement. The circumstances of the parties often change over time in ways or to an extent which either cannot be or simply was not envisaged (para 80).

(ix) 'Of the three strands identified in *White v White* and *Miller v Miller*, it is the first two, needs and compensation, which can most readily render it unfair to hold the parties to an ante-nuptial agreement. The parties are unlikely to have intended that their ante-nuptial agreement should result, in the event of the marriage breaking up, in one partner being left in a predicament of real need, while the other enjoys a sufficiency or more, and such a result is likely to render it unfair to hold the parties to their agreement. Equally if the devotion of one partner to looking after the family and the home has left the other free to accumulate wealth, it is likely to be unfair to hold the parties to an agreement that entitles the latter to retain all that he or she has earned' (para 81).

(x) 'Where, however, these considerations do not apply and each party is in a position to meet his or her needs, fairness may well not require a departure from their agreement as to the regulation

of their financial affairs in the circumstances that have come to pass. Thus, it is in relation to the third strand, sharing, that the court will be most likely to make an order in the terms of the nuptial agreement in place of the order that it would otherwise have made' (para 82).

(xi) It is the court that determines the result after applying the Act (para 83).

[46] What is the meaning of 'predicament of real need' referred to at para 81 of *Radmacher (supra)*? It was treated as akin to 'destitution' by Mostyn J at para 72(iv)(c) of *Kremen v Agresi (No 11)* [2012] EWHC 45 (Fam), [2012] 2 FLR 414, and the same judge at para 14 of *Cummings v Fawn* [2023] EWHC 830 (Fam), [2024] 1 FLR 117 suggested, using a bookend analogy, that where a PMA is in play, needs are no more than is necessary to move the applicant's lifestyle just to the right of the left-hand bookend, ie little more than 'a spartan lifestyle catering for not much more than essentials'.

[47] Unsurprisingly, H relies upon these dicta. I do not read Mostyn J as saying that in every case involving a PMA needs must always be assessed in a parsimonious, restrictive way, regardless of the factual context; in my view, it will all depend on the facts, and I doubt Mostyn J was saying otherwise. If he was, that would conflict with (i) the words of the statute which do not limit the court's discretion in this way, (ii) dicta in *Radmacher (supra)* itself, and (iii) the approach adopted in the jurisprudence by other judges.

[48] The breadth of judicial discretion was emphasised by King LJ in *Brack v Brack* [2018] EWCA Civ 2862, [2019] 2 FLR 234 at para 103:

> 'In my judgment, in the ordinary course of events, where there is a valid prenuptial agreement, the terms of which amount to the wife having contracted out of a division of the assets based on sharing, a court is likely to regard fairness as demanding that she receives a settlement that is limited to that which provides for her needs. But whilst such an outcome may be considered to be more likely than not, that does not prescribe the outcome in every case. Even where there is an effective prenuptial agreement, the court remains under an obligation to take into account all the factors found in s 25(2) MCA 1973, together with a proper consideration of all the circumstances, the first consideration being the welfare of any children. Such an approach may, albeit unusually, lead the court in its search for a fair outcome, to make an order which, contrary to the terms of an agreement, provides a settlement for the wife in excess of her needs. *It should also be recognised that even in a case where the court considers a needs-based approach to be fair, the court will as in KA v MA, retain a degree of latitude when it comes to deciding on the level of generosity or frugality which should appropriately be brought to the assessment of those needs* [emphasis added].'

[49] In *Radmacher (supra)*, at para 76 thereof, in its introduction to possible circumstances justifying departure from the PMA, the Supreme Court said:

> 'That leaves outstanding the difficult question of the circumstances in which it will not be fair to hold the parties to their agreement. This will

necessarily depend upon the facts of the particular case, *and it would not be desirable to lay down rules that would fetter the flexibility that the court requires to reach a fair result*' [emphasis added].

[50] It seems to me that the Supreme Court in *Radmacher* and the Court of Appeal in *Brack* have emphasised the latitude and flexibility available to the judge to meet the demands of fairness in cases where a PMA has been entered into by the parties. That latitude and flexibility applies to the assessment of needs as much as it applies to the other s 25 factors. Each case is a highly fact specific evaluation and discretionary exercise. There is a world of difference between, say: (i) a childless couple whose marriage lasts for 2 years, enjoying only a modest lifestyle, at the end of which one party might need no more than short term maintenance or a highly attenuated housing budget (perhaps restricted to time limited rental); and (ii) as here, a couple with 2 young children, where the impecunious wife will have the primary responsibility of bringing up the children for many years to come, leaving the already wealthy husband able to enjoy the fruits of his successful career.

[51] The evaluation carried out by judges since *Radmacher* in these cases demonstrates that, as foreseen by the Supreme Court, hard and fast rules are not appropriate.

[52] In respect of housing needs, for example, a number of different approaches have been taken in the balancing exercise weighing up the agreed PMA terms on the one hand, and the needs of the parties on the other. Thus:

(i) A Sch 1 type housing award whereby the payee is entitled to occupy the property until the children finish tertiary education was made in *Radmacher* itself (albeit Baroness Hale in a dissenting judgment said that she would have varied the terms of the housing fund to a *Martin* style arrangement), and also in *Backstrom v Wennberg* [2023] EWFC 79.

(ii) A Sch 1 type award with a partial outright payment whereby the property was to be sold upon the children finishing tertiary education and the payee was to receive a proportion of the sale proceeds outright: *Luckwell v Limata* [2014] EWHC 502 (Fam), [2014] 2 FLR 168, and *AH v PH (Scandinavian Marriage Settlement)* [2013] EWHC 3873 (Fam), [2014] 2 FLR 251.

(iii) A *Martin* style arrangement whereby the payee is entitled to occupy a property for life such as in *WW v HW* [2015] EWHC 1844 (Fam), [2016] 2 FLR 299 (albeit subject to a step down upon the children reaching their majority), *HD v WB (supra)*, *BL v OR* [2023] EWFC 229, [2024] 2 FLR 37 and *Xanthopolulos v Rakshina* [2024] EWCA Civ 84, [2024] 2 FLR 372.

(iv) An outright payment enabling the payee to purchase a property for himself/herself with no reversionary terms, as in *KA v MA (Pre-Nuptial Agreement: Needs)* [2018 EWHC 499 (Fam), [2018] 2 FLR 1285, *SA v PA (Pre-Marital Agreement: Compensation)* [2014] EWHC 392 (Fam), [2014] 2 FLR 1028 and *Z v Z (No 2) (Financial Remedy: Marriage Contract)* [2011] EWHC 2878 (Fam), [2012] 1 FLR 1100.

[53] It is of note that, so far as I am aware, there is not a single reported PMA case where a primary carer of the children, with no significant assets of his/her own, has not received a sum of money for housing outright. After a draft judgment was sent to the parties, H's legal team referred me to *BN v MA* [2013] EWHC 4250 (Fam) where, it is suggested, such an order was made. I do not think that case in fact assists H as it concerned a Maintenance Pending Suit hearing where the judge fixed the award at the level of maintenance set out in the PMA; the outcome in respect of housing at final hearing was not in issue.

[54] As for an income fund, courts have not shied away from a capitalised maintenance sum. To reflect a PMA, that sum can be limited by the level of maintenance or the length of term. Thus, in *Radmacher (supra)* the capitalised maintenance sum was intended to last to the end of the children's minority but not beyond. By contrast, in *KA v MA (supra)* and *BL v OR (supra)* the capitalised fund was on a whole life basis.

[55] I was referred to *Collardeau-Fuchs v Fuchs* [2022] EWFC 135, [2023] 2 FLR 345, but I do not find that decision of much help in this case because of the vast factual discrepancy. In *Fuchs* the wife received in her own right assets totalling about £37.5m pursuant to a PMA, whereas here W's entitlement is restricted to £818,025 in addition to her own modest assets.

The parties' cases on needs

[56] W submits that appropriate housing for herself and the children is met by the FMH. It consists of 2,605 square feet, has 5 bedrooms, and is in an area close to friends and schools. Were she to move, she estimates she would need a similar sum to the value of the FMH (£5m) to rehouse in North London. She says that when the children finish tertiary education, her housing needs would reduce to (on present figures) about £2.5m for a 3-bedroom house in the area.

[57] H says that W can rehouse in a 4-bedroom property in an appropriate area for a sum of about £1.9m. Something similar to his own property would, he says, be more than adequate; it has 4 bedrooms, is 1,745 square ft in size and close to the children's schools.

[58] As usual, I have been met with a battle of property particulars and I have heard a significant amount of oral evidence on the subject. I made a direction at the PTR for the parties to file particulars between £1.9m and £5m so that I could see a full range, without prejudice to either party's contentions that such properties would not be appropriate.

[59] H served a number of his proposed property particulars late in the day. W was, as a result, unable to visit them all. However, she studied the particulars, viewed them from the outside where possible and formed a clear sense of location. She was able to comment on all of them and I am satisfied that she was not hampered in expressing a considered view on each property. H by contrast had not visited any of his proposed particulars, although he had seen some from the outside. Essentially, W said that the properties put forward by H, and those in the court directed range between £1.m and £5m, were deficient in one or more of the following respects; unsafe or unattractive areas, too small, too far from the schools, limited garden space, distant from parks, in need of renovation, on busy roads.

[60] As for W's income needs, she puts forward a budget for herself at £288,000pa, with children's costs in addition at £63,000pa. H says this figure

is grossly overstated. He, by contrast, says that his own income needs are £93,000pa which he considers much more realistic.

Analysis

[61] The PMA represents a constant influence on the case. By that document, signed with full knowledge of its meaning and consequences, and with the benefit of legal advice, W was aware that her claims on divorce would be heavily restricted. Future anticipated circumstances included the birth of children and provision was calibrated in the alternative (children or no children). The marriage was relatively short (just over 5 ½ years including a period of cohabitation). H was independently wealthy at the time of signing the PMA, and clearly (as W acknowledged) wanted to protect that wealth, particularly his business. All of these points weigh in the balance.

[62] On the other hand, a factor of considerable (indeed magnetic) significance, and a powerful counterweight to the PMA, is that W will be the primary carer for these children for the rest of their minority. Further, the fact of marrying and having children has had a significant impact upon her. She is no longer an independent woman in capital city A with a mortgage free flat and stable earnings. She is (and certainly feels) vulnerable and dependent. She now has no alternative property of her own, and her earning capacity has been heavily diminished. She committed some of the proceeds of her flat to fund renovations to the FMH which belongs to H and in which she has no legal interest, and took an active part in the refurbishment project; those actions have financially benefited H, as the legal owner, but not her. H also benefited from the stamp duty rebate. I was struck by H in evidence referring to W's financial contribution to the renovations as a gift to him which seemed to me to be a technical adherence to the PMA with minimal recognition of what W gave up. She contributed fully to the marriage as wife and mother, and made sacrifices for the sake of the relationship (the sale of the flat and giving up full time work).

[63] These are all material changes since the PMA was entered into. True, the parties anticipated having children. But para 20 of the PMA expressly records that the PMA 'shall be reviewed' in the event of, among other things, the birth of children. In my judgment that clearly indicates the parties contemplated that it might not be a fair document upon children being born. The fact that it was not reviewed does not prevent this court from considering the overall fairness of the PMA in the light of present circumstances.

[64] H no doubt wants the children to be brought up in a happy, stable environment where the children, and by extension W, are financially secure; to do that, he needs to provide not just for the children, but also for W. I do not think it will help anybody in this case if W is left with modest resources of her own, yet is required to do her very best to bring up these children for years to come. If the bookend analogy deployed in *Cummings v Fawn (supra)* is helpful, I would place the needs of W and the children in this case well to the right of the left-hand bookend.

[65] It would be unfair, in my view, for W to be restricted to Sch 1 type housing such that she would, upon the children finishing tertiary education, be required to leave the property. Where would she then live? Her earning capacity is nowhere near that of H's. Her capital, on H's case, would comprise the lump sum of £818,025 plus her own modest assets, but those sums would

be needed to meet her income needs. I do not think it fair to run the risk of the children, who by then will be adult, seeing their mother in heavily reduced financial circumstances whereas their father will be far wealthier.

[66] It is clear that W is deeply attached to the FMH. I suspect it is something of an anchor at a very challenging time for her when the marriage has broken down, bitter litigation has ensued, she is the principal carer of the children, she faces an uncertain financial future, she has minimal assets and no meaningful earnings, and there are ongoing physical and mental health issues. However, it does seem to me that, in the context of this case (including the terms of the PMA), the FMH overhouses her and the children, who are young enough to be able to adapt easily to a move. It ties up a very large proportion of the non-business assets; absent sale, it would be difficult for H to pay a capitalised sum which W seeks, and meet the obligations of child maintenance and school fees, from his remaining non-business capital. He might well have to resort to accessing capital from the business which is contrary to the terms of the PMA and unfair to him. There is ample housing stock available within reach of the schools, and in amenable local areas, albeit not necessarily to the same standard as the FMH. I am confident that W also, once these proceedings have settled down, will adjust to different accommodation. In my judgment, the FMH should be sold, and W should receive a sum of money outright for purchase of an alternative property.

[67] I do not accept H's contention that W is able to rehouse reasonably for about £1.9m. The particulars put forward by H are deficient in too many aspects, as identified by W, and it is important to bear in mind that W needs accommodation for the children as their main home, whereas H's property (which to my mind is not an appropriate benchmark for the reasons articulated by W) is used by them for more limited periods of time. W and the children will need to accept a compromise between size of property and location, but H's particulars are far too much of a compromise. In my judgment W and the children can reasonably rehouse for about £2.75m excluding costs of purchase, stamp duty and any renovations.

[68] I will provide that the FMH be sold and after costs of sale W shall receive 56.7% (£2.75m) and H the balance (£2.1m). There shall be no floor of £2.75m for W; if the house sells for less, her housing budget will be correspondingly lower, although it may be that purchase prices of smaller properties may also be available at lower prices. I understand that there may be some cgt on sale, which H shall meet from his share; W's share is not to be reduced by tax.

[69] Stamp duty on the purchase of a property at £2.75m would be £241,250. There will also be costs of purchase and, in my judgment, W will need additional funds to carry out some refurbishment, although she should not need much for furniture as I am told she will retain the majority of the contents of the FMH. To cover all these items, H will pay W a lump sum of £300,000 on sale of the FMH.

[70] I considered whether, if I provide for an outright sum to W for housing (as I do), that sum should be subject to a charge in H's favour when the children finish tertiary education, for by then W's housing needs will arguably be met by a smaller property. The consequence would be for her to sell her property at that stage and find alternative, cheaper accommodation. On the facts of this case I have decided against that course for the following reasons: (i) I do not think that W will be able to purchase a vast or extravagant property

for £2.75m; (ii) the difference between £2.75m and a reasonable sum for W alone is, in my judgment, likely to be relatively modest in the context of the assets in this case; (iii) it may be that the entirety of the sum would be needed if, for example, she wanted to move to a smaller property but in a more desirable location; (iv) I do not see why she should be forced to sell when she would no doubt hope that the children, by then adult, and in due course grandchildren, would come to stay; (v) she should have the option of releasing funds for her own income needs if required, particularly as the capitalised periodical payments may not be sufficient; and (vi) it is unreasonable for her to look constantly over her shoulder, with the attendant anxiety of a forced sale at some point in the future.

[71] As for income needs, W's budget is, in my view considerably overstated. Her original schedule of income needs attached to her Form E put her budget at £375,000pa, with children's expenses on top. I felt W's answers about her budgetary requirements were at times based on guesswork. Her asserted costs of holidays during the marriage were overstated, although not as much as H contends, but I accept that they did have (pre children) 7 or 8 holidays a year in expensive locations.

[72] The analysis of expenditure during the marriage seems to me to be a better guide to the sort of standard of living enjoyed by the parties, and to an appropriate budget going forward, than W's claimed budget, although it is not by itself determinative. Those sums were, as I have indicated, about £250,000pa on average in 2021 and 2022. I take into account that the purchase by W of a smaller property than the FMH is likely to reduce some costs, and, further, that W's budget going forward is for three people, not four. Further, H points out, I think reasonably, that these figures included a total of about £72,000 for art purchases and £18,000 for H's hobby of antique books which might fall in the category of non-recurring items; deducting these items brings the annual expenditure to closer to about £205,000pa. I am less persuaded that smaller sums for H's therapy and some post separation accommodation costs in the latter part of 2022 should also be disregarded; the monies might just as easily have been spent on something else.

[73] On the other hand, 2021 and 2022 were in part during Covid years when costs were probably a little lower than normal (particularly holidays). The children were extremely young, and their needs (and therefore costs) will increase as they get older. And the scale of the wealth in this case cannot be ignored.

[74] Stepping back and looking at it in the round, I consider that an appropriate budget is £110,000pa for W and £40,000pa for the children (£20,000 each). That is £150,000pa in total which in my judgment is fair.

[75] The figure of £110,000pa for W shall be capitalised, as W seeks, over a 10-year period. I reject H's submission that it should be expressed as ongoing periodical payments. A clean break is highly desirable (the litigation has taken its toll on the parties), can be easily achieved, and is consistent with the statutory objective.

[76] The 10-year term is arguably generous to H. W might legitimately have sought periodical payments until the children reach 18 or finish tertiary education. I am not entirely confident that she will be self-sufficient within 10 years. Partly for that reason I have, as indicated above, not provided for any step down in W's accommodation.

[77] W suggests that I should assume an earning capacity of £21,000pa gross from 2031 which is 7 years away. In my judgment, a 5-year time span before she can earn sums at that level is more appropriate, to be factored into a *Duxbury* calculation. If she earns anything before the initial 5-year period comes to an end, it is likely to be modest and should be ignored.

[78] Taking all this into account, the *Duxbury* figure for the 10-year term is £906,208 which I will round up to £910,000. W proposes that £200,000 of her own capital be set against that figure, which reduces it to £710,000.

[79] H shall, from the date of sale of the FMH, pay child maintenance at £20,000pa until they complete tertiary education, such sum to be apportioned as to one third to W and two thirds to each child when they reach 18 or finish secondary education, whichever is later. These sums shall be CPI linked.

[80] H shall pay nursery and school fees, to include reasonable extras on the school bill. The costs of out of school clubs and activities shall be shared equally.

[81] H shall pay W interim maintenance of £12,500 pm for three months, then £5,000 pm until sale of the FMH, as well as nursery fees and school fees. That shall start on the next due date.

[82] Chattels are to be divided by agreement, on the basis that W shall retain the majority of the contents at the FMH.

[83] H has now paid the outstanding school fees due for this term. He must forthwith reimburse W for last term's fees. I did not think he gave a satisfactory explanation for his failure to pay the fees on time, and it will have engendered more mistrust on W's part.

[84] The net effect for W will be:

(i)	Own assets	£291,944 net
(ii)	56.7% FMH	£2,750,000
(iii)	Lump sum for stamp duty etc.	£300,000
(iv)	Capitalised pps	£710,000
	Total	**£4,051,944**

[85] H by contrast, will have his own assets, about £50.1m, less payments to W of £3,760,000 (56.7% of the FMH, the lump sum and the capitalised pps) ie about £46.3m. In percentage terms W will exit the marriage with about 8% of the assets, and H with 92%. H will have ample liquid funds to pay the lump sum and the capitalised pps order from his share of the sale proceeds of the FMH, with monies to spare. He will retain all of his bank balances and investments, including the private equity funds which are due to pay out over 2025 to 2030. His business will be unaffected.

[86] Had the parties not signed the PMA, W might have been entitled to receive on a sharing basis as much as £7.5m, and possibly more. Even on a needs basis, I consider that, absent the PMA, her award would likely have been greater than I have provided for; retention of the FMH and a longer Duxbury term (perhaps even a whole life term) would have been arguable.

[87] W will have, I am satisfied, sufficient to meet her needs and those of the children. If she chooses, she can of course apply more monies to a property, such that her income fund will be reduced accordingly, or vice versa. That will be a matter for her; there are no conditions on application of these funds.

[88] I am satisfied that this decision gives appropriate weight to the PMA, protecting H's business interest and restricting the extent of W's claims, while at the same time reflecting W's ongoing long-term responsibilities for the children, the relationship generated impact on her, the extent of the wealth and the family's standard of living. The outcome leaves H with the vast preponderance of the assets, while meeting the needs of W and the children, albeit to a lesser degree than would have been the case absent the PMA.

Costs

[89] I asked the parties to make some submissions on costs in closing even though they did not know at that stage what my decision would be. Mr Glaser KC on behalf of H had intimated at the start of the hearing that he would be seeking some form of costs order, and I thought it desirable to deal with the issue provisionally, in order to try and avoid a further hearing on it.

[90] I am quite satisfied that no order for costs is the proper outcome here. True, W's first two offers, in October 2023 and January 2024, sought about £12m and £11m respectively to be paid to W outright, plus child maintenance and school fees. Those offers were hopelessly ambitious and completely ignored the PMA. But her final offer in February 2024 was arithmetically much closer to my decision in this judgment, although she has not succeeded in retaining the FMH. H by contrast did not make an open offer at all until 26 February 2024 (6 weeks before trial), and has maintained throughout that W should receive nothing beyond the terms of the PMA. In fact, I have departed from the PMA so as to meet W's needs, and H's offer has fallen well short. Further, the most glaring piece of litigation misconduct was H's inexcusable failure to disclose the purchase of his property until after the event. Either party is at liberty now, in the light of this judgment, to apply to me for a costs order to be made, but I will require very strong persuasion to do so.

Order accordingly.

LUCY BREDENKAMP
Law Reporter

BRACK v BRACK
[2018] EWCA Civ 2862

Court of Appeal

Lewison, King and Peter Jackson LJJ

20 December 2018

Financial remedies – Prenuptial agreement – Prorogation clause – Validity – Provision for wife and children on a needs basis – Appeal

The Swedish husband and wife were married for 14 years and had two children together. During the marriage they lived in the USA, where the husband was an Indy car driver, Belgium and the UK. The wife was the home maker and had no assets in her name but during the marriage the parties acquired total assets of almost £11m. Prior to the marriage three prenuptial agreements were signed in Niagara, Gothenburg and Ohio. Those agreements set out a separation of property regime and purported to prorogate jurisdiction to the Swedish courts. When the marriage broke down in 2014 the wife applied for financial remedies. At first instance the judge held that there were no vitiating factors which would preclude the court from giving effect to the prenuptial agreements but that it was unfair in that they failed to provide for the needs of the wife and children. He further held that the prenuptial agreements contained a prorogation clause, the effect of which was to give exclusive jurisdiction in respect of the parties' maintenance obligations to the courts of Sweden (which included housing needs). The judge, however, found that he retained residual jurisdiction to determine the rights of the parties in property. Since the needs issue had been prorogated to Sweden by virtue of the maintenance prorogation clause (the MPC), he was prohibited from making orders under the Matrimonial Causes Act 1973, other than in relation to strict property rights, even in relation to the unmet needs. In an attempt to make up the shortfall in the wife's needs he made an order for sale of the jointly owned matrimonial home pursuant to s 17 of the Married Women's Property Act 1882 and made orders under Sch 1 to the Children Act 1989 whereby: the husband was to provide a property, up to the value of £2m, as a home for the children until they ceased full-time education, whereupon the wife's right to occupy the property would cease; pay £35,000 towards the cost of a car for the wife and; pay child maintenance and a carer's allowance of £95,000 pa. The wife appealed. The two issues which fell to be determined were: whether there was a valid MPC in the agreements, or any of them, depriving the English courts of jurisdiction to provide directly for the needs of the wife in financial remedy proceedings; and, as a matter of general principle, where there was no MPC and a court had found there to be a prenuptial agreement with no vitiating factors which, however, failed adequately to provide for the needs of the wife and any children, was the court limited to making only such orders as would meet the wife's needs?

Held – allowing the appeal; remitting the wife's application for financial remedies –

(1) It was common ground that under Swedish law, neither the Niagara nor the Gothenburg agreements were enforceable in Sweden, either in respect of the prenuptial agreement element, or the prorogation agreements contained in them. Prorogation clauses concerning matrimonial property (as opposed to maintenance) entered into prior to a matrimonial dispute, were not enforceable under Swedish law. Further, in relation to the separation of property agreement, Swedish law required that to be valid it must be entered into in contemplation of or after the start of divorce proceedings. These agreements were signed before the marriage. If the judge, in referring to the fact that the Swedish agreement should take precedence over the American agreement was making a finding that the Swedish agreements contained valid MPCs, in addition to the property prorogation clauses, he was in error (see paras [41], [43]).

(2) The only agreement that could potentially be valid was the Ohio agreement. In relation to prorogation clauses conferring jurisdiction in a matrimonial dispute, the principle set out in *Sanicentral GmbH v Rene Collin* [1979] ECR 3423 must apply. In those circumstances, the agreements were to be interpreted on the basis that the relevant Regulation was Council Regulation (EC) No 4/2009 of 18 December 2008 on Jurisdiction, Applicable Law, Recognition and Enforcement of Decisions and Co-operation in Matters Relating to Maintenance Obligations (2009) OJ L 7/1 (the Maintenance Regulation), notwithstanding that a prorogation clause agreed between these Swedish parties, choosing Sweden as their choice of jurisdiction, would have been void at the date it was made in 2000 pursuant to Council Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Brussels I) (2001) OJ L 12/1. Article 4 required the court to be satisfied that the Ohio agreement demonstrated an agreement, at the time it was made, for maintenance to be prorogated to the jurisdiction of the Swedish courts. In this instance there was nothing within the Ohio agreement which was capable of being a valid MPC. The requirements of Art 4 had not been satisfied notwithstanding that the agreement was in writing (see paras [48]–[68]).

(3) If that conclusion were wrong, the terms of the Ohio agreement itself militated against a finding that it contained a valid MPC. The Ohio agreement specifically incorporated the Sewdish (Gothenburg) prenuptial agreement within it and provided that that agreement would have precedence. That agreement (Gothenburg) did not provide an MPC (although it might have done) but simply repeated the limitation in the Niagara agreement of the prorogation clause to 'property'. This precluded a finding that the Ohio agreement contained a prorogation clause in relation to maintenance, since that would be inconsistent and/or in conflict with the subsequent Gothenburg agreement which, as noted, was clearly identified as having precedence (see paras [68]–[76]).

(4) Where a judge had found there to be no vitiating features in relation to a prenuptial agreement, he was entitled, when applying the s 25 factors in his search for a fair outcome, to take into account needs, compensation and sharing. In other words, the fact of a valid prenuptial agreement did not necessarily lead inexorably to a solely needs-based outcome. It was clear from the totality of the judgment that the judge in this case felt himself to be in a straitjacket and that on the authorities, he was driven inexorably to conclude that he only had power to make a needs-based order. He fell into error in going so far as to conclude that the effect of the authorities including *Z v Z (No 2) (Financial Remedies: Marriage Contract)* [2011] EWHC 2878 (Fam), [2012] 1 FLR 1100 and *Luckwell v Limata* [2014] EWHC 502 (Fam), [2014] 2 FLR 168 meant that the wife had inevitably lost her sharing claim by reason of the prenuptial agreement. Even where there was an effective prenuptial agreement, the court remained under an obligation to take into account all the factors found in s 25(2) of the MCA 1973, together with a proper consideration of all the circumstances, the first consideration being the welfare of any children. Such an approach may, albeit unusually, lead the court in its search for a fair outcome, to make an order which, contrary to the terms of an agreement, provided a settlement for the wife in excess of her needs (see paras [102]–[104]).

Per curiam: observations on the general approach currently taken by courts of first instance to the extent to which they should interfere with prenuptial agreements validly entered into by the parties in order to satisfy the needs principle, while at the same time according proper weight to the autonomy principle recognised in *Granatino v Radmacher* (see para [102]).

Statutory provisions considered

Married Women's Property Act 1882, s 17
Matrimonial Causes Act 1973, ss 23, 24, 25, 25(1)–(2)
Children Act 1989, Sch 1

Brussels Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (1972) OJ L 299/32, Arts 1, 2, 5, 6, 17, 54

Council Regulation (EC) No 4/2009 of 18 December 2008 on Jurisdiction, Applicable Law, Recognition and Enforcement of Decisions and Co-operation in Matters Relating to Maintenance Obligations (2009) OJ L 7/1, Arts 4, 75

Council Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Brussels I) (2001) OJ L 12/1, Art 23(1)

Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (2012) OJ L 351/1, Art 1

Cases referred to in judgment

Deutsche Bank AG v Asia Pacific Broadband Wireless Communications Inc [2008] EWCA Civ 1091, [2009] 2 All ER (Comm) 129, [2008] 2 Lloyd's Rep 619, CA

Estasis Salotti di Colzani Aimo et Gianmario Colzani v Ruewa Polstereimaschinen GmbH [1976] ECR 1831, [1976] 12 WLUK 98, [1977] 1 CMLR 345, CJEU

Granatino v Radmacher (Formerly Granatino) [2010] UKSC 42, [2011] 1 AC 534, [2010] 3 WLR 1367, [2010] 2 FLR 1900, [2011] 1 All ER 373, SC

Joint Stock Co Aeroflot Russian Airlines v Berezovsky [2013] EWCA Civ 784, [2013] 2 Lloyd's Rep 242, CA

KA v MA (Prenuptial Agreement: Needs) [2018] EWHC 499 (Fam), [2018] 2 FLR 1285, FD

Luckwell v Limata [2014] EWHC 502 (Fam), [2014] 2 FLR 168, FD

Moore v Moore [2007] EWCA Civ 361, [2007] 2 FLR 339, CA

Sanicentral GmbH v Rene Collin [1979] ECR 3423, [1980] 2 CMLR 164, ECJ

Van den Boogaard v Laumen (Case C-220/95) [1997] ECR I-1147, [1997] QB 759, [1997] 3 WLR 284, [1997] 2 FLR 399, [1997] All ER (EC) 517, ECJ

Versteegh v Versteegh [2018] EWCA Civ 1050, [2019] 2 WLR 399, [2018] 2 FLR 1417, CA

Z v Z (No 2) (Financial Remedies: Marriage Contract) [2011] EWHC 2878 (Fam), [2012] 1 FLR 1100, FD

Patrick Chamberlayne QC for the appellant (instructed by *Sears Tooth*)
Martin Pointer QC and *Peter Mitchell* for the respondent (instructed by *Irwin Mitchell*)

Judgment was reserved.

KING LJ:

[1] This is an appeal from an order made by Francis J, on 22 December 2016, in financial remedy proceedings.

[2] The case centred on a series of three prenuptial agreements made between Dominica Brack (the wife), and Per Cenny Brack (the husband) in 2000. The judge found that, although there were no vitiating factors which would militate against the agreements being effective, the terms of the agreements were unfair in that they failed to provide for the needs of either the wife or the children of the marriage.

[3] The judge also held that the prenuptial agreements contained a prorogation clause, the effect of which was to give exclusive jurisdiction in respect of the parties' maintenance obligations to the courts of Sweden

(maintenance obligation includes all 'needs' including housing). The judge held, however, that he retained residual jurisdiction to determine the 'rights of the parties in property'.

[4] The judge went on to hold that, as 'needs' had been prorogated to Sweden by virtue of the maintenance prorogation clause (the MPC), he was prohibited from making orders under the Matrimonial Causes Act 1973, other than in relation to strict property rights, even in relation to the unmet needs.

[5] The judge accordingly attempted to make up the shortfall in the wife's needs by way of:

(i) An order for sale of the jointly owned matrimonial home pursuant to s 17 of the Married Women's Property Act 1882.

(ii) Orders under Sch 1 to the Children Act 1989 whereby (a) the husband was to provide a property, up to the value of £2m, as a home for the children until they cease full-time education, whereupon the wife's right to occupy the property would cease; (b) £35,000 towards the cost of a car for the wife; (c) child maintenance and a carer's allowance of £95,000 pa.

[6] The appeal raises two issues:

(i) On the facts of this case, was there a valid MPC in the agreements, or any of them, depriving the English courts of jurisdiction to provide directly for the needs of the wife in financial remedy proceedings?

(ii) As a matter of general principle, where there is no MPC and a court has found there to be a prenuptial agreement with no vitiating factors which, however, fails adequately to provide for the needs of the wife and any children, is the court limited to making only such orders as will meet the wife's needs?

Background

[7] The husband and wife are Swedish by birth and nationality. They were married on 29 December 2000, having lived together for 6 years. The marriage broke down in 2014. There are two children of the marriage.

[8] During the course of the marriage, the family lived variously in the USA, Belgium and most recently, in the UK.

[9] The husband was a racing driver. He achieved considerable success on the US IndyCar circuit before a serious crash in October 2003 effectively brought his racing career to an end. Since his accident, the husband's principal source of income has been from the active management of his substantial asset portfolio.

[10] Following the birth of the children, the wife was the homemaker. Other than her half share in the former matrimonial home, the wife has no assets in her own name and has debt, some of which is owed to the husband consequent on his having lent her £95,000 towards her legal costs (and upon which he charges interest at 5% pa). That £95,000 has proved to be but a drop in the ocean. In the 4 years since their separation, the parties have spent in excess of £1m in legal fees in relation to the financial remedy proceedings, with further significant costs being incurred in relation to the arrangements for the children. By the time of trial, the wife was in debt to the tune of £350,000.

[11] Each of the parties have made equal, but different, contributions to the marriage. At the time of trial, the assets accumulated during the duration of the relationship, amounted to a little under £11m, £1.8m of which represents the net equity in the former matrimonial home.

[12] Having set out the background, which is relatively conventional in terms of the parties' respective contributions, the judge said:

> '[22] … apart from two significant issues to which I now turn, this may well have been a case where the assets would have been broadly shared between the parties. I recognise that there may still have been arguments about the extent to which some of the assets were non-matrimonial in character, but in my judgment it is highly unlikely that the parties would have spent hundreds of thousands of pounds on high quality legal advice and litigation about such arguments but would have reached a compromise tolerable to each of them.'

[13] The two 'significant issues' to which the judge referred were:

(i) the impact of the three prenuptial agreements; and

(ii) whether there was an effective MPC for the purpose of Art 4 of Council Regulation (EC) No 4/2009 of 18 December 2008 on Jurisdiction, Applicable Law, Recognition and Enforcement of Decisions and Co-operation in Matters Relating to Maintenance Obligations (2009) OJ L 7/1 (the Maintenance Regulation). The effect of an Art 4 MPC, if valid, would be that all issues in relation to maintenance were within the exclusive jurisdiction of the Swedish courts.

[14] In order to determine the issues, it was necessary:

(i) In respect of the prenuptial agreements, for the judge:

(a) to hear evidence and to make findings of fact in relation to the agreements and, in particular, to determine whether any of the standard vitiating factors of duress, fraud or misrepresentation were present, or whether there was pressure or exploitation of a dominant position by the husband which would serve to negate the effect of any agreement (*Granatino v Radmacher (Formerly Granatino)* [2010] UKSC 42, [2011] 1 AC 534, [2010] 3 WLR 1367, [2010] 2 FLR 1900, at para [71]). In the present case, the wife alleged that the husband had obtained her signature on each of the agreements by misrepresentation; and

(b) in the event that no vitiating factors were present, to decide whether the agreements were 'fair' and to what extent the court should give effect to the agreements in question.

(ii) In respect of the purported MPC, the judge had to decide whether there was, on the facts of the case, a prorogation clause valid under European law. This issue was and remains, a matter of construction and required no specific findings of fact.

The Prenuptial Agreements

[15] Three prenuptial agreements were signed by the parties in the months leading up to their marriage. The first and third of those agreements, known respectively as the 'Niagara agreement', dated 10 July 2000, and the 'Gothenburg agreement', dated 26 December 2000 (being the locations where each were signed), were, for all relevant purposes, in identical terms and upon being translated from the Swedish, provided as follows:

> 'PRENUPTIAL AGREEMENT
> and
> PROROGATION AGREEMENT
> The undersigned … who intend to contract a marriage with one another, by this conclude the following prenuptial agreement. Furthermore, we enter into a prorogation agreement in which we determine what law and court shall apply and as to the distribution of property between ourselves.
> *Prenuptial Agreement*
> All property acquired by each of us independently before entering into marriage or which will be acquired during the marriage as well as any property which will replace that property together with all revenue generated by all property shall make up the private property of each of us independently, in which the other spouse shall have no right by marriage to community property or other joint property rights.
> *Prorogation Agreement*
> Moreover, we agree that in the case of separation between the two of us Swedish law shall apply at the distribution of our property and that any dispute as to that property shall be settled in accordance with Swedish law before the City Court of Stockholm, Sweden.'

[16] Each of the documents was signed and dated by both the husband and wife.

[17] At the time of the signing of the Niagara agreement and prior to the marriage, the husband and wife were living in the USA, where the husband was pursuing his racing career. On 11 December 2000 (18 days before the marriage), the second in time of the three agreements (the Ohio agreement) was entered into by the parties. This document was a far more lengthy and detailed document than either the Niagara or Gothenburg agreements, and was wide-ranging in its prenuptial terms covering, by way of example; pensions, taxes and medical expenses, as well as (at clause 12) the issues that would arise upon 'termination of the marriage'. The wife received clear, legal advice that she should not sign the agreement on the ground that it was unfair, but, notwithstanding that advice, decided that she wished to do so.

[18] Clause 12 of the Ohio agreement dealt with, inter alia, how the matrimonial home should be divided, and made financial provision for the children. Significantly for the purposes of this appeal, within clause 12 is found the following provision:

> 'Each party hereby irrevocably waives, releases and relinquishes any and all claims or rights that he or she now or hereafter might otherwise have, including without limitation any rights acquired of virtue of the

marriage, to receive in the event of the termination of the marriage any payment whatsoever from the other party for alimony, maintenance or support, by whatever name designated, under the present or future laws of the Kingdom of Sweden or any other jurisdiction in which the parties now or hereafter reside.'

[19] A number of recitals precede the main body of the Ohio agreement, and a number of general provisions are found at the end of the document at clause 19. These recitals and provisions together provide the context for the prenuptial agreement. So far as are relevant for the purposes of this appeal, the following recitals are of importance:

> 'WHEREAS, it is the desire and intent of the parties to submit themselves to the jurisdiction of the judicial system of Sweden, and more particularly to the City Court of Stockholm, Sweden and;
> WHEREAS, the parties have caused a "Prenuptial Agreement and Prorogation Agreement" to be filed with the judicial authorities in Sweden, pursuant to Swedish law, whereby they, inter alia consent the City Court of Stockholm, Sweden and the application of Swedish law for the resolution of any dispute between them, and;
> WHEREAS, the parties intend that the said "Prenuptial Agreement and Prorogation Agreement" as filed in Sweden shall be incorporated in the within Agreement but shall not merge and shall survive, and;
> WHEREAS, the parties agree that in the event of any inconsistency, ambiguity, or conflict between the Swedish Prenuptial Agreement and Prorogation Agreement", and the within Agreement, the Swedish document shall take precedence and shall apply.'

[20] Within the general provisions, at clause 19 is the following:

> 'This agreement is entire and complete and embodies all understandings and agreements between the parties, except to the extent that these may conflict with a "Prenuptial Agreement and Prorogation Agreement" dated within ninety (90) days of this Agreement, to be filed with the judicial authorities in Sweden and more particularly described above. The terms of said agreements shall be incorporated in the within Agreement but shall not merge and shall survive …
> Nothing herein contained shall infer that the parties wish to have the agreement herein resolved in the courts of any jurisdiction other than the City Court of Stockholm, Sweden and nothing herein contained shall confer jurisdiction upon any Court in any jurisdiction other than the City Court of Stockholm, Sweden.
> In the event that the City Court of Stockholm, Sweden shall cease or decline to accept jurisdiction of any dispute between the parties, then, in that event, any such dispute shall be submitted to any Court within the geographical boundaries of the Kingdom of Sweden and shall accept the same, as if no court in Sweden shall accept such jurisdiction, any

court accepting jurisdiction shall be required to apply Swedish law in resolution of any dispute between the parties.

The parties agree that no dispute between the parties shall be submitted for resolution to any Court in any jurisdiction before the City Court of Stockholm, Sweden or such successor Swedish Court as is provided for above has first declined jurisdiction and the appellate process for such declination has expired.'

[21] It can be seen, therefore, that the provision within clause 19 of the general provisions set out above anticipated that a further prenuptial agreement would be produced within 90 days of the Ohio agreement. It was this provision which led to the drafting of the Gothenburg agreement, the third and final agreement, dated 26 December 2000, in the terms set out at para [15] above. That agreement was signed 3 days before their marriage.

The judge's findings of fact

[22] Having heard both parties give evidence, the judge found the husband to be 'cold'. The approach of the husband towards both the wife and the prenuptial agreements (with the consequent financial 'knock-on' effect upon their children) was, the judge said, 'both mean-spirited and mean'. Notwithstanding this however, the judge found the husband to be honest and truthful, and preferred his recollection of the circumstances surrounding the signing of the agreements to that of the wife. Where the judge had doubts as to whom to believe, he found those doubts to be resolved in favour of the husband. Having made this critical finding of credibility, the judge went on:

'[38] However, because I find the husband to be financially mean does not have to lead me to the conclusion that he was a dishonest witness. On the contrary, his attitude led me to accept as far more likely than not that it was he that was giving truthful evidence about the circumstances that surrounded the signing of the prenuptial agreements. I accept that he was happy to carry on being unmarried. I reject the wife's assertion that the husband was guilty of serious misrepresentation in relation to the prenuptial agreements. It is also important to bear in mind that, at least in relation to the American agreement, the wife had independent legal advice and elected to ignore that advice. I cannot accept that the wife on three separate occasions signed a prenuptial agreement imagining it to be irrelevant and assuming its provisions to be of no impact …

[39] I find that the parties did consensually enter into one or more prenuptial agreements and that, at the time when they were entered into, the effect of the agreement or agreements was not vitiated by factors such as fraud misrepresentation or undue pressure.'

[23] In respect of the consequences of the prenuptial agreement, if implemented with complete rigour, the judge said:

'[55] In this case, giving effect to the agreement would leave the wife with one half of the value of Wildwood, [the former matrimonial home] less debts of some £350,000, leaving about £560,000 The husband

indicated to me that, in the event of this outcome, he would not press for the repayment of the loan of £95,000, so the wife's resources would grow to £656,000 although (his concession was very carefully limited to the acceptance by the court, in full, of his open offer). That amounts to 5% or 6% of the family assets. The Supreme Court in *Radmacher* plainly left the courts with a wide residual discretion as to the definition of what is fair in any given case. I am satisfied that the prenuptial agreement would work unacceptable unfairness on the wife and that, worse still, it would adversely affect the best interests of the children of the family … I do not believe that it can be considered fair after a marriage of this length and with these contributions and with these children, for the wife to be left with almost nothing and for the husband to be left with almost everything. Certainly it would put the wife and children in a predicament of real need.'

The judge's approach and judgment

[24] The judge, having made findings favourable to the husband as to the validity of the prenuptial agreements, moved on to tackle the issue of the prorogation clause. Until such time as the judge had determined whether there was, or was not, a valid MPC, he was unable to decide whether the English courts' jurisdiction in the financial remedies case was in any way constrained and, if so, to what extent.

[25] In his judgment, the judge set out the critical terms recited above from the Niagara and Gothenburg agreements before going on to set out the relevant recitals from the Ohio agreement. The judge dealt with the matter briefly over two paragraphs, making no reference to either clause 19 (identifying Sweden as having jurisdiction) or to clause 12 (the clause whereby the wife waived any rights to maintenance for herself). The judge identified that the validity of a prorogation clause required consideration of Art 4 of the Maintenance Regulation which provides (so far as is relevant):

'1. The parties may agree that the following court or courts of a Member State shall have jurisdiction to settle any disputes in matters relating to a maintenance obligation which have arisen or may arise between them—

(b) a court or the courts of a Member State of which one of the parties has the nationality

2. A choice of court agreement shall be in writing.'

[26] The judge went on to analyse the validity of the prorogation agreement as follows:

'[43] This therefore requires the satisfaction of two criteria: (a) the parties shall have agreed; and (b) that the agreement should be in writing. I have already found that the parties each consented to the agreement; and the agreement is of course in writing. The wife accepted during the course of her oral evidence that she understood that each of the three agreements provided for the resolution by a Swedish court of any issue that might arise between them concerning the agreement or its

> implementation. Moreover, the evidence of Mr Satine [the American lawyer who prepared the American agreement] leads me to conclude that the wife understood the agreement into which she was entering and knew that there was a Swedish forum clause. I have already found that there were no vitiating factors at the time when the agreement was entered into and therefore I find that this is a valid prorogation clause.
>
> [44] I reject Mr Chamberlayne's contention that the prorogation clause is invalid due to the fact that there is an inconsistency between the American and the Swedish agreement. The language of the American agreement in respect of Swedish jurisdiction is entirely clear and, in any event, the American agreement expressly says that in the event of any inconsistency between the Swedish and the American agreement, the Swedish agreement shall take precedence and shall apply.'

[27] On my reading of the latter part of para [44], it would appear that the judge had formed the view that the Swedish agreements in themselves contained a valid prorogation clause, both as to property and maintenance. The judge concluded by holding that the effect of the prorogation clause was that Art 4 was engaged, and that accordingly, the court's jurisdiction to make orders for maintenance was excluded. The judge was 'clear' that, as a consequence, the court's jurisdiction was now confined to dealing with 'rights in property arising out of a matrimonial relationship'.

[28] The reference by the judge to 'rights in property arising out of a matrimonial relationship' (whilst not set out by him in the judgment) is a reference to Art 1, an Article most recently found in Regulation (EU) No 1215/2012 of the European Parliament and of Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (2012) OJ L 351/1 (Brussels recast); but which can be traced back, in identical terms, through Council Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (2001) OJ L 12/1 (Brussels I) and in its original form in the Brussels Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (1972) OJ L 299/32 (the 1968 Brussels Convention). It was the 1968 Brussels Convention that was the applicable Convention at the date the agreements between these parties were signed; Brussels I not having come into effect until 1 March 2002.

[29] Article 1 provides that in respect of jurisdiction, recognition and enforcement:

> 'This Convention shall apply in civil and commercial matters whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters.
>
> The Convention shall not apply to:
>
> … the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, wills and succession;'

[30] It follows that England retains its domestic law jurisdiction in relation to 'rights in property arising out of a matrimonial relationship' (Art 1),

regardless of the terms of any of the three agreements, and that only maintenance (needs) can be prorogated (Art 4).

[31] At trial and on appeal in the respondent's notice, Mr Pointer QC, on behalf of the husband, submitted that the judge was wrong in law, having concluded the MPC to be valid, to conclude that he was thereafter entitled in an English divorce to make, or consider making, an award based on the so-called sharing principle because:

> '(a) under English law no rights in property arise from a matrimonial relationship;
> (b) The only powers the court has under the Matrimonial Causes Act 1973, sections 23 and 24 are to make financial provision and property adjustment orders which are wholly discretionary orders and are necessarily based on a consideration of the various factors in Matrimonial Causes Act 1973 section 25; and
> (c) There is under English law no such thing as a "sharing award" or "sharing claim" as that is merely the rationale for the exercise of the court's powers and the orders it makes under Matrimonial Causes Act 1973, sections 23 and 24.'

[32] It follows Mr Pointer QC submitted, that where the court is limited to making orders for rights in property arising out of a matrimonial relationship, in English law that permits the court only to make declaratory orders of existing property rights.

[33] The judge rejected Mr Pointer QC's submission, holding that the wife was making (subject to the prenuptial agreement) a claim for a fair share of the assets of the marriage and that those assets were 'rights in property arising out of a matrimonial relationship'. That conclusion cannot be faulted in the light of the judgment of Thorpe LJ in *Moore v Moore* [2007] EWCA Civ 361, [2007] 2 FLR 339, at para [71].

[34] The judge rightly concluded that an effective MPC would deny him jurisdiction to make an award by reference to the needs of the wife (per the decision of the European Court of Justice in *Van den Boogaard v Laumen* (Case C-220/95) [1997] ECR I-1147, [1997] QB 759, [1997] 3 WLR 284, [1997] 2 FLR 399, at paras 21–23), but that he retained residual jurisdiction over 'rights in property arising out of a matrimonial relationship' which rights, he held, included jurisdiction in respect of the wife's 'sharing' claim and the parties' 'strict property rights' saying:

> '[52] In my judgment, what the wife makes here, subject to the pre-nuptial agreement to which I shortly turn, are claims for a fair share of the assets of the marriage and these are clearly rights in property arising out of a matrimonial relationship in the sense referred to in *Van den Boogaard*. Accordingly, in my judgment, the prorogation clause, albeit properly entered into, and not negated by one of the traditional vitiating factors, is not caught by the Maintenance Regulation insofar as it deals with any sharing or real property claims, unless those claims are negated by the terms of the pre-nuptial agreement itself …'

[I think that in the above citation the judge must have referred to 'the prorogation clause' in error, and intended rather to refer to 'the prenuptial agreements'.]

[35] The judge, having made findings on the evidence and considered the law in respect of the MPC, had the following elements in play as he came to determine what orders were open to him to make:

(i) There was a valid MPC which governed the jurisdiction in respect of the husband's maintenance obligations.

(ii) There was a prenuptial agreement in respect of which there were no vitiating features which (on the face of it) would serve to undermine its effectiveness.

(iii) Giving effect to the agreement in full would, however, 'work unacceptable unfairness' and put the wife and children in a 'predicament of real need'.

(iv) The judge retained jurisdiction in respect of the 'rights in property arising out of a matrimonial relationship'. Those rights, he held, excluded needs (consequent upon the MPC) but included any 'sharing' claim made on behalf of the wife.

[36] The judge decided that, absent an MPC, where assets were available, the needs of the wife should be met by 'invading the husband's separate property' (para [60]). The judge did not make a finding by reference to the terms of any of the agreements that the wife's claims to sharing had, on the facts of the case, been 'negated', but rather went on to hold that he was constrained to approach the present case solely on a 'needs' basis, as a result of the decisions in *Z v Z (No 2) (Financial Remedies: Marriage Contract)* [2011] EWHC 2878 (Fam), [2012] 1 FLR 1100 and *Luckwell v Limata* [2014] EWHC 502 (Fam), [2014] 2 FLR 168, two prenuptial agreement cases where there were no vitiating factors, and where the courts had excluded sharing and made orders limited only to meeting the reasonable needs of the wife.

[37] The judge, therefore, believed that, so far as the prenuptial agreements were concerned, upon a proper application of the authorities to his findings of fact, he was deprived of the ability to make any order which went beyond provision for the needs of the wife, notwithstanding his earlier view as to the extent of the wife's rights in property arising out of a matrimonial relationship (set out at para [33] above). Once the MPC, which the judge had found to be within the agreements, was factored in, the judge concluded that he was unable to make even a needs-based order. The judge therefore considered that he was left with only limited jurisdiction within the financial remedies application, that is to say to deal with the parties' strict property rights, by which the wife was limited to her half share in the former matrimonial home. In those circumstances, the judge was driven to make orders under Sch I to the Children Act 1989 as the only way to provide for the children of the family.

The Appeal

[38] By ground 1, the wife submits that the judge made a fundamental error of law as to the effect of the prenuptial agreements. It is submitted that the judge took the 'legally incorrect' view that, where a prenuptial agreement is found to be unfair, he was thereafter precluded from making an award in

favour of the wife (save one based upon her needs). The essential ground is expanded by Mr Chamberlayne QC in this way:

> 'Given that the assets in this case were all matrimonial (in the usual sense of all having been earned during the marriage), and having found the PNAs to be unfair, the judge was free to make (and should have made) an award in the wife's favour based on the sharing principle. He could have made the award 50 percent of the assets had he concluded that no weight should have been attached to the PNAs, or he could have made a reduced sharing claim if he had concluded that reduced weight (rather than no weight at all) should have been attached to the PNAs.'

[39] Ground 2 of the appeal goes to the validity, or otherwise, of the MPC. It is said that the judge wrongly concluded that there was a valid MPC preventing him from making any award in the wife's favour based upon her financial needs.

Is there a valid maintenance prorogation clause?

[40] This court took the view on appeal, as had the judge at first instance, that logically the first question to be answered is that posed by ground 2, that is to say, whether there is, or is not, a valid MPC. Absent the MPC, the case reverts to being a conventional financial remedy case where most if not all of the assets have been accrued during the course of the marriage, but where there is a prenuptial agreement in respect of which the judge has made specific findings of fact. Such a discretionary determination is a task to be undertaken by a judge at first instance and not by this court. On this basis, Mr Chamberlyne QC, on behalf of the appellant wife, and Mr Pointer QC, on behalf of the respondent husband, were each invited to make their submissions in respect of the MPC before any consideration was given to the effect of the prenuptial agreement and ground 1.

The maintenance prorogation agreement

[41] It is common ground (confirmed by agreed expert evidence), that under Swedish law, neither the Niagara nor the Gothenburg agreements are in fact enforceable in Sweden, either in respect of the prenuptial agreement element, or the prorogation agreements contained in them. This is because prorogation clauses concerning matrimonial property (as opposed to maintenance) entered into prior to a matrimonial dispute are not enforceable under Swedish law. Further, in relation to the separation of property agreement, Swedish law requires that to be valid it must be entered into in contemplation of or after the start of divorce proceedings. These agreements were signed before the marriage.

[42] There is some dispute between the parties as to exactly what Mr Pointer QC's position was at first instance, but it matters not, as it is accepted by Mr Pointer QC that neither the Niagara agreement, nor the Gothenburg agreements contain MPCs (enforceable or otherwise). All they contain are unenforceable prenuptial and prorogation clauses in relation to property.

[43] It follows that if, at para [44] (see para [26] above), the judge, in referring to the fact that the Swedish agreement should 'take precedence over

the American agreement' (the Ohio agreement), was making a finding that the Swedish agreements contain valid MPCs, in addition to the property prorogation clauses, he was in error.

[44] Both parties now agree that if there is a valid MPC, it can be found only in the Ohio agreement. The court, as a matter of construction, must therefore consider:

(i) whether the requirements in Art 4 itself are satisfied; and

(ii) if so, does the relevant clause, purporting to be an MPC in the Ohio agreement fall foul of the provision in the agreement itself that specifies that, in the event of any 'inconsistency, ambiguity or conflict' between the Swedish agreement and the Ohio agreement, the Swedish agreement will take precedence? If that is the case, the only relevant purported prorogation agreement is the one found in the Swedish agreement in respect of property and not maintenance.

[45] We have been asked to determine the appeal on the basis that Art 4 of the Maintenance Regulation applies, notwithstanding that the agreements were made many years before the Maintenance Regulation came into force.

[46] The Maintenance Regulation contains transitional provisions at Art 75 which provide:

> '1. This Regulation shall apply only to proceedings instituted, to court settlements approved or concluded, and to authentic instruments established as from its date of application, subject to paragraphs 2 and 3.'

[47] These proceedings were instituted after the Maintenance Regulation came into force on 18 December 2008. It seems likely, however, that were a court considering the matter under the 1968 Brussels Convention, it would conclude that nothing in the three agreements would have been capable of being a valid prorogation clause under Art 17 of the 1968 Brussels Convention (the relevant Article under that Convention). Both parties were domiciled in Sweden and chose Sweden, their country of domicile, as their choice of jurisdiction; as such, the potential dispute was a domestic matter with no international element capable of involving the Art 17 jurisdiction (see P Jenard, *Report on the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters* (1979) OJ C 59/1, Section 6, Art 17).

[48] There has, however, been a ruling in the European Court of Justice in *Sanicentral GmbH v Rene Collin* [1979] ECR 3423, [1980] 2 CMLR 164, at para 7 which says that:

> 'Articles 17 and 54 of the convention must be interpreted to mean that, in judicial proceedings instituted after the coming into force of the convention, clauses conferring jurisdiction included in contracts of employment concluded prior to that date must be considered valid even in cases in which they would have been regarded as void under the national law in force at the time when the contract was entered into.'

[49] I am satisfied that for these purposes in relation to prorogation clauses conferring jurisdiction in a matrimonial dispute, the same principle must apply. In those circumstances, the agreements are to be interpreted on the basis that the relevant regulation is the Maintenance Regulation, notwithstanding that a prorogation clause agreed between these Swedish parties, choosing Sweden as their choice of jurisdiction, would have been void at the date it (or they) were made in 2000.

[50] Turning then to Art 4; as there is no MPC in either the Gothenburg or the Niagara agreements, in order to satisfy Art 4(1), the court must be satisfied that the Ohio agreement demonstrates an agreement, at the time it was made, for maintenance to be prorogated to the jurisdiction of the Swedish courts.

[51] The parties satisfy the status criteria in Art 4, each of them being Swedish nationals (Art 4(1)(b)). Further, the agreement as a whole is in writing (Art 4(2)). The question is therefore whether, for the purposes of Art 4(1), it can be said that, the Ohio agreement drafted in 2000, contains a valid MPC. In other words, did the parties agree that 'the following court or courts of a (named) Member State shall have jurisdiction to settle any disputes in matters relating to a maintenance obligation which have arisen or may arise between them'?

[52] In *Estasis Salotti di Colzani Aimo et Gianmario Colzani v Ruewa Polstereimaschinen GmbH* [1976] ECR 1831, [1976] 12 WLUK 98, [1977] 1 CMLR 345 the court considered the application of Art 17 of the 1968 Brussels Convention (the earlier Article which allowed a prorogation clause by agreement). The judgment of the European Court held that:

> 'The way in which Article 17 of the convention of 27 September 1968 is to be applied must be interpreted in the light of the effect of the conferment of jurisdiction by consent, which is to exclude both the jurisdiction determined by the general principle laid down on Article 2 and the special jurisdictions provided for in Article 5 and 6 of that convention. In view of the consequences that such an option may have on the position of the parties to the action, the requirement to set out in Article 17 governing the validity of the clauses conferring jurisdiction must be strictly construed.'

[53] This is a reference to the fact that, in permitting the parties to choose a jurisdiction, Art 17 (as is Art 4) is providing an exception to the general rules, whereby jurisdiction is governed by domicile (Art 2), or (prior to the Maintenance Regulation) the place where the maintenance creditor is domiciled, under the special jurisdiction in Art 5.

[54] *Estasis* was itself a case where the requirement for the agreement to be in writing was held not to have been satisfied. The court said:

> '2. The case of a clause conferring jurisdiction, which is included among the general conditions of sale of one of the parties, printed on the back of the contract, the requirement of writing under the first paragraph of Article 17 of the Convention of 27 September 1968 is only fulfilled if the contract signed by the two parties includes an express reference to those general conditions.'

[55] *Estasis* emphasised that the purpose of the formal requirement is to ensure that consensus between the parties was in fact established. In *Deutsche Bank AG v Asia Pacific Broadband Wireless Communications Inc* [2008] EWCA Civ 1091, [2009] 2 All ER (Comm) 129, [2008] 2 Lloyd's Rep 619, Longmore LJ considered an exclusive jurisdiction clause, (in that case, Art 23(1) of Brussels I) which contains a similar requirement that the 'agreement conferring jurisdiction' shall be in writing or evidenced in writing.

[56] Longmore LJ had in mind the *Estasis* case (para [15]) and said that the court had to determine whether the clause conferring jurisdiction was in fact the subject of consensus 'which must be clearly and precisely demonstrated' given that the very purpose of the Article's formal requirements was to ensure that the consensus was in fact established. He said at para [30]:

> 'That is authority for the proposition that if the formal requirements are established (e.g. that the clause is in writing) that will be enough to ensure that consensus is established for the purpose of enabling the case to be determined.'

[57] *Joint Stock Co Aeroflot Russian Airlines v Berezovsky* [2013] EWCA Civ 784, [2013] 2 Lloyd's Rep 242 was another case where the issue of jurisdiction was before the court. Aikens LJ referred to both the *Deutsche Bank* case and to *Estasis* and considered the ratio of *Deutsche Bank* as set out at para [43] above to be binding on the Court of Appeal. It follows, therefore, that the ratio of *Deutsche Bank* is equally binding in this case and, providing always that the formal requirements are established, that will be sufficient to ensure that consensus is established for the purposes of enabling the case to be determined. It follows that if there is a clause capable of amounting to an MPC in the Ohio agreement, consensus has been established by the fact that the agreement is in writing.

[58] Prorogation clauses are very straightforward and require no complex drafting. That is why, in part, compliance with the requirement that the agreement is in writing is enough to satisfy the need for consensus between the parties. All that an MPC in this case would require would be a clause saying: 'The parties agree that the Courts of Sweden shall have jurisdiction to settle any disputes in matters relating to a maintenance obligation which has arisen or may arise between them'.

[59] The question then to be considered by this court is whether, absent an unequivocal and clear MPC, there is anything in the Ohio agreement which amounts to a valid MPC in the light of the *Estasis* case as confirmed by the Court of Appeal in *Deutsche Bank.*

[60] The part of the Ohio agreement which Mr Pointer QC relies upon as amounting to a maintenance prorogation clause (which I set out again for ease of reference) is the following part of clause 19:

> 'Nothing herein contained shall infer that the parties wish to have the agreement herein resolved in the courts of any jurisdiction other than this City Court of Stockholm, Sweden and nothing herein contained shall confer jurisdiction upon any court in any jurisdiction other than the City Court of Stockholm, Sweden.

> In the event that the City Court of Stockholm, Sweden shall cease or decline to accept jurisdiction of any dispute of the parties, then, in that event, any such dispute shall be submitted to any court within the geographical boundaries of the Kingdom of Sweden and shall accept the same, and if no court in Sweden shall accept such jurisdiction, any court accepting jurisdiction shall be required to apply Swedish law in resolution of any dispute between the parties.
>
> The parties agree that no dispute between the parties shall be submitted for resolution to any court in any jurisdiction before the City Court of Stockholm, Sweden or such successor Swedish Court as is provided for above has first declined jurisdiction and the appellate process for such declination has expired.'

[61] It was argued forcefully by Mr Pointer that, whilst there is no reference to maintenance in clause 19, clause 12 includes maintenance as an integral part of the agreement to which the choice of jurisdiction clause will, therefore, apply.

[62] Mr Chamberlayne submits that, although the agreement is in writing (with the signature of each of the parties at the end of the document) there is nothing within the part of clause 19 set out above which relates to maintenance; it is not open, Mr Chamberlayne submits, to the husband to 'piggy-back' a term of the prenuptial agreement in relation to maintenance onto clause 19 which relates solely to jurisdiction in order to make good the deficit.

[63] Clause 12 is headed 'Termination of the Marriage' and goes on to say that:

> 'The parties recognise that it is in their best interests to set forth their agreement as to their respective rights in the event of a termination of their marriage …'

[64] As part of that agreement, each party 'irrevocably waived' their rights to maintenance in whatever form. Whilst clause 19 specifically provides for any question of 'rights' under the agreement to be determined and construed under the laws of Sweden, there is no specific choice of jurisdiction clause in respect of maintenance.

[65] In *Deutsche Bank AG v Asia Pacific Broadband Wireless Communications Inc* [2008] EWCA Civ 1091, [2009] 2 All ER (Comm) 129, [2008] 2 Lloyd's Rep 619, the clause in question was unequivocal and said: 'The English Courts have exclusive jurisdiction to settle any dispute in connection with any Finance Document'. As a consequence, the fact of the agreement was sufficient to establish consensus. In my judgment there is a strong argument that where, as in *Estasis Salotti di Colzani Aimo et Gianmario Colzani v Ruewa Polstereimaschinen GmbH* [1976] ECR 1831, [1976] 12 WLUK 98, [1977] 1 CMLR 345, the clause which is said to be the subject of the agreement is, itself, incomplete or unclear, the requirements of Art 4 will not be satisfied, notwithstanding that the agreement is in writing and signed by the parties.

[66] It should be remembered that under EU law only maintenance can be prorogated, all other aspects of matrimonial finance being excluded from the

Regulation and subject therefore to domestic law, pursuant to Art 1. In the present case, the clause relied upon makes no reference at all to maintenance, but rather leaves the reader to work through the prenuptial terms and, having done so, include maintenance, the only matter capable of prorogation, into the jurisdiction clause by inference.

[67] In *Estasis,* a prorogation clause found within the terms and conditions on the back of the agreement was not adequate to satisfy the requirements of Art 4 without specific reference to the clause within the agreement itself. Having considered the submissions of both parties, I have concluded that the same must be equally true where the meaning of the clause relied upon is itself unclear, particularly where, as here, the critical wording must be read across from a part of the document, dealing specifically with rights and not jurisdiction. In my judgment, the requirements in Art 4 are not satisfied, notwithstanding that the agreement is in writing.

[68] I have concluded that there is nothing within the Ohio agreement which is capable of being a valid MPC. If, however, I am wrong about that, the terms of the Ohio agreement itself, in my view, militate against a finding that it contains a valid MPC. The Ohio agreement specifically incorporates the Swedish prenuptial and prorogation agreement within it, and goes on to provide that in the event of any 'inconsistency, ambiguity or conflict' the Swedish document shall take precedence.

[69] The court was presented with extracts from the Oxford English Dictionary as to the meaning of the word 'inconsistent'. Mr Pointer submits that the Ohio agreement is not inconsistent with the Swedish agreement as the Swedish agreement does not provide a prorogation clause in relation to maintenance. The Ohio agreement, therefore, he submits, represents an extension of the Swedish agreement, which agreement is subject to Swedish jurisdiction.

[70] For my part, I could see the attraction of such an agreement but for two matters; one significant, and one which I regard as fatal to Mr Pointer's arguments.

[71] First, the Ohio agreement, which was signed by both the parties, specifically incorporates the Swedish agreement. The Swedish agreement, it is now accepted, does not contain an MPC. Whilst presenting Mr Pointer with difficulties, this would not necessarily be fatal given his 'extension' argument. What is fatal, in my judgment, is that, pursuant to the Ohio agreement, the Gothenburg agreement was signed some 15 days later, on 26 December 2000 and the Gothenburg agreement is drafted in the same, limited, terms as the Niagara agreement. In other words, the Gothenburg agreement:

(i) had been anticipated under the terms of the Ohio agreement to be 'remade' at a date after the signing of the Ohio agreement;
(ii) was specifically incorporated into the Ohio agreement;
(iii) was, under the terms of the Ohio agreement to take precedence; and
(iv) does not provide an MPC (although it clearly could have done) but simply repeats the limitation of the prorogation clause to 'property' in identical terms to those found in the Niagara agreement.

[72] It follows that even if it could be said for the purposes of Art 4, that, within the Ohio agreement, the combination of the references to Swedish jurisdiction, together with oblique references to the prenuptial provisions in relation to maintenance, was capable of amounting to a valid MPC (which I doubt), such a clause is, in my judgment, inconsistent and/or in conflict with the subsequent Gothenburg agreement drafted and signed some days later, an agreement clearly identified as taking precedence over the Ohio agreement.

[73] It may well be that the parties had intended, in 2000, to give Sweden jurisdiction in relation to all matters arising out of their marriage, but, if that was the case, they singularly failed to do so. They did not, as a matter of English, European or Swedish law, achieve their goal. The agreements failed even to achieve an effective choice of jurisdiction clause in respect of property alone in the Niagara and Gothenburg agreements, those agreements having been drafted prior to a dispute arising.

[74] In my judgment the parties failed to confer jurisdiction as to maintenance by the terms of the Ohio agreement. There is, therefore, no MPC, and it follows that there is not, as in *Sanicentral GmbH v Rene Collin* [1979] ECR 3423, [1980] 2 CMLR 164, a clause which, whilst void at the date when the agreement was made under the 1968 Brussels Convention, must now, pursuant to Art 75 of the Maintenance Regulation, be considered to be valid.

[75] As I have said, a choice of jurisdiction clause is simple to draft in clear and unambiguous terms, and the necessary consensus will have been established once committed to an agreement in writing. Failure to express a choice of jurisdiction in unambiguous terms can result, as here, in international jurisdictional disarray leading to delay and lengthy, complex litigation at extortionate cost.

[76] I am therefore satisfied that there is no valid MPC in this case which constrained the judge's jurisdiction and prevented him from considering and making orders in respect of the wife's needs.

Ground 1: the consequences of the prenuptial agreement: sharing or only needs?

[77] Having heard argument in relation to the validity of the MPC, the court told the parties of our conclusion that there is no valid MPC which would result in the Swedish courts alone having jurisdiction to determine issues in relation to the maintenance (needs) of the wife. It was then submitted by Mr Chamberlayne that, prior to the matter being remitted to the judge in order for him to carry out the conventional exercise referred to above, the court must nevertheless consider ground 1 and the wife's appeal against the judge's approach to the prenuptial agreement. Whilst a respondent's notice was filed on behalf of the husband seeking to uphold the judge's order in this respect on other grounds, the arguments within it largely fell away during the hearing. It became apparent, however, that there was a dispute about the basis upon which the matter is to return to the judge.

The effect of the prenuptial agreements

[78] The area of disagreement between the parties has narrowed considerably. It is neither necessary nor helpful to analyse each side's respective starting point, whether at first instance or in this court. Suffice it to

say that it is now common ground that, in financial remedy proceedings, where a judge has found there to be no vitiating features in relation to a prenuptial agreement, he is entitled, when applying the s 25 factors in his search for a fair outcome, to take into account needs, compensation and sharing. In other words, the fact of a valid prenuptial agreement does not necessarily (but may) lead inexorably to a solely needs-based outcome.

[79] The residual issue between the parties, therefore, relates to what limitations, if any, on the facts of the case and against the backdrop of the judge's findings, should the judge impose upon himself in his fresh consideration of the wife's claim for financial remedies.

[80] Consideration of this issue has involved a microscopic analysis by counsel of three paragraphs of the judgment, as follows:

> '[60] … However, where, as here, a valid agreement has been entered into and there are no vitiating factors present, then in my judgment it would be wrong simply to disregard the agreement; rather it is the court's duty to step in to alleviate the unfairness. That will not usually be simply to restore the parties to the position that they would have been in absent the agreement. In the instant case the parties agreed to a regime of separate property, so the starting point here is that, apart from the matrimonial home, the husband owns everything. Where assets are available (as here) to meet the wife's needs, these should be met by invading the husband's separate property. The extent to which need is "generously" or otherwise interpreted will of course vary from case to case.
>
> [61] This is the approach which was taken by Moor J in *Z v Z* [2011] EWHC 2878 (Fam) where the court upheld a French *separation de biens* insofar as it excluded sharing but the court went on to meet the wife's reasonable needs. A similar approach was adopted by Holman J in *Luckwell v Limata* in 2014.
>
> [62] The effect of the above is, however, very serious indeed for the wife, when I return to the consequences of the prorogation agreement, *for it means that I am now to approach the case on a needs basis*.'
> (My emphasis.)

[81] Mr Chamberlayne, on behalf of the wife, submits that this amounts to a pure error of law. The judge, he submits, concluded that in law he was constrained to consider only a needs-based settlement. Notwithstanding his clear concern as to the outcome, the judge (submits Mr Chamberlayne) felt himself to be driven to conclude that, having found there to be a valid prenuptial agreement, he was now limited to a needs-based outcome and that, as he put it at para [68], the wife had 'lost her sharing claim' by reason of the prenuptial agreement.

[82] Mr Pointer, on behalf of the husband, says whilst as a matter of law, 'sharing' remained open to the judge on a proper reading of the paragraphs quoted above, the judge had not made an error of law but rather he had exercised his discretion in deciding to limit the wife's claim (absent a valid MPC) to needs alone.

[83] It is helpful in this regard to look at the approach of various courts in respect of this issue, which inevitably starts with the judgments of the

Supreme Court in *Granatino v Radmacher (Formerly Granatino)* [2010] UKSC 42, [2011] 1 AC 534, [2010] 3 WLR 1367, [2010] 2 FLR 1900. The starting-point must be with the well-known principle expressed by Lord Phillips of Worth Matravers in his judgment at para [75]:

> *'White v White* and *Miller v Miller* establish that the overriding criterion to be applied in ancillary relief proceedings is that of fairness and identify the three strands of need, compensation and sharing that are relevant to the question of what is fair. If an ante-nuptial agreement deals with those matters in a way that the court might adopt absent such an agreement, there is no problem about giving effect to the agreement. The problem arises where the agreement makes provisions that conflict with what the court would otherwise consider to be the requirements of fairness. The fact of the agreement is capable of altering what is fair. It is an important factor to be weighed in the balance. We would advance the following proposition, to be applied in the case of both ante- and post-nuptial agreements, in preference to that suggested by the Board in *MacLeod*:
>
> > "The court should give effect to a nuptial agreement that is freely entered into by each party with a full appreciation of its implications unless in the circumstances prevailing it would not be fair to hold the parties to their agreement."
>
> [76] That leaves outstanding the difficult question of the circumstances in which it will not be fair to hold the parties to their agreement. This will necessarily depend upon the facts of the particular case, and it would not be desirable to lay down rules that would fetter the flexibility that the court requires to reach a fair result. There is, however, some guidance that we believe that it is safe to give directed to the situation where there are no tainting circumstances attending the conclusion of the agreement.'

[84] Lord Phillips of Worth Matravers went on, under the heading of 'autonomy', to say:

> '[78] The reason why the court should give weight to a nuptial agreement is that there should be respect for individual autonomy. The court should accord respect to the decision of a married couple as to the manner in which their financial affairs should be regulated. It would be paternalistic and patronising to override their agreement simply on the basis that the court knows best. This is particularly true where the parties' agreement addresses existing circumstances and not merely the contingencies of an uncertain future.'

[85] Of particular relevance to the issues before this court, Lord Phillips of Worth Matravers reverted to the three strands of needs compensation and sharing:

> '[81] Of the three strands identified in *White v White* and *Miller v Miller,* it is the first two, needs and compensation, which can most

readily render it unfair to hold the parties to an ante-nuptial agreement. The parties are unlikely to have intended that their ante-nuptial agreement should result, in the event of the marriage breaking up, in one partner being left in a predicament of real need, while the other enjoys a sufficiency or more, and such a result is likely to render it unfair to hold the parties to their agreement. Equally if the devotion of one partner to looking after the family and the home has left the other free to accumulate wealth, it is likely to be unfair to hold the parties to an agreement that entitles the latter to retain all that he or she has earned.

[82] Where, however, these considerations do not apply and each party is in a position to meet his or her needs, fairness may well not require a departure from their agreement as to the regulation of their financial affairs in the circumstances that have come to pass. Thus it is in relation to the third strand, sharing, that the court will be most likely to make an order in the terms of the nuptial agreement in place of the order that it would otherwise have made.'

[86] This theme was picked up by Baroness Hale of Richmond in her judgment. Baroness Hale of Richmond described situations where couples have contracted out of sharing but not out of compensation and support (para [177]). She went on to say:

'Provided that the provision made is adequate, why should they not be able to do so? On the one hand, the sharing principle reflects the egalitarian and non-discriminatory view of marriage, expressly adopted in Scottish law … and adopted in English law at least since *White v White.* On the other hand, respecting their individual autonomy reflects a different kind of equality. In the present state of the law, there can be no hard and fast rules, save to say that it may be fairer to accept the modification of the sharing principle than of the needs and compensation principles.'

[87] In *Versteegh v Versteegh* [2018] EWCA Civ 1050, [2019] 2 WLR 399, [2018] 2 FLR 1417, Lewison LJ set out what he regarded as the key points in *Granatino v Radmacher.* Insofar as is relevant to the issues now before the court he said:

'[177] …

(vii) Thus, the court should give effect to a PMA that is freely entered into by each party with a full appreciation of its implications unless in the circumstances prevailing it would not be fair to hold the parties to their agreement (para [75]).

(viii) Typically, it would not be fair to hold the parties to their agreement if it would prejudice the reasonable requirements of any children of the family (para [77]); or if holding them to the agreement would leave one spouse in a "predicament of real need" (para [81]).

(ix) But in relation to the sharing principle the court is likely to make an order reflecting the terms of the PMA (paras [82], [177]–[178]).

[178] I reject Mr Bishop's submission that if a PMA is unfair in the circumstances (eg because it fails to cater for the reasonable requirements of children or for the wife's needs) it must be discarded entirely, rather than tempered to take account of the unfairness. His submission is, in my judgment, inconsistent with the way in which the Supreme Court dealt with the application of the PMA to the sharing principle.'

[88] For my part, in my judgment in *Versteegh* at para [82], I emphasised that an effective prenuptial agreement is an example of a case where, upon a proper consideration of all the circumstances of the case (per s 25(1) of the Matrimonial Causes Act 1973), a court can conclude that the assets should be divided unequally, and that such an outcome would represent, as it was put by Baroness Hale of Richmond, a 'modification of the sharing principle' (at para [178]).

[89] The court has been taken to the judgments in the two cases referred to by the judge in his judgment, namely; *Z v Z (No 2) (Financial Remedies: Marriage Contract)* [2011] EWHC 2878 (Fam), [2012] 1 FLR 1100; and *Luckwell v Limata* [2014] EWHC 502 (Fam), [2014] 2 FLR 168. In *Z v Z,* although there were some inherited assets on either side, the majority of the assets had been accrued by the husband during the course of the marriage, the judge, as has Francis J in the present case, carefully considered all the circumstances leading up to the agreement which was in the form of a French *separation de biens*. Having done so, the judge rejected all the arguments raised to say that it would not be fair for him to uphold the agreement insofar as it excluded sharing, and went on to make a needs-based order. The judge observed that it might have been 'very different' if the agreement had also purported to exclude maintenance claims in the widest sense (para [64]).

[90] In *Luckwell v Limata*, the husband had no assets and the principal asset was the former matrimonial home which had been given to the wife by her father. Holman J took the view that the agreements in that case were highly relevant, having been entered into after legal advice with no vitiating factors. The husband was, however, on any view in a 'predicament of real need', and Holman J took the view that in the absence of the agreements it was inconceivable that any court would not have made a substantial award to the husband (para [143]). Notwithstanding that conclusion, the judge afforded 'as much weight as possible to the fact and contents of the agreements', and whilst he ordered the wife to provide a sum for the husband to purchase a property for his occupation, he nevertheless made an order that the property be sold when the youngest child became 22, and that upon sale 45% of the net proceeds of the sale were ordered to be repaid to the wife. Sharing was thereby wholly excluded.

[91] More recently, Roberts J had cause to consider a prenuptial agreement in *KA v MA (Prenuptial Agreement: Needs)* [2018] EWHC 499 (Fam), [2018] 2 FLR 1285. This was a case where, as here, it was held that the wife had freely entered into the prenuptial agreement. It was accepted by counsel for the wife that in those circumstances the computation of the wife's award

should be driven by her generously interpreted assessed needs rather than any application of the sharing principle (para [52]).

[92] The central issue in *KA v MA* was the assessment of those needs and, far from there being any suggestion that sharing should form any part of her provision, the question was as to the extent (if at all) the assessment of those needs should be constrained by the existence of the prenuptial agreement together with the future welfare of the child of the marriage (para [79]).

[93] Roberts J rightly reminded herself that, notwithstanding the existence of the prenuptial agreement, she had to have regard to all the factors set out in s 25(2) of the Matrimonial Causes Act 1973 with the first consideration being the welfare of the child (para [90]).

[94] She concluded:

> '[110] I am satisfied that a fair outcome in the assessment of both housing and income needs in this case must reflect the fact that this wife agreed to restrict the ambit of her financial claims should the marriage end in divorce.'

[95] In this case, Francis J, having found none of the vitiating factors to be present, rightly concluded that the Supreme Court in *Granatino v Radmacher (Formerly Granatino)* [2010] UKSC 42, [2011] 1 AC 534, [2010] 3 WLR 1367, [2010] 2 FLR 1900 had left the court with a wide residual discretion as to the definition of what is fair in any given case (para [55]) and rejected what he believed to be Mr Chamberlayne's submission that a 'very unfair prenuptial agreement' should be 'ripped up'.

[96] It might be thought that, up until this stage, the judge's view is entirely uncontroversial. It is at the next stage of his analysis that Mr Chamberlayne submits that the judge fell into error by concluding that the effect of the prenuptial agreement, following the approach taken by Moor J in *Z v Z (No 2) (Financial Remedies: Marriage Contract)* [2011] EWHC 2878 (Fam), [2012] 1 FLR 1100 and Holman J in *Luckwell v Limata* [2014] EWHC 502 (Fam), [2014] 2 FLR 168, was to restrict him to making an order limited to one to meet the wife's needs (para [62]).

[97] Mr Chamberlayne submits that the judge was wrong to conclude:

(i) that the wife had 'lost her sharing claim by reason of the prenuptial agreement'; and that, therefore,

(ii) having found the prenuptial agreement to be unfair, the judge erred in directing himself that he was thereafter limited to making only such order as would satisfy her needs.

[98] In the judgment, it is clear that the judge took the view that, having found there to be an effective prenuptial agreement, he could only (to use the judge's own, phrase) 'invade the husband's assets' to the extent necessary to provide for the wife's needs, and that payment of additional funds (by way of the sharing principle) was not open to him. The judge decided this notwithstanding his finding that *Granatino v Radmacher* left him with a wide discretion as to what is fair in any given case. Having found himself unable to make an award providing for the wife's needs as a consequence of what he

had held to be a valid MPC, the judge was left with no other option within the financial remedies proceedings other than to make declarations in relation to the parties' strict property rights.

[99] In summary, therefore, the route followed by the judge in relation to the prenuptial agreements was that:

(i) He found there to be no vitiating features which would preclude the implementation of the agreement.
(ii) He was aware from *Granatino v Radmacher* that parties to such agreement are able to 'contract out' of sharing.
(iii) In *Z v Z* and *Luckwell v Limata*, where the agreements had been held to be valid, the courts had made only needs-based orders.
(iv) He concluded said that (para [62]) 'the effect of the above is … that I am now to approach the case on a needs basis'.

[100] In my judgment, this analysis cannot properly be characterised as an exercise of discretion by the judge on the facts of the case; rather it is clear from the totality of the judgment that he felt himself to be in a straitjacket and that on the authorities, he was driven inexorably to conclude that he only had power to make a needs-based order.

[101] In my judgment, the judge did fall into error in going so far as to conclude that the effect of *Z v Z* and *Luckwell v Limata* meant that the wife had inevitably 'lost' her sharing claim by reason of the prenuptial agreement.

[102] It is undoubtedly the case that since the Supreme Court's decision in *Granatino v Radmacher,* and up to and including Roberts J's judgment in *KA v MA (Prenuptial Agreement: Needs)* [2018] EWHC 499 (Fam), [2018] 2 FLR 1285 in March of this year (2018), the courts at first instance have resolved cases where there is a valid prenuptial agreement which does not meet the needs of the wife by interfering with the agreement only to the extent necessary to ensure that those needs are satisfied. In doing so, the courts have honoured the sentiment in *Granatino v Radmacher* (para [75]) by respecting the autonomy of the parties and by giving effect to the nuptial agreement which has been freely entered into to the extent that it is fair to do so.

[103] In my judgment, in the ordinary course of events, where there is a valid prenuptial agreement, the terms of which amount to the wife having contracted out of a division of the assets based on sharing, a court is likely to regard fairness as demanding that she receives a settlement that is limited to that which provides for her needs. But whilst such an outcome may be considered to be more likely than not, that does not prescribe the outcome in every case. Even where there is an effective prenuptial agreement, the court remains under an obligation to take into account all the factors found in s 25(2) of the Matrimonial Causes Act 1973, together with a proper consideration of all the circumstances, the first consideration being the welfare of any children. Such an approach may, albeit unusually, lead the court in its search for a fair outcome, to make an order which, contrary to the terms of an agreement, provides a settlement for the wife in excess of her needs. It should also be recognised that even in a case where the court considers a needs-based approach to be fair, the court will as in *KA v MA,* retain a degree of latitude when it comes to deciding on the level of generosity or frugality which should appropriately be brought to the assessment of those needs.

[104] It follows that the appeal must also be allowed in relation to ground 1, given that, in my judgment, the judge was in error in regarding himself as being precluded, consequent upon the prenuptial agreements, from making an order in favour of the wife that was not based on her needs.

[105] I should emphasise that, in allowing the appeal, the court is not advocating an award in excess of the wife's needs, nor is it saying that having considered the case, and taken into account all the circumstances of the case, the judge will not reach the same conclusion as he did before, namely that this is a 'needs case'. All this court is doing is remitting the case to the judge, now absent a valid MPC, in such a way as to leave him in a position to exercise his broad discretion, to make such order as he deems to be fair in all the circumstances.

Conclusion

[106] It follows that:

(i) The court is satisfied that there is no valid MPC in this case prorogating any assessment of the wife's maintenance/needs to the Swedish courts, and that accordingly the appeal on ground 2 succeeds.

(ii) The judge fell into error in concluding that, having found there to be an effective prenuptial agreement which did not meet the wife's needs, he was thereafter constrained to make an order limited to providing for those needs.

(iii) Whilst the court must in each case consider all the s 25 factors, there is nothing which prevents a wife (or husband) from contracting out of 'sharing' and, in such a case where there are no vitiating factors, the court may well in the exercise of its discretion interfere with the terms of the prenuptial agreement only to the extent necessary to provide for the needs of the wife and any children.

(iv) Accordingly, the appeal on ground 1 also succeeds.

[107] If my Lords agree, the appeal is allowed and the matter is remitted to the judge for further consideration of the wife's claim for financial remedy against the background of the facts as found by the judge.

[108] I would simply add this: the parties have subjected themselves and each other to punishing litigation for over 3 years and at huge financial and emotional cost. The court would encourage the parties, whether through mediation or negotiation with the assistance of their legal teams, to now seek a resolution to the case without the need for further litigation.

LEWISON LJ:

[109] I agree.

PETER JACKSON LJ:
[110] I also agree.

Order accordingly.

SAMANTHA BANGHAM
Law Reporter

IN THE FAMILY COURT AT THE CENTRAL FAMILY COURT

BV19D10071

Neutral Citation Number: [2023] EWFC 36 (B)

BETWEEN:

NO

Applicant

and

PQ

Respondent

Mr James Finch (instructed by JMW Solicitors) for the applicant

The respondent appeared in person

Hearing dates 23 - 25 January 2023 and 23 February

JUDGMENT OF RECORDER R TAYLOR

Contents

Introduction

1. This is the final hearing of NO's ("W") application for financial remedies.

2. W and PQ ("H") cohabited from 1988, married in 1994 and separated in or about 2018. W is 60 and H is 58.

3. The marriage produced three children who are now aged 26, 25 and 21. The children are presently residing with W at the five bedroomed former matrimonial home ("FMH"), but as they are now adults they do not feature to any extent in the determination I need to make.

4. Before setting out the unhappy background to my decision, I would like to pay tribute to Mr Finch who has been unfailingly helpful throughout the hearing, both to myself and H who acted without the benefit of legal representation.

5. H also conducted himself with dignity in what must have been a very stressful experience for him. H can be assured that I do not consider him to have been at any material disadvantage for having conducted the hearing without lawyers. Hopefully, H will see that I have listened very carefully to him and clearly heard his arguments.

6. Notwithstanding H's clear arguments before me, I am not persuaded by them.

7. I accept W's evidence and submissions and upon that basis, with her offer to indemnify H in respect of some of his business debts, in particular those which are in joint names and/or secured on the FMH, I make no provision for H.

8. I am acutely aware that this leaves H in a predicament of real need. This is an unusual outcome, I accept, but justified as the only fair one on the facts.

9. The decision, as I will explain, is driven by an informal agreement which the parties arrived at and then acted upon. This has resulted in H having already had "his share" which he has lost in a failed business venture. Any attempt to apply a modest needs based

award, to alleviate H's predicament of real need, would be lost to further creditors. There is nothing I can do to temper the wind to the shorn lamb.

Background

Life prior to the breakdown of the marriage

10. H was a successful restaurateur for many years in South East England. H conducted his business via a limited company called TLF Ltd of which at the material times he was a shareholder and the only director. For about 25 years he ran a restaurant called TL and it enjoyed much success.

11. TLF Ltd also took out a long lease in 2005 on a second premises which operated as a bakery. This was a renewable lease. For many years TL and the bakery enjoyed a symbiotic relationship, with the bakery supplying TL. The lease in respect of the bakery premises plays an important and unhappy role later in the chronology.

12. There are some other debts in H's name but they are lost in the noise of the implications facing H with the unpaid rent litigation.

13. W had a textile, design and jewellery business, but was not the principal earner in the family and cared for the children. Together H and W made an equal contribution to their fortunes and married life.

14. In 2017 H sold TL for £1.8M and netted £1.3M.

15. He retained the bakery which was less successful in the absence of its relationship with TL. It made losses.

16. By 2018 the £1.3M had depleted to about £600,000. This was partly on account of living costs, on account of settling commercial debts which were a legacy of TL, and bearing the losses at the bakery.

17. H and W discussed what they wished to do with their remaining nest egg. There was some discussion as to whether they might purchase some buy-to-let properties but this was not progressed. Eventually in 2018 it was agreed that H would close the bakery and

the parties would develop a high-end restaurant and bar at the bakery premises, which would be revamped.

18. Taking a step back in the chronology, since about 2014, H had been dissatisfied with his lot. H had wanderlust and a desire for an easier life than the restaurant business.

19. H stated that such was his unhappiness that he regarded the marriage was at an end in 2014. H stated that he agreed to stay only for the sake of the children. W accepted that there had been difficulties and that H would sometimes say the marriage was over, after a heated argument. Whatever was said, the parties remained functionally a couple. They shared a bedroom and the mundane aspects of domestic existence together. They presented as a couple socially.

The parties' separation

20. In September 2018, H handed back his wedding ring and shortly after moved out of the family home to rent elsewhere. H had commenced a relationship with another woman in her early thirties who had worked in the business and who was known to the family.

What did the parties agree at the point of separation?

21. From early 2019, W was expressing the view that she did not want to be in business with H anymore. The parties are now in dispute as to what was agreed between them at this stage. I shall detail with this key point in the chronology in more detail shortly.

22. In summary, W puts her case on two bases: her primary case is that the parties agreed that H would take the cash left over from the sale of TL (£600,000) plus retain his pension worth about £50,000 and she would take the FMH (net equity @£800,000) as financial settlement. In the alternative, and as I will find, more realistically, W asserts that it was agreed between the parties that H's investment in the new business, known as the new restaurant ("the new restaurant"), would "come out of his side" of the settlement. Mr Finch realistically accepted in closing that there was "always the spectre of a future financial reconciliation" to ensure a fair settlement.

23. H asserts there was no agreement or that the only agreement was that H would set up a new restaurant, turn it into a success and then the parties could look at what would be fair in 2026 when the mortgage deal on the FMH was up.

Setting up and financing of the new restaurant

24. W made plain in early 2019 that she did not want to be part of H's new restaurant project. The project was in its early stages at that point. The staff at the loss-making bakery were being laid off and that business was being wound up. I was told by W that about £10,000 - £15,000 had been spent on a licensing application in the early part of January. I accept this evidence and find that H was not obliged to invest the kind of money he subsequently did into the premises. It was his choice. In evidence, H stated that being a restaurateur was the only business that he knew. Whilst that may be true in one sense, setting up a new restaurant also ran contrary to his long-held ambition to travel and have an easier life free of the commitment required to run a successful restaurant business. There would have been any number of options for investment of the parties' nest egg at this stage. It was H's active choice to invest heavily in another restaurant business.

25. The new restaurant project was delayed for reasons which do not matter. H needed further finance in about October 2019 and obtained advice that to do so he would need to offer the FMH as security. W was unhappy about this but acquiesced upon H's reassurances that it was only as security that he would be able to pay off the commercial borrowing shortly and that his business assets would cover the loan in the event of difficulties.

26. I note that H's financial adviser sent H a WhatsApp on 23 October 2019. This was forwarded to W. The adviser stated that W would need independent legal advice before granting a charge over the FMH, unless she was appointed as a director of TLF Ltd. W was appointed a director later that day. H also asked W at around this time not to tell the financial adviser that the parties were seeking a divorce. H secured borrowing of about £383,500.

The lease on the premises

27. I need to come back to the lease on the bakery premises. A lease of about 20 years was taken out by TLF Ltd in about 2005. I am not sure of the exact date the lease was granted or its term. H was clear that it was a renewable lease.

28. At the time the lease was granted in about 2005, H offered a personal guarantee, as did a third party who was then a business partner. H bought out the business partner's interest a few years later but each remained liable under their personal guarantees.

29. Fast forwarding to 2019, H sought to have the business partner released from his obligation and for the lease to be assigned to another entity. The landlord refused.

30. At this point there was a couple of years left unexpired on the lease. H sought advice as to its value and ascertained that it was probably worthless in terms of sale to a third party. H does not appear to have explored at this stage whether and on what terms the landlord might consider a surrender prior to the expiration of the lease. I do not know what the answer to such a request would have been.

31. H told me in evidence that his plan had been to develop the new restaurant into a successful business over the course of the medium term, extend the lease (as he thought he was entitled to do) and then sell a prosperous business benefitting from a renewed lease.

32. At the point the new restaurant failed in 2021, there remained a couple of years unexpired term on the lease. The landlord is now in the process of pursuing H in the County Court on his personal guarantee. The sum claimed is in the order of £223,876. The £223,876 is debt is in addition to the calculations I have set out below.

33. I have given careful consideration as to whether I should characterise the lease as a "matrimonial debt." The liability was incurred during the course of the marriage and the commercial premises formed part of the commercial arrangements which financed the matrimonial lifestyle over many years. On the one hand it might be said that if it started out with a "matrimonial character" it has retained that character and both parties should now share in the latent liability.

34. On the other hand, H knew that the lease was at its fag end and did nothing to explore the terms upon which he might have secured its surrender. On the contrary, H's plan was to financially invest heavily in the development of premises and extend the lease to ready it for a sale in the medium term.

35. On balance, I am persuaded that the lease lost its matrimonial character when H decided to pursue the new restaurant project on his own account at the start of 2019. The lease liability was personal to him and not secured against the FMH. His choice to invest heavily and extend the lease were commercial decisions which came with risk. By that stage, as I will explain shortly, W had made it plain that she wanted nothing to do with the business. Upon that basis this liability lost its matrimonial character and H "took it on" in the minds of the parties, as well as it being his actual legal liability.

Why the restaurant failed

36. The restaurant opened in about December 2019.

37. W is very critical of H's actions at this time. With her version of history, the business subsequently failed due to the fact that H spent too much time with his new partner, who had by now returned to live in France and who fell pregnant in late 2019.

38. Whilst we can all be wise with the benefit of hindsight and some things might have been done differently, I do not accept this central criticism W makes of H. Yes, he was involved in a new relationship which took him to France on a not infrequent basis (when the world was not subject to the lockdowns which were to follow in 2020). On the other hand, prior to the parties' separation they had travelled extensively for five years and H had successfully managed a team remotely at TL. H's idea for the new restaurant had always been to be a hands-off manager so that he could pursue his desire for an easier life.

39. Things might have been done better or differently but that is all water under the bridge now. I do not accept W's central charge that H destroyed the business by his unreasonable lack of diligence and care.

40. H gave evidence about the challenges when the new restaurant was opened, including having to warn and then sack a chef prior to March 2020. The manager was also sacked for not being up to the job. H had sourced what he believed to be competent staff via an agency. Then the lockdown came. H quickly re-purposed the business as a fishmonger. A delivery of fish would be about £7,000 worth of stock and so it was an obvious and innovative change of tack during those difficult months. H spoke of learning the craft of being a fish monger with his son (who was assisting) on the job, with them watching YouTube videos on how to gut fish.

41. H spoke of very long hours, both serving customers and also cleaning to ensure that there was not an unpleasant fish smell. This involved working all hours, sometimes finishing at 1am and starting the next day at 5am.

42. Some Covid loans and grants were sought at the start of the lockdown. W assisted with some of the paperwork and even included herself in the application (she having been added as a director the previous October for loan purposes, as I have described). I accept W's account that she did not have the furlough money in her name paid directly to her and that later when she tried to make another claim in her own right she found she was unable to on the basis that her NI number had already been used to make a claim.

43. W did have some financial support from, or on behalf of, H in 2020, in the sum of about £30,000. W thought at the time this was maintenance from H, but she was actually receiving payments from TLF Ltd. This would have been a tax efficient method, albeit not a totally honest way for H to make payments to W.

44. I do not find that W's willingness to assist with the forms, claim furlough monies or the source of some payments at this stage in the chronology indicates that the parties were back in business together. They were exceptional times and W was willing to lend a hand with some forms and indeed sometimes also brought some sandwiches to the new restaurant for H and the workers (which included his sons). The parties were not engaged in business together, however.

45. When the first lockdown came to an end, the restaurant re-opened. H seemed unaware of the "Eat Out to Help Out" campaign and said that he just had his nose to the grindstone and did not pay particular attention to what was going on. I find this a little surprising, given the level of publicity it received, but having broadly accepted that H worked phenomenally hard during those months, this does not change my overall view of his endeavours.

46. H told me that he did not visit his partner for much of 2020 due to work and lockdowns. He went to France in September 2020 and their baby was born shortly thereafter.

47. Once the first lockdown was over it was more difficult to source staff in the hospitality sector. Further lockdowns ensued with consequential disruption to business. Following a return from lockdown in early 2021, the head chef left after five days, taking most of

the kitchen staff with him. They had been able to secure better paid employment elsewhere. H found a replacement chef almost immediately. He was Russian and brought over to keep things going. The chef then got Covid and was sick for a few weeks. A Covid cluster broke out amongst kitchen staff. The restaurant had to close down for ten days. H then sought agency staff. Things did not ultimately work out with the Russian chef and he was sacked in September 2021. A further chef was secured but he suffered ill health.

48. The restaurant was only able to open four days a week due to the various staffing crises and could also not offer breakfast on the days it was open. There were 36 covers and H explained that the business model depended on a high turnover of covers, which was simply not possible if the restaurant was not open seven days a week and not opening for all sessions during the days when it was open.

49. Matters limped along until December. The Omicron variant of Covid then struck. The December bookings, which had looked healthy, began to evaporate at the start of the month. The chef and staff took the view that there would be no money left at the end of the month and so told H they were quitting. The new restaurant was closed once and for all.

50. I have described events in some detail to illustrate that I do not consider that the new restaurant failed due to lack of effort by H. Circumstances were simply against him, even if some things might have been done differently with the benefit of hindsight. H had, however, risked and traded from his share of the settlement.

Money that H has received

51. At the point of failure, H had invested in the order of about £776,000 into the business. This was put by Mr Finch as being:

    51.1 The loan secured against the FMH for £383,000

    51.2 £392,500 from the joint account (£542,500, less a sum of Corporation Tax of £150,000 which is referable to the realisation of the TLF business). The figure of £542,500 is taken from an email dated 6 September 2019 in which W tots up the figures and states "…[this] is your settlement figure, to be used as you please, the new restaurant or other."

52. H sought to challenge an aspect of the 6 September 2019 email by stating that the monies taken from the Nationwide savings account (which forms part of the £542,500) in the sum of £120,200 was spending on the winding up costs of the bakery. H has had many months to articulate and evidence this argument which he failed to do prior to the final hearing. It was not possible for me to make an accurate assessment of this argument, but in any event it can now be seen to be part of the background, given the level of money H has received.

The money W will be left with

53. The sum overall enjoyed by H (joint account monies with or without the £120,200 and secured loan monies) are more than W will exit the marriage with:

    53.1 Equity in family home - £1,095,000
    53.2 Less joint/secured debts (£407,500)
    53.3 Less W outstanding legal costs per Form H1 (£62,000)
    53.4 Total £625,500

54. This figure is cross checked against the money which had been in the parties' joint account, namely £601,000 in January 2019. H asserted that W had spent about £107,000 from that account but after making some adjustments (an error of £25,000 and £6,000) that figure reduces to £76,000. If one takes the £76,000 from the £601,000 says Mr Finch, one is left with £525,000, a figure "adjacent" to the figure of £542,500 quoted above. I agree with this helpful analysis.

55. W spent the £76,000 on legal fees (£47,000), FMH renovation (£23,000) and living expenses.

56. It is almost impossible to conduct a perfect account, but it is possible to get a pretty good feel for the order of the amount of money which was invested into the new restaurant. The expenditure at this level is also confirmed by some WhatsApp messages passing between the parties.

57. W has used the FMH with ingenuity since separation. She rents rooms using Airbnb and Booking.com. In addition to conventional guests, she has also established the property as a place to generate income in a variety of other ways. From that variety of sources since separation in about 2018/2019 to date, this has resulted in W earning about

£200,000. This has formed the bedrock of her income to keep the house going, alongside modest earnings in her business and the support I have noted that she received in 2020 from TLF Ltd. I was not told what drawings H had had from the the new restaurant business, but this is how he financed his existence between December 2019 and December 2021.

The parties' overall positions

58. W made an open offer dated 2 December 2022 in which she proposed that the FMH be transferred into her sole name upon the basis she would indemnify the joint and/or secured borrowings. This would be on clean break basis.

59. In closing, Mr Finch accepted that W would have to sell the FMH if she could not secure H's release from the FMH mortgage within a reasonable period of time. As noted above, this will leave W with £625,000.

60. The joint debts of £407,500 W will take on are made up of:

    60.1 AA loan now standing at £295,000 (this was the principal loan H persuaded W to offer the FMH as a security for once the parties had separation, as described above). AA have sought possession of the FMH but have agreed to an adjournment of their application pending the outcome in these proceedings.

    60.2 Loan to W's father which paid off to B - £58,000. W was party to this loan and B sought to bankrupt W. The only way to avoid bankruptcy was to pay them off and W's father came up with the funds. In the circumstances, I categorise this as a hard debt which must be repaid, even though it is W's father who is actually now the creditor.

    60.3 There are then three smaller loans for which the parties are jointly liable of £10,000 (FBS Ltd), £20,000 (PL) and £24,000 (Nationwide). These are not presently charged against the FMH.

61. I should add that H has done nothing to assist W in fending off the creditors. W has been caught up in dealing with the maelstrom of issues whilst he has remained in France. H gave unsatisfactory explanations as to the fact that he had lost his business email account and did not know what was going on. He also stated at one point that "He was hiding under the duvet rather than putting his head in the sand" which I took him to mean he

was unable to cope with the problems rather than wilfully and coldly leaving W to face the music on her own. Whatever the reason, H's lack of engagement with the creditors reflects poorly on him. W simply has not had the option of any duvet days.

62. H's position in his s.25 statement is that there was no agreement between the parties. In evidence H asserted that there was an agreement that the FMH would be sold in 2026 when the mortgage was up and that there would be a divvy up to divide equity equally. H now wants the FMH sold and each party should have a 50% share of the net proceeds.

63. When H was before District Judge Hudd on 31 August 2022, he stated that he wanted capital to start another business. He repeated this when giving evidence before me, albeit he also stated that he would like to have some money to try and purchase a property in France, as he is currently renting with his new partner and two children they have had together. This suggestion was not put with much conviction and it appears to me that H recognises that he cannot afford to buy. It seems to me, and I find, that if H was in possession of free capital (which was not swallowed up by his creditors), his real ambition is to start another business as he does not believe he is employable at age 58, at least not in occupations which he would wish to consider.

My impression of the parties

64. This case does not turn on the demeanour of the parties in the witness box. That said, I record the following.

65. I found W to be matter of fact and long suffering to the point of being inured by her present unhappy circumstances. W has coped with H's stated dissatisfaction with the marriage, his new relationship and business crises and battle with creditors which she has been sucked into. She has done what she can to keep the FMH going and preserve the equity therein.

66. At one point post separation the parties each invested 50% in a start-up company being run by friends. W told me that as H stated he was treating the money in the joint account as his, she found her share of the investment (£25,000) via a loan from her brother and "cash takings" from her business. It was plain that alongside her declared business income she also dealt in cash. This was not honest.

67. Additionally, when the liquidators were about to take possession of the new restaurant premises, H asked W to go and take some chairs which were part of the business. H rather optimistically suggested on the ES2 that W was in possession of £10,000 worth of chairs. I do not accept that. However, this is another incidence of dishonesty as those chattels were the property of the liquidator and not the parties.

68. In light of this dishonesty, I give myself a *Lucas* style direction and remind myself that dishonesty of a party may legitimately affect the view the court takes of their credibility. However, in the circumstances where a witness has been dishonest, the court must take care to give specific consideration as to how the dishonesty should be factored in when determining an issue of fact. In particular the court should consider whether the dishonesty was deliberate; whether it related to a significant issue; and whether there is anything else, for example shame, misplaced loyalty, fear or distress, which could explain the lie: *R v Lucas* [1981] QB 720; *Re A, B and C (Children)* [2021] EWCA Civ 451.

69. Not declaring income to HMRC and hiding assets from a liquidator are respectively both dishonest and a criminal offence. Whilst this court does not condone such behaviour, this has not affected my overall view of W on the key issues I have to decide in this case.

70. H struck me as being as wishful as to the story which the contemporaneous documents in the case tell, which I am about to describe. He came across as an engaging individual, but appearing to lack a proper understanding of what he has put W through by failing to engage with the creditors. He appears somewhat self-absorbed with his own situation.

71. For his part he paid W "maintenance" via TLF Ltd when she was not working for him (albeit she was a director for the technical reason of avoiding her having independent legal advice when H obtained the secured loan) and also sought to defraud creditors by asking W to remove chairs prior to the liquidator taking possession. I give myself the same *Lucas* style direction as I recited above. Again, his dishonesty with these episodes does not affect my overall judgment on the issues on which I must determine.

What did the parties agree?

72. It is my determination that the parties agreed that H's investment in the new restaurant would come from his side of the settlement. This is W's alternative case which I outlined above. I do not accept that the parties agreed that W would take the FMH and H would

take the cash from the sale of TL. The difference in those sums (£800,000 FMH, £600,000 cash plus, say, £50,000 pension) was such that I do not accept that the parties agreed such a division. I accept W's alternative case for the following reasons.

73. On 9 January 2019 at 18.38, W sent a WhatsApp message to H in the following terms:

> "Please know that all I am trying to do is secure a future for myself and our children in light of current circumstances.
>
> I felt it was only fair to discuss theses things sooner rather than later in case you would like to reconsider how best you would like your future to unfold.
>
> If we were to discuss such things in a years time it could [sic] be more complicated as the new restaurant would be up and running.
>
> You may or may not decide to go ahead with the new restaurant but I want that to be your decision, not one that you feel pressured to make.
>
> I will support whichever decision you make. …"

74. In an email dated 16 January 2019, W stated to H that to go into business together would not be a healthy solution. W stated that she had been looking forward to working on the project together if they could work as a team "…but in light of recent events and historical events the trust has gone."

75. Mr Finch described these messages as "the line in the sand" when W made plain her unwillingness to continue in business with H. It is clear that matters were not agreed immediately and there were further exchanges and discussions which take us to April 2019.

76. On 5 April 2019 at 12.26, H sent an email message to W in the following terms:

> "Any share taken from our joint account for the new restaurant project will be deducted from my share of the settlement as NOis not part of this project."

77. There was some controversy over this message in the hearing. For the first time in the life of the litigation, H sought to assert, in a note filed on the Friday before the commencement of the hearing on the Monday, that this email had not been sent by him and that his computer may have been accessed by another member of the family.

78. This was an unwise allegation to make which did not bear any scrutiny. Mr Finch applied to introduce contemporaneous WhatsApp messages which were also being exchanged between the parties at around the time this email was sent. H opposed this application, but it was only fair I had the full picture. It is abundantly clear that the parties were in conversation via several WhatsApp messages which I do not need to recite about the wording of the email. For H to try and say his email had been hacked is wrong and misleading and, in fairness to him, he dropped the point once he could see that the contemporaneous documents had blown this argument right out of the water.

79. H then sought to assert that he had been told what to say by W in the prior WhatsApp exchanges and that this was not really his view. I reject that argument entirely.

80. The parties had to make a decision about the future of the new restaurant project in early 2019 which had not, at that stage, been fully committed to. W wanted out. H wanted to proceed. With the matrimonial finances unresolved, these two capable adults decided on a way forward which they both perfectly understood and made perfect sense at the time: H's spending on the new restaurant would come out of his ultimate share of the matrimonial settlement, which would need some reconciliation to get to a fair division in due course.

81. Whilst this informal agreement is not final or couched in a formal legal document, the intentions of the parties are clear. The parties then relied upon it. H traded with and risked money from his share of the settlement.

82. On 13 April 2019, H sent W a message stating that he needed money "for the project to start."

83. There are subsequent WhatsApp exchanges between the parties which only make sense if the parties had had a prior agreement. For example, H stating in a WhatsApp message that he did not want W to take money from the joint account for an investment as "the value of the property and the cash are maybe equivalent." Later WhatsApp messages

from H, which are unnecessary to recite in detail, have H referencing back to the effect of accounting for the £150,000 Corporation Tax bill which would have to come out of the joint account consequent to the realisation of the equity in TL.

The law

84. Factual disputes are resolved in the Family Court on the balance of probabilities. The burden of proving that an allegation is true lies with the party making the allegation. Findings must be based on evidence, including inferences that can properly be drawn from the evidence, and not on suspicion or speculation. The law operates a binary system and may only find either that something happened or that it did not happen: *Re B* [2008] UKHL 35.

85. I must apply s.25(1) and (2) and s.25A of the Matrimonial Causes Act 1973. In so doing I am required to take into account all of the circumstances of the case, including:

a) the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future, including in the case of earning capacity any increase in that capacity which it would in the opinion of the court be reasonable to expect a party to the marriage to take steps to acquire;

b) the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future;

c) the standard of living enjoyed by the family before the breakdown of the marriage;

d) the age of each party to the marriage and the duration of the marriage;

e) any physical or mental disability of either of the parties to the marriage;

f) the contributions which each of the parties has made or is likely in the foreseeable future to make to the welfare of the family, including any contribution by looking after the home or caring for the family;

g) the conduct of each of the parties, if that conduct is such that it would in the opinion of the court be inequitable to disregard it;

h) in the case of proceedings for divorce or nullity of marriage, the value to each of the parties to the marriage of any benefit which, by reason of the dissolution or annulment of the marriage, that party will lose the chance of acquiring.

86. I have had these factors firmly in mind throughout this judgment.

87. By s.25A Matrimonial Causes Act 1973 I must consider whether to exercise the court's redistributive powers such that the financial obligations of each party towards the other will be terminated as soon after the making of the order as the court considers just and reasonable. This is the statutory steer in favour of a clean break if just and reasonable.

88. In *HD v WB* [2023] EWFC 2, Peel J provides a helpful summary of how the court should treat nuptial agreements:

> "44. The starting point for my purposes is *Radmacher v Granatino* [2010] UKSC 42 from which the following propositions can be drawn:
>
> i) There is no material distinction between an ante-nuptial agreement and a post-nuptial agreement (para 57).
>
> ii) If an ante-nuptial agreement, or a post-nuptial agreement, is to carry full weight, "what is important is that each party should have all the information that is material to his or her decision, and that each party should intend that the agreement should govern the financial consequences of the marriage coming to an end" (para 69).
>
> iii) It is to be assumed that each party to a properly negotiated agreement is a grown up and able to look after himself or herself (para 51).
>
> iv) The reason why the court should give weight to a nuptial agreement is that there should be respect for individual autonomy. The court should accord respect to the decision of a married couple as to the manner in which their financial affairs should be regulated. It would be paternalistic and patronising to override their agreement simply on the basis that the court knows best. This is particularly true where the parties' agreement addresses existing circumstances and not merely the contingencies of an uncertain future (para 78).
>
> v) The first question will be whether any of the standard vitiating factors, duress, fraud or misrepresentation, is present. Even if the

agreement does not have contractual force, those factors will negate any effect the agreement might otherwise have. But unconscionable conduct such as undue pressure (falling short of duress) will also be likely to eliminate the weight to be attached to the agreement, and other unworthy conduct, such as exploitation of a dominant position to secure an unfair advantage, would reduce or eliminate it (para 71). The court may take into account a party's emotional state, and what pressures he or she was under to agree. But that again cannot be considered in isolation from what would have happened had he or she not been under those pressures (para 72).

vi) The court should give effect to a nuptial agreement that is freely entered into by each party with a full appreciation of its implications unless in the circumstances prevailing it would not be fair to hold the parties to their agreement. (para 75).

vii) Of the three strands identified in *White v White* and *Miller v Miller*, it is the first two, needs and compensation, which can most readily render it unfair to hold the parties to an ante-nuptial agreement. The parties are unlikely to have intended that their ante-nuptial agreement should result, in the event of the marriage breaking up, in one partner being left in a predicament of real need, while the other enjoys a sufficiency or more, and such a result is likely to render it unfair to hold the parties to their agreement. Equally if the devotion of one partner to looking after the family and the home has left the other free to accumulate wealth, it is likely to be unfair to hold the parties to an agreement that entitles the latter to retain all that he or she has earned (para 81).

viii) Where, however, these considerations do not apply and each party is in a position to meet his or her needs, fairness may well not require a departure from their agreement as to the regulation of their financial affairs in the circumstances that have come to pass. Thus, it is in relation to the third strand, sharing, that the court will be most likely to make an order in the terms of the nuptial agreement in place

of the order that it would otherwise have made (para 82).

ix) It is the court that determines the result after applying the Act (para 83).

45. Sound legal advice is "desirable" (*Radmacher* at para 69), but not essential. In *V v V* [2012] 1 FLR 1315 Charles J held that the agreement should be upheld notwithstanding lack of legal advice or disclosure because it was readily understood by an intelligent (but legally unadvised) reader (para 50), and both parties intended the marriage settlement to be effective and were aware of its obvious purpose. In *Versteegh v Versteegh* [2018] 2 FLR 1417, a similar approach was adopted. When considering the absence of legal advice, the court should, in my view, look at all the circumstances, including whether the party had the opportunity to take legal advice, and whether the party had a sufficient understanding of the meaning and consequences of the PNA. I cannot accept that absence of legal advice is, by itself, a vitiating factor, or "fatal" to W's case, as H suggests in his counsels' opening note, such that no weight can be attributed to it.

46. Ultimately, the court remains under an obligation to consider all the s25 factors: para 103 of *Brack v Brack* [2018] EWCA Civ 2862."

89. Peel J then goes on to review the modern authorities which consider the phrase and effect of a "predicament of real need":

"47. An interesting question is what "predicament of real need" means. Counsel for W submit that any order should be confined to ensuring that the supplicant party (in this case H) has sufficient to be kept from "destitution" (the word used by Mostyn J at para 72(iv)(c) of *Kremen v Agrest* (No 11) [2021] EWHC 45 (Fam). Or does it mean, as counsel for H submit, that if the PNA entered into by the parties leaves one of them in a predicament of real need on divorce, the court then moves on to consider needs in accordance with all the s25 criteria, and is not confined to alleviating a predicament of real need; in other words, the "predicament of real need" is a gateway through which the supplicant party must go before s25 is fully engaged.

48. In *V v V* (supra) Charles J at paras 81 and 82 did not restrict the interpretation of needs in the way suggested by W in this case.

49. In *WW v HW* [2015] EWHC 1844 Deputy High Court Judge Nicholas Cusworth QC (as he was) said:

> "[53] So, should the husband's need here necessarily be interpreted as the minimum amount that is required to keep him from destitution? This will not invariably be the case, even where an agreement would otherwise produce such an extreme situation. As Lord Phillips confirmed in *Granatino v Radmacher (Formerly Granatino)* [2010] UKSC 42, [2011] 1 AC 534, [2010] 2 FLR 1900 at [75]: 'The fact of the agreement is capable of altering what is fair'. However, even where there is an agreement, fairness will not necessarily equate to near destitution. The level at which a party's needs should be assessed, if they are not met by an agreement which might otherwise be binding upon them, must surely depend upon all the circumstances of the case, amongst which the fact of the agreement may feature prominently as a depressing factor. But each case will be different."
>
> [54] In *Radmacher* itself, having rejected the view adopted by Wilson LJ in the Court of Appeal that the agreement should be binding irrespective of need, the Supreme Court went on to find that in that case the husband's needs were in fact met by the award made, albeit it not at the level he might have expected absent the agreement. Given the earning capacity which they were inferentially able to attribute to him, this could hardly be equated to 'destitution'. In *Luckwell v Limata* [2014] EWHC 502 (Fam), [2014] 2 FLR 168, Holman J found of the husband in that case at para [143] that: 'He has no home, no current income, no capital, considerable debt and absolutely no further borrowing capacity'. He justified further provision on the basis at para [148] that: 'the need to provide an adequate home in which the children can visit and stay with their father is very important'.
>
> [55] Unlike *Luckwell*, and more closely like *Radmacher*, this is a case where any provision which W makes will have a significant effect on the

quality of the children's lives whilst they are with her. There is thus no need to balance the effect on the children of losing their home with one parent to provide adequate accommodation in which they can stay with the other. However, it should be borne in mind that any award to meet need, even absent the agreement in this case, is being made from non-matrimonial assets; and here those assets were specifically protected by the agreement which H willingly entered into. There is consequently no obvious basis for any generosity in the interpretation of these needs."

50. Roberts J at para 100 of *KA V MA* [2018] EWHC 499 (Fam) agreed with those observations.

51. In *Ipecki v McConnell* [2019] EWFC 19 at para 27 (iv) Mostyn J said:

"The agreement does not meet any needs of the husband. I do not take the language used by the Supreme Court, namely "predicament of real need" as signifying that needs when assessed in circumstances where there is a valid prenuptial agreement in play should be markedly less than needs assessed in ordinary circumstances. If you have reasonable needs which you cannot meet from your own resources, then you are in a predicament. Those needs are real needs."

52. In *Brack v Brack (supra)* King LJ said at para 131:

"It should also be recognised that even in a case where the court considers a needs-based approach to be fair, the court will as in *KA v MA* , retain a degree of latitude when it comes to deciding on the level of generosity or frugality which should appropriately be brought to the assessment of those needs".

53. I take the view that whether a party should be confined to needs at the minimum level required to meet a "predicament of real need" will depend on the circumstances of the case. There is a world of difference between, say; (i) a childless couple whose marriage lasts for 2 years, enjoying only a modest lifestyle, at the end of which one party might need no more than short term maintenance or a highly attenuated housing budget (perhaps restricted to time

limited rental), and (ii) as here, a couple with 3 children, who have been together 20 years, who each contributed to the welfare of the family in different ways, and who enjoyed a high standard of living. I adopt the words of King LJ which seem to me to describe accurately the flexibility of the discretionary exercise. Of course, the court will always, in conducting the s25 evaluation, have regard to the fact of a PNA and its terms. I would not therefore adopt the approach of W's counsel, which seemed to me to be too straitjacketing. Nor do I consider that the two stage gateway process suggested by H's counsel is made out on the authorities."

90. I also have in mind *Edgar v Edgar* (1981)_ 2 FLR 20 in which it was suggested that one of the grounds for not holding a party to an agreement might be "…an important change of circumstances, unforeseen or overlooked at the time of making the agreement …"

91. *BT v CU* [2021] EWFC 87, [2022] 2 FLR 26 held the line espoused in *Myerson v Myserson (No 2)* [2009] EWCA Civ 282, [2009] 2 FLR 147 that seismic unforeseen world changing events such as the 2007/2008 world financial crises and then Covid do not justify the high bar for setting aside final *orders* made in financial remedy cases.

92. This situation is different in that I am considering only an informal and unperfected agreement between the parties and not a court order. That said, it does seem to me that an unforeseen change of circumstances can only be one factor in the scales when considering whether the parties should be held to their bargain.

93. I was also referred to *H v H (Financial Relief)* [2010] EWHC 158 (Fam), [2010] 1 FLR 1864 in which Munby LJ (as he then was, and sitting as a judge of the Family Division) largely supported the husband's unilateral division of assets shortly after separation in circumstances where the husband had greatly enhanced "his share" by the time of the division. Munby LJ stated:

"If the unilateral division of the family assets a year after separation was objectively fair, then there was no principled basis for going behind it, because after dividing the assets, the husband had ceased to 'gamble' with the wife's undivided share of the assets. Provided the division was fair, following the division the husband and wife should each bear the

consequences, good or bad, of any subsequent changes in the values of their respective portfolios."

94. The comments of Munby LJ seem to have force in this case. By an informal agreement (which arguably has even more magnetic force than unilateral, albeit fair, action), H agreed that he could "gamble" the money in the joint account, subject to any later fine tuning. That was understood by the parties at the time, as I have found, and objectively fair.

95. If anything, H's subsequent obtaining of the secured loan over the FMH tipped the scales on the agreement in such a way that it cannot possibly now be said that he has not had his share. But I am afraid that in these unhappy circumstances as I have described, H must bear the consequences of his commercial risk.

96. I also note the case of *A v B (Financial Remedies)(No 2)* [2018] EWFC 45, [20119] 1 FLR 17 much of which is not at all relevant to this case. However, at its heart was the fact that the parties were held to an informal agreement which they had struck together in a pub.

97. I was also referred to some conduct authorities, but given my findings about the reasons for the failure of the business, I do not need to dwell upon those.

Should I make a needs based award?

98. Having come to the conclusions that I have, it seems to me that H does not have any entitlement to a share of the equity in the FMH.

99. But applying the approach of Peel J that I have set out above concerning nuptial agreements (informal agreements between husband and wife are still nuptial) and a real predicament of need, should I make some kind of award to alleviate H's predicament of real need?

100. H lives with his new partner in a rented property in France. She works and they also receive some support from her family, which may have to be paid back or may be a soft loan. H has yet to identify employment which he considers to be congenial and fears he will not do so at age 58. He is a long way from the carefree existence he set out for at the end of the marriage. That said, he has a roof over his head and his partner (and mother of

his two children) brings home an income. I am afraid that H may be right in fearing that his options for congenial employment are limited – but he is still young enough to work and he will be able to find *some* work, even if it is work he would rather not do. So, whilst H is now shorn of capital, he is not destitute. He has a home, a partner with an income and he has the ability to go and earn some money.

101. There are two forceful drivers against making any needs based provision. The first is that any sum I awarded would be swallowed up in H's litigation with the landlord over the unpaid rent. Whilst the authorities encourage me to do what I can to avoid a predicament of real need, here I am unable to do anything which will actually assist H in a practical sense. H has no entitlement to more and I am not required to award him money which I can see will just disappear in further litigation he faces.

102. Even if I was wrong about that, H's stated intention before DJ Hudd and in evidence before me is that he would like a lump sum to start another business. The balance of his evidence is not for a roof over his head (although I accept he has also mentioned this, it did not seem to me to be the driving issue for H). That is not the kind of alleviation of real need which I consider to be appropriate in this case. H's opportunity for risking capital generated during the marriage must now be considered to be at an end.

Other points

103. After the hearing H sent an email to my clerk after the email. I did not study its contents and asked my clerk to indicate that I would not be reading it as the evidence and time for submissions was over.

104. There are some chattels which remain in dispute. These should be agreed or subject to a further application. If no further application is made within six weeks from the date of the order then any claim in respect of chattels should be dismissed and the chattels will be the property of the party presently with possession.

105. I accept that the FMH, which has an agreed value of £2.1M, subject to mortgage and secured loans is beyond W's needs. The equity left in the property after W has dealt with debt is in the order of £600,000. That will purchase a comfortable but relatively modest accommodation in the South East London area. It seems to me, absent of any third-party

assistance, unlikely that she be able to refinance, but she wishes to have the opportunity to try.

106. There should be a clean break both ways. Each is going to have to make their own way here.

107. I would invite Mr Finch to settle an order in the terms which he sought, namely a transfer of the FMH to W upon her undertaking to use her best endeavours to secure the release of H from the mortgage and to indemnify the joint and/or secured loans, with a sale in default if not achieved within seven months.

108. This is my judgment.

Recorder R Taylor

23 February 2023

LUCKWELL v LIMATA
[2014] EWHC 502 (Fam)

Family Division

Holman J

28 February 2014

Financial remedies – Pre-marital agreement – Main matrimonial asset gifted to the wife by her father – Agreement not to sell house – Husband in need of financial provision

The husband applied for financial relief following divorce after a marriage of 8 years. He had signed a pre-nuptial agreement stating that in the event of a divorce he would have no claim at all against the wife's assets, and also two 'supplemental agreements' during the course of the marriage confirming that he would not make any claim against two properties given to the wife by her wealthy parents. The husband argued that he should not be held to the agreements because he was in need, and also that provision must be made for him as the father of the couple's three children. The wife's position was that the husband should be held to the agreement, and she was not offering any money at all. All the current assets of the parties, almost entirely in the wife's hands, derived from her parents, who were currently supporting the wife and children by payments of over £100,000 pa. The main asset, the matrimonial home with a net value of about £6.7m, had been given to the wife by her father, on the basis of an oral assurance that she would not sell, charge, or raise a mortgage upon the property without his consent. The father's strongly stated position was that if the wife were required by the court to sell or raise money on the matrimonial home, this would amount to a breach of her promise, which would result in him ending all payments for her benefit and the benefit of the children, including payment of the children's school fees. Apart from the matrimonial home, the wife's debts equalled her other assets; she had no significant income. The husband had no remaining assets, and net debts of about £226,000 (largely legal costs); he had no significant income. The husband had been in paid employment for most of the marriage, earning between £50,000 and £62,000 pa gross a year, but had been made redundant repeatedly, had mental health issues, including a history of self-harming, and had very few qualifications. He was currently working part time for the minimum wage; for many months he had been homeless, sleeping either in vacant rooms at his mother's small hotel or on friends' sofas, but he had recently used part of his litigation loan to rent a flat. Following a visit by the husband to the matrimonial home to see the children in the wife's absence, the wife obtained without notice non-molestation injunctions against him, with a return date 2 months later. The judge directed that the proceedings be held in open court, under r 27.10 of the Family Procedure Rules 2010 (the FPR 2010). As a result, journalists and members of the public were present throughout most of the 6½-day hearing.

Held – ordering the wife to sell the house to provide £900,000 for the husband to purchase a property for his occupation, to be sold when the youngest child was 22, whereupon 45% of the net proceeds to be returned to the wife and the remainder used to purchase a smaller property for the husband; the wife to pay him an additional £292,000 for furniture, a car and other liabilities –

(1) The agreements were a highly relevant circumstance, having been entered into freely by a mature man after expert legal advice, with no vitiating factors such as duress or non-disclosure. However, current and likely future need could outweigh the fact of an agreement in the overall circumstances of a particular case. The weakness, or even unfairness, of the agreements in the present case was that they provided nothing at all for the husband in any circumstances, no matter how long the marriage might

last, nor how great his need was upon relationship breakdown. They made no attempt, for instance by a formula or by some reference to house price indices, to pre-assess any provision for the husband's accommodation or needs in the event of relationship breakdown, perhaps after many years of dependence by him upon the wife for his accommodation (see paras [133], [138], [139]).

(2) The husband was now, on any view, in the context of this case, in a 'predicament of real need'. He had no home, no current income, no capital, considerable debts, and no further borrowing capacity. The wife, by contrast, had 'a sufficiency', if not more. The agreement made provisions that conflicted with what the court would otherwise consider to be the requirements of fairness. In the absence of the agreements it was inconceivable that any court would not have made a substantial award to the husband; further, if all the facts were the same but the genders reversed, it was inconceivable that the agreements would outweigh making a substantial award to the wife (see para [143] and see *Granatino v Radmacher (Formerly Granatino)* [2010] UKSC 42, [2010] 2 FLR 1900 at para [90]).

(3) It was important, when achievable, to ensure that each of the two parents had at least adequate homes in which their children could visit them and stay. In his role as a loving and committed father, the husband had a very pressing need for secure accommodation in which he could accommodate all three children together and which did not demean him too much relative to their mother, the wife (see paras [144], [145]).

(4) The court would proceed on the basis that if it made any award at all for the husband, that would necessarily require the wife to sell the matrimonial home, because she had no other assets and (without the co-operation of her father) no borrowing capacity, and also, on the balance of probabilities, that when this happened the father would immediately cease paying his daughter her allowance, and stop paying the school fees (see paras [98], [99]).

(5) The non-molestation order should have provided a return date in the following week. The district judge had left it to a court official to identify and insert a date convenient to the court after the judge had made the order; this procedure did not comply with the requirements of s 45(3) of the Family Law Act 1996, which required the court to fix a return date that was not only 'convenient' but 'just'. It was the responsibility both of the solicitors who made the application, and of the district judge who made the order, to ensure that a rapid return date was given on a without notice order of this kind (see para [73]).

(6) A family dispute resolution hearing (FDR) could be highly effective at promoting settlement and avoiding much costs and bitterness, but a case like this, which was obviously going to be heard at the level of the High Court, required much longer than one hour and required to be listed before a High Court judge (see para [7]).

(7) There was no presumption that financial remedy proceedings should be heard in private; r 27.10 of the FPR 2010 provided no more than a starting point, and the question whether a given case should or should not be heard in public was entirely in the discretion of the court. Only if the public were able to see and hear for themselves how proceedings unfolded in the court room, what the oral evidence and arguments actually were, and indeed how the judge comported himself, was there true transparency, open justice and public accountability (see paras [3], [5]).

Statutory provisions considered

Matrimonial Causes Act 1973, s 25(1)–(3)(d)
Family Law Act 1996, s 45(3)
Family Procedure Rules 2010 (SI 2010/2955), rr 27.10(1)(a), (b), 27.11

Cases referred to in judgment

Cartwright v Cartwright (1983) 4 FLR 463, FD

Granatino v Radmacher (Formerly Granatino) [2010] UKSC 42, [2011] 1 AC 534, [2010] 3 WLR 1367, [2010] 2 FLR 1900, [2011] 1 All ER 373, SC
M v B (Ancillary Proceedings: Lump Sum) [1998] 1 FLR 53, CA
Miller v Miller; McFarlane v McFarlane [2006] UKHL 24, [2006] 2 AC 618, [2006] 2 WLR 1283, [2006] 1 FLR 1186, [2006] 3 All ER 1, HL
Practice Guidance: Transparency in the family courts; Publication of Judgments [2014] 1 733

Charles Howard QC for the wife
Lewis Marks QC and *Marina Faggionato* for the husband

Cur adv vult

HOLMAN J:

The core issue
[1] This is a claim by a husband for financial provision upon divorce. Shortly before the marriage, the parties entered into a 'pre-marital agreement'. The husband agreed that he would not make any claim either during or after the marriage in relation to the wife's separate property or to gifts made or to be made to her by her 'wealthy family'. That agreement was effectively repeated and reinforced by two 'supplemental agreements' made during the course of the marriage on the occasions of the wife's parents or father making substantial further gifts to her. If the pre-marital agreement had not been made, the marriage would not have taken place. If the supplemental agreements had not been made, the parents/father would not have made the further gifts to the wife. There is no doubt that by making his present claim the husband is acting in breach of what he had earlier agreed to, upon which not only the wife but each of her parents had relied. The core issue in this case is how much weight should now be accorded to those agreements, and whether they should have the effect that the husband's claims should be dismissed. The law on this topic is not difficult to state. But it requires a discretionary decision by the court which is, in my view, and on the facts on this case, an exceptionally difficult one.

The public hearing
[2] Rule 27.10 of the Family Procedure Rules 2010 (the FPR 2010) provides as follows:

> '(1) Proceedings to which these rules apply will be held in private, except—
>
> (a) where these rules or any other enactment provide otherwise;
> (b) subject to any enactment, where the court directs otherwise …'

[3] Subparagraph (a) of that rule does not apply. In my view, the effect of r 27.10(1), read with subparagraph with (b), is as follows. It provides a starting point, or default position, that in the absence of the court directing otherwise, proceedings for a financial remedy after divorce will be held in private, with 'duly accredited representatives of news gathering and reporting

organisations' normally being permitted to be present pursuant to r 27.11, but not ordinary members of the public. In my view, r 27.10 does not contain any presumption that financial remedy proceedings should be heard in private – it is no more than a starting point – and the question whether a given case should or should not be is entirely in the discretion of the court.

[4] This case began in court at 2.00 pm. At 10.49 am that day my clerk had sent to all counsels' clerks an email message which said:

> 'Mr Justice Holman may order that all or part of the hearing in this case will be heard in public pursuant to FPR r 27.10(1)(b) and all counsel are accordingly requested to attend in robes.'

The effect of that message was to give to all counsel over 3 hours' notice that I may make such a direction. They clearly had ample opportunity to consider the position and take instructions from their respective clients and instructing solicitors, and to prepare any submissions to the effect that I should or should not give a direction under subpara (b). At the outset of the hearing itself, I indicated that it was my provisional position that I should give such a direction. I inquired whether either party opposed that course and invited the two leading counsel to make any submissions they wished. Neither of them stated that there was any resistance to a hearing in public or that they wished to make any submissions. Further, at no stage at the outset of, nor during the course of, the hearing has there been any application for a reporting restriction order, subject only to not naming the three children as I have directed. As a result, the entire hearing has indeed taken place in public (as is the handing down of this judgment). Some journalists have been present intermittently during the hearing and a very small number of people have sat at the back of the court room from time to time, whom I believe to have been members of the public. I am aware that the case has received publicity in the national press in print and on line.

[5] The reasons why I formed that provisional view, and later (without opposition) directed that I would sit in public were, briefly, as follows. The principle that courts normally sit in public underpins the rule of law in a free and democratic society. Historically, courts sitting at first instance to hear financial cases after divorce have almost always sat in private. But there has recently been a strong shift towards greater transparency. That is evidenced by, amongst other sources, r 27.11 of the FPR 2010 to which I have referred, and by the very recent Practice Guidance: *Transparency in the family courts; Publication of Judgments* [2014] 1 FLR 733, issued by the President of the Family Division on 16 January 2014 and coming into effect on 3 February 2014 (before the start of the hearing in this case). At para 2 of his Practice Guidance the President states:

> '… there is a need for greater transparency in order to improve public understanding of the court process and confidence in the court system ….'

Whilst greater publication of judgments will make for greater transparency, publication of the judgment alone suffers from the limitation, or even defect, that the public can only read what the judge chooses to say. It is only if the

public are able to see and hear for themselves how the proceedings unfold in the court room, what the oral evidence and arguments actually are, and indeed how the judge comports himself, that there is true transparency, open justice and public accountability. Jeremy Bentham famously said:

> 'Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself, while trying, under trial.'

Mere publication of a judgment does not achieve that. It is curious, to say the least, that precisely the same financial case may be conducted under full public gaze on appeal and yet in private at first instance. It is true that it is normally only at first instance that witnesses have to give oral evidence, but as witnesses have to give evidence publicly in most other situations, including often in intimate detail as to their sexual lives or their financial affairs, it is not obvious why they should be treated with greater protection in a financial remedy case. Those are general considerations. (Protection of commercially sensitive or other confidential information of third parties is another consideration which, however, does not arise in this case.) In the present case, there was the particular consideration that the core issue which I have already identified is one of considerable and legitimate current public interest. The Law Commission was, as I understood, about to publish its report on the topic of prenuptial agreements, and in order that the public can have an informed debate on a topic of considerable public interest they need to be able to see how, under the present law, courts resolve these cases on a case specific basis. [I here interpose that the Law Commission did in fact publish their report on 27 February 2014, the day before this judgment is handed down. I had already fully prepared this judgment by then. I have not seen the report, and its contents do not impact in any way whatsoever upon the judgment or my decisions, which are based upon the law as it currently is.] For those reasons, and taking into account the lack of any opposition by either party or their advocates, I directed the public hearing. I am glad that I did so, and there was not one moment during the hearing when I regretted having done so, despite what I am about to say in para [6] below. The outcome of this case is likely to be controversial with some polarised public reactions to it. Everything has been done openly. Nothing has been done secretly.

The course of the proceedings and the lost opportunities to settle

[6] The evidence and argument in this case lasted 6½ long days in the court room. Although there were some flashes of humour it has been an exceptionally bitter hearing which was very painful to behold. The two sides are now very entrenched indeed. Many hurtful things have been said. Caught in the cross fire are three adored, innocent but vulnerable children. Further, the financial remedy proceedings have already cost some £550,000 and rising, and other aspects of the overall litigation have cost a further £107,000 with more to come. It did not have to be like this. The husband now has no assets at all, and net debts, including all he owes in costs, of about £226,000. The wife is property rich. She owns unencumbered the house where she lives which is worth, net of costs of sale, about £6,740,000. But she now has no free assets, and her debts, inclusive of costs, will now also begin to exceed her only other

assets apart from her home. Neither spouse has any significant income. But the wife has, as described in the pre-marital agreement, 'wealthy' parents. Although certain figures were bandied about as to the wealth of the wife's father in particular, I have no idea at all of the scale of the wealth of either of them and it is none of my business. But between them her parents currently voluntarily fund allowances for the wife and children totalling about £80,000 pa and all the school fees. There is not the slightest suggestion that they, and in particular her father, cannot afford to do so. By an open letter dated 29 May 2013 the wife's solicitors made an open offer that included raising a mortgage of £850,000 upon her current home, to be guaranteed and funded by her father. With this she offered to purchase a home for the husband until the children had all left school or, if earlier, attained the age of 18. That proposal was rejected, apparently out of hand, when the husband, by his solicitors' open letter of 21 June 2013, asked for almost double that amount and for a significant part of it to be paid outright. Now the primary open position of the wife is not to offer a penny. There is not the slightest suggestion that her father could not easily have afforded the proposal that was made on 29 May 2013 or, indeed, more. I wish to stress with the utmost clarity that neither the wife's father nor her mother are under the slightest legal obligation whatsoever to pay a single penny to, or for, their daughter, nor their grandchildren, nor, still less, their son-in-law. It was, in my view, very unwise and misjudged that the husband's solicitors wrote on 21 June 2013, presumably on their client's instructions, that '… her parents will, inevitably, be prepared to assist her to meet her obligations to my client' and then asked for considerably more than her father had already, voluntarily and with some generosity, effectively offered to fund. (It was, of course, irrelevant to the husband whether the offered £850,000 was funded by a mortgage paid by the father or a cheque written by the father.) But the tragic fact is that there was scope for a negotiated settlement last summer, assisted by the generosity of the father, and that has now all been lost. At the outset of, and repeatedly during, the hearing I urged settlement and provided a number of breaks and adjournments for the purpose. I do not know what may have been discussed outside the court room. But alas there has been no settlement and the wife's primary open position remains that there is not a penny on the table.

[7] The Family Procedure Rules 2010 provide for a family dispute resolution hearing or FDR. During April 2013 the solicitors agreed that a one-hour hearing that had been fixed before a district judge on 1 May 2013 for another purpose should be rescheduled and utilised as that FDR. That seems to me to have been a tragic mistake. In my experience an FDR can be highly effective at promoting settlement and avoiding much costs and bitterness. But a case like this, which was obviously going to be heard at the level of the High Court, requires much longer than one hour and, with no disrespect to the district judge, requires to be listed before a High Court judge. No one can ever know, but I venture to speculate that if there had been an FDR, with a full clear day allowed, before one of the High Court judges experienced in financial cases, and with the wife's father present and made welcome, the framework for a settlement which was later suggested in the letter of 29 May 2013 could have been discussed and refined, the figures and terms adjusted, and a settlement could have resulted. This is a case which never needed to come to court and which was eminently capable of

settlement. I stress that apart from the two open letters I have no idea what the respective negotiating positions may have been or may indeed still be. But, objectively, this terrible conflict was as avoidable as it has been destructive.

The facts

[8] This account of the facts (many of which are not disputed) will incorporate also my findings on disputed issues. The wife is Miss Victoria Lee Luckwell. The husband is Mr Francesco Alessandro Limata (Frankie). The wife's parents are Mr Michael Luckwell (Mike) and Mrs Mary Luckwell. For convenience and clarity, and intending no disrespect to any of them, I will call them Victoria, Frankie, Mike and Mary, being the names by which they know each other and are generally known.

[9] The story begins with the wife's parents. Mike is now aged 71. Mary is now aged 67. They have two children. Their son, Adam Luckwell, is now aged nearly 40. He is not married and has no children although he is currently engaged. Victoria was born in July 1976 and is now aged 37. Sadly, the marriage between Mike and Mary had ended in divorce in 1997 when Victoria was about 20. Although they sat next to each other throughout the hearing, I understand that Mike and Mary normally rarely meet or communicate and that when they do have to communicate their relationship is more one of civility than of friendship. I understand that the wealth of Mary, who now has property developments, derived originally from Mike. It is clear that Mike, whom Victoria described as a self-made man, has been, and remains, a successful business man in the film, advertising or media and now other fields. As already stated, I have no idea as to the scale of his wealth, but there has been no attempt to disguise that he is a wealthy man.

[10] In 1997, when Victoria was 20, her parents purchased and gave her, her first home, at Greencroft Gardens, London NW6. In 2002 her mother purchased and gave her another home at Elm Row, London NW3. Greencroft Gardens was later sold and Mary received the net proceeds.

[11] Frankie was born in February 1969 and is now aged 45. He was long ago briefly married and divorced, with no children from that union. In 2004 Frankie was working in the post production and visual effects industry. Coincidentally, he was employed by a company, MPC, which had originally been established by Mike although, as I understand, Mike had sold it before Frankie began working for it. Frankie owned a flat in Eastlake House, London NW8. It had a mortgage and the equity was later stated in the pre-marital agreement to be about £50,000, before costs of sale, although in the event it later only yielded £30,000 net on sale. In summer 2004 Victoria and Frankie began to live together. Over the next few months they actually lived or stayed at Eastlake House, then in the basement flat of Mike's then home, then at a flat owned by Mary in Abercorn Place. Elm Row and Eastlake House were both rented out. In February 2005 Victoria and Frankie became engaged, and in March 2005 Victoria became pregnant. In April 2005 Victoria ceased work and she has never since been in paid employment. The wedding date was advanced due to the pregnancy and set for 23 July 2005.

[12] On 11 July 2005 both parties signed the 'Pre-Marital Agreement', which I will call the PMA (the parties having selected the adjective 'marital' in preference to 'nuptial'). Recital L to the PMA states as follows:

> 'Victoria and Francesco each specifically acknowledges and agrees that the marriage would not be taking place without this Agreement having been negotiated and signed by each of them.'

Each of Victoria and Frankie expressly agreed during their evidence that that was a true and accurate proposition. In relation to the PMA I am sure that:

(i) Victoria herself was insistent upon it;
(ii) Mike was also very determined that there should be one;
(iii) But for the agreement, the marriage would never have taken place, even although Victoria was already pregnant. They might of course have continued to live together;
(iv) When Frankie agreed its terms and signed it, he was a mature man (then aged 36). He was of normal intelligence (although he has few educational qualifications – just two 'O' levels). He was mentally stable. He knew exactly what he was signing and he meant what he was agreeing to. He was keen to demonstrate to Victoria and her family that he was marrying her for love and not for her money. At the time he had every intention of abiding by the agreement, although he did not imagine that they would ever actually separate or divorce. During the course of his oral evidence Mike said that even when Frankie signed the PMA (and the later supplemental agreements) he was 'lying' because he did not intend, even at the time, to be bound by them. That is unfair to Frankie. He did intend at the time to be bound by them. He has more recently broken his promises.
(v) Frankie had independent legal advice of the highest calibre. He saw and was advised by the late John Cornwell of the solicitors Dawson Cornwell. Frankie was very complimentary about John Cornwell during his oral evidence. I personally knew (professionally) John Cornwell (as I have also known the wife's solicitor, Ms Frances Hughes) for many years. Each of these parties was advised by family lawyers of the highest repute and great experience.
(vi) Full and accurate financial disclosure was made and summarised in the agreement itself.

The terms and content of the PMA

[13] The whole agreement is of course available and I can only summarise or highlight the more important terms. It recited at the outset (recital A) that Victoria was pregnant and their child was expected to be born, as she later was, in December 2005. The agreement accordingly expressly contemplated that there would be at least one child. The agreement clearly referred to, and identified, 'Victoria's separate property' and 'Francesco's separate property' and recorded, correctly, that each had acquired all his/her separate property independently of, and without contribution from, the other (recital C). Victoria's separate property included Elm Row, stated to be worth about £750,000 and mortgage free. Frankie's separate property was the equity in Eastlake House, stated to be £50,000 before costs of sale. He had 'no significant cash or other assets or debts'. It was stated that Victoria had

'substantial inheritance prospects from parents' and that Francesco has 'some inheritance prospects on the death of his parents'. Francesco had 'just joined the pension of MPC but only two months ago'.

[14] The PMA then recited, at recital D, the proposed purchase of Flat 7, 22 Westbourne Terrace, to which I will refer later. It recorded that Victoria (assisted by a gift from her father) would provide one half the costs of purchase. A mortgage in joint names would fund the other half. Francesco would fund the interest only on the mortgage. Upon sale, Victoria would receive one half ('equivalent to her contribution to the purchase costs') and the balance would be divided equally between them.

[15] Recital C expressly stated that 'Victoria comes from a wealthy family' and contemplated (in wide terms) that Victoria may later acquire other assets from her parents or family, to be referred to as 'Victoria's family gifts'.

[16] Recital F recorded that each wished to retain as their own separate property their 'separate property' as defined and identified, and that Victoria wished to retain as her own separate property 'Victoria's family gifts' – viz later gifts from her family.

[17] Recitals G–K recorded, in summary, that each 'expected and intended' the agreement to be binding on them throughout the world, and binding upon their heirs and personal representatives. Each had received separate and independent legal advice. Each were entering into the agreement 'freely and voluntarily, without coercion, influence or pressure of any kind from the other or from any third party *or from the circumstances* or otherwise' (my emphasis). Each fully understood the nature and effect of this agreement and 'the rights they are surrendering or limiting as a result of this agreement …'.

[18] Recital K continued: '… whilst acknowledging that in certain jurisdictions it may not be possible to oust the court's power to override the terms of this agreement they respectively acknowledge, intend and agree that in the event of a decree of separation, annulment or divorce … in any jurisdiction this agreement shall be treated by them as binding and of full force and effect'.

[19] Pausing there, recital K is the first of many provisions which make very clear and express reference to separation or divorce. Although Frankie did not believe that would occur, he can have been under no doubt or illusion that in the event of separation and divorce the agreement was still intended to govern. The agreement was patently targeted at least as much upon possible separation or divorce as upon regulating affairs during the subsistence of cohabitation and the marriage. Victoria knew from recital K that the agreement could be 'overridden' by the court in certain jurisdictions and will unquestionably have been advised that England and Wales is one of them.

[20] The operative part of the agreement contains several belts and braces and repeats, as matters of agreement, many parts of the recitals. The essence is in article 3:

> 'Victoria's separate property and Victoria's family gifts shall remain Victoria's. Francesco shall not either during or after the marriage make any claim in relation to Victoria's separate property or Victoria's family gifts and he hereby releases any and all rights or potential rights

> whether arising pursuant to the marriage or otherwise to Victoria's separate property or Victoria's family gifts, or any portion thereof.'

[21] The second limb of art 3 was to the reciprocal effect that Victoria would make no claim against Francesco's separate property. However it lacked mutuality for, as Mr Lewis Marks QC and Miss Marina Faggionato strongly emphasise on behalf of Frankie, it concluded with additional words in brackets '(save for claims relating to maintenance for Victoria and/or the child(ren) of the family)'. This difference appeared again in art 8 which provides that:

> '8 In the event of the dissolution … of the marriage (or [permanent] separation …) Francesco will make reasonable maintenance provision for Victoria and the child(ren) … in the context of all the circumstances prevailing at the time … and on the specific understanding that Victoria will fully utilise her capital to house and support herself and the child(ren) and, in particular, will purchase housing appropriate to the marriage and the prevailing circumstances.'

[22] Mr Marks submits that that one-way article shows how unfair and one-sided the agreement was. It makes no provision for Victoria to maintain Frankie, but does require that Frankie '*will* make' reasonable maintenance provision for Victoria, albeit subject to the other qualifications in the article. It does, however, contain protection for Frankie, too, in that it makes clear that Victoria will 'fully utilise' her capital not only to house but also to 'support herself and the child(ren)'.

[23] Article 10 provided that:

> 'The terms of this agreement shall be reviewed with the benefit of legal advice after 5 years have elapsed from the date of this agreement and every 3 years thereafter.'

Mr Charles Howard QC, on behalf of the wife, makes some play of the fact that Frankie has never apparently sought a formal 'review' pursuant to that article. This carries no weight with me. First, there is no indication in the agreement as to how a 'review' would be conducted or by what principles it would be guided. Secondly, by July 2010 (when 5 years had elapsed) there had been many stresses in the marriage and it is fanciful to suppose that around that time Victoria would have countenanced any relaxing of the terms. Thirdly, the fact of the first and second supplemental agreements in 2006 and 2008, to which I refer below, effectively superseded some separate 'review', at any rate for 5 years from the date of the second supplemental agreement. The claims which Frankie now makes effectively subsume any 'review' by the parties now.

[24] The PMA concluded with two 'Certificates of Independent Legal Advice received by' the respective parties. John Cornwell signed and certified that he had experience of, and expertise in, advising clients in relation to pre-marital contracts and that he had advised Francesco with regard to the agreement, on the terms included in the agreement, their meaning and effect. He continued:

> 'Francesco expressed himself to me as understanding, and appeared to me as fully understanding, the said Agreement and the nature and effect of the said Agreement on and in the light of present and future circumstances, and as understanding my advice to him. He stated to me, and it appeared to me, that he entered into the said Agreement willingly and without any pressure, duress, stress, undue influence or deception on the part of any other person, including Victoria or otherwise.
>
> I believe that upon entering into this Agreement Francesco was fully advised and informed with regard to all the foregoing matters and may fairly be said to have acted independently herein.'

The marriage, Westbourne Terrace, the First Supplemental Agreement and Avonmore Road

[25] The PMA having been signed, the marriage duly took place on 23 July 2005. At that time Frankie was working for MPC and earning just under £50,000 gross pa. The day before the marriage the purchase of the flat at Westbourne Terrace was completed. Victoria, assisted by her father, provided all the down payment. During August 2005 Mike made a further payment to Frankie of £18,624. The circumstances in which that payment was requested (or Mike would say, demanded) and precisely what it was intended for, and how it was spent, are much disputed, although the email from Mike to Frankie dated 22 August 2005, now at bundle B/F3, seems to give a very clear contemporary account of how it was calculated. (It was a balancing figure so that the amounts paid by Victoria or her family and the final amount of the mortgage (£190,000) upon which Frankie was to pay the interest were equal.) I do not intend to go further into this issue. Over 8 years later it is, frankly, a footnote to the case, and the sum in question is now insignificant in the context of this case. In any event, the agreed revised asset schedule dated '18.02.14' clearly credits that sum back to Victoria out of the net proceeds of sale of Westbourne Terrace which is currently on the market. Whether she accounts for it to her father is between the two of them.

[26] They moved to live in Westbourne Terrace as their first matrimonial home. Their first child and only daughter was born in December 2005. She is now aged 8.

[27] Victoria and Frankie soon felt that the flat in Westbourne Terrace was too small, and at too high a level (the fourth floor) for a family with a small child. By June 2006 Mike and Mary generously agreed to provide more money for the purchase of a house at Avonmore Road, London W14. The entire purchase cost of about £1m (with associated legal costs) was paid as to £750,000 by Mike and £250,000 by Mary. I am sure that Mike, if not Mary, would not have agreed to fund the purchase unless the parties had already agreed to sign the first of two 'supplemental agreements' (the FSA). This actually bears the date 18 June 2006 (shortly after completion of the purchase) but was patently drafted earlier.

The First Supplemental Agreement

[28] Again this was based upon, and recorded, full and frank financial disclosure, and was signed after independent legal advice. In the case of Frankie the Certificate of Independent Legal Advice (in identical terms to that attached to the PMA) was signed, and the advice given, by Rhiannon Lewis, a

partner of John Cornwell. Recital B refers to the PMA and continues '… this agreement is intended to be read in conjunction with and be supplemental to that agreement'. Clause 1 makes reference to the expressions 'Victoria's separate property' and 'Victoria's family gifts' which had been defined in the PMA. That is why, in para [1] above, I have described the FSA as effectively repeating and reinforcing the PMA. Recital D refers to the intended purchase of Avonmore Road and that 'the entire purchase price and related costs have been met by Victoria using moneys gifted to her by her parents'. There are similar recitals with regard to legal advice, capacity and understanding as in the PMA, and a repetition at recital J of recital K to the PMA. Clause 1 of the agreement states that:

> 'Avonmore Road shall be treated as Victoria's separate property and shall be treated in the same way as Victoria's separate property and Victoria's family gifts as provided for by clauses 3–5 of the pre-marital agreement.'

[29] The parties only actually moved into Avonmore Road during 2007. Also in 2007 Frankie sold his flat at Eastlake House, realising in the event £30,000 net (since spent). Victoria sold the flat at Elm Row, realising £1,117,000 net which, at that stage, she retained. The flat at Westbourne Terrace was let, and from then on the mortgage has been funded out of the rental, so the period during which Frankie actually paid the interest on the mortgage out of his own earnings was not more than 2 years.
[30] In July 2007 Frankie changed jobs and began working for a firm (in the same industry) called Glassworks at an increased salary of £65,000 gross pa.

Connaught Square and the Second Supplemental Agreement
[31] In December 2007 the parties moved from living in Avonmore Road to living in Mike's own house at that time at 26 Connaught Square, London W2. This is a fine, large, period house in a prestigious square, the value of which has escalated in the last few years. Soon afterwards Mike offered to Victoria (not to Frankie) that he would give the house to Victoria. But unquestionably this was a gift on terms and conditions. I am quite clear that by now Mike had low regard for Frankie and did not trust him an inch. He clearly regarded him as lazy and workshy. Even before the marriage, he had been told (whether or not accurately) that Frankie had had a number of girlfriends who were rich or were the daughters of very rich parents. He had always regarded Frankie as a gold-digger who had married for money and from whom Victoria's money and the assets he now proposed to give Victoria had to be utterly protected. During the course of his evidence Mike referred contemptuously to Frankie as 'that man' and as 'the predator'.
[32] Mike wished to give Victoria Connaught Square as what he calls her 'patrimony' by which he means, as I understand it, her and her children's inheritance given up-front during his lifetime rather than after his death. He was determined that although Frankie could of course live in it, he was not to be able to get his hands on it.
[33] There were two conditions. First, there must be a 'second supplemental agreement' (SSA) making specific reference to Connaught

Square. Secondly, Victoria had to promise Mike, which she did, that she would never sell, mortgage or charge Connaught Square without his prior consent (the promise).

[34] In addition to these conditions there was a concurrent process of what was described both then and during the hearing as 'levelling up' with Adam – ie ensuring that, roughly calculated, Adam and Victoria had each benefited evenly from their father.

[35] As part of 'levelling up' it was calculated that Victoria would still be in surplus compared with Adam by about £2m. This was later paid by Victoria to her father by a cash payment of £600,000 in October 2008 from her retained proceeds of Elm Row, and by payment to him of the whole of the net proceeds of sale of Avonmore Road, namely about £1,440,000, when it was finally sold in December 2009 (the £2m).

The Second Supplemental Agreement

[36] This was dated 28 February 2008. I am sure that Mike was not willing to authorise the actual transfer of Connaught Square to Victoria until he knew that the SSA had been signed, and he would never have transferred Connaught Square to her if it had not been signed.

[37] The SSA is in many respects a 'carbon copy' of the FSA. It was 'intended to be read in conjunction with and to be supplemental to' both the PMA and the FSA. There was again full and frank disclosure. Both parties again received independent legal advice, in Frankie's case again from John Cornwell, who signed a further certificate in the same terms as previously. Recital E referred to the proposed gift by Mike to Victoria of Connaught Square and continued:

> 'The gift is intended to be effected as soon as practicable after Victoria and Francesco execute this agreement … By this agreement Victoria and Francesco wish to enter into an agreement recording their wishes and intentions regarding Connaught Square.'

Clause 1 provided that:

> 'Connaught Square shall be treated as Victoria's separate property and shall be treated in the same way as Victoria's separate property and Victoria's family gifts as provided for by clauses 3–5 of the pre-marital agreement.'

[38] The appendix containing the 'Summary of Victoria's assets and income' is significant. It referred, amongst other assets, to the net proceeds of sale of Elm Row and to her intention to sell Avonmore Road as soon as possible. It continued, in words that have been pored over during the hearing:

> 'Victoria intends to make a gift of approximately £600,000 to her brother Adam and *may* [my emphasis] make a further gift of £2 million to her father. These gifts will be funded by the cash at bank currently held by Victoria and from the sale proceeds of Avonmore Road.'

[39] Under a heading 'Income' the summary recorded that at that time Victoria was receiving '£12,000 pa by way of an allowance paid by her father. £25,000 pa by way of an allowance paid by her mother'. It continued:

> 'Once Connaught Square has been transferred to Victoria her father intends to give her a further allowance of £24,000 pa to cover the costs of Connaught Square. Victoria's father will also be responsible for the school fees for Victoria and Frankie's children.'

The promise

[40] At para 14 of his statement dated 17 December 2013, Mike said that a second condition of the transfer was that Victoria would promise him not to sell, mortgage or otherwise charge Connaught Square without his agreement. He said it was not recorded in writing but she made the promise and he trusted her. The reason why he required the promise is clear. He wrote, and his oral evidence was to the same effect:

> 'I knew that the Pre-Marital agreement and the Supplemental Agreements were not absolutely binding but I trusted that Victoria would stick to her promise not to sell or charge the property without my agreement.'

Mike was afraid that, even without divorce or separation, Frankie might pressurise Victoria into raising a mortgage on Connaught Square, or even into selling it, so as to generate cash which he, or they, might fritter, thereby debasing the patrimony. He considered that a promise given by Victoria to him would ring fence (my phrase, not his) Connaught Square and strengthen and protect her from any pressures from Frankie.

[41] At para 30 of her statement dated 14 January 2014, Victoria similarly described the promise.

[42] At the outset of the hearing Frankie and his lawyers were equivocal about the existence of this promise. During his oral evidence, however, Frankie himself admitted that Victoria had told him about the promise. Further, it is quite clear from the informal notes that the father's property solicitor, Mr Simon Mapstone of Goodman Derrick, made on a file, and from the oral evidence of Mr Mapstone, that conditions to this effect were under very active consideration before the transfer. His notes record a telephone conversation between himself, Nik Gollings (Mike's accountant) and Mike Luckwell on 25 March 2008. Mike [had] agreed with Victoria no sale, no mortgage, no collateral. However, as the notes evidence, there would be no charge or restriction recorded on the Land Register because this would amount to a 'gift with reservation' and make the whole of Connaught Square vulnerable to inheritance tax on the death of Mr Luckwell. As a result it was decided that Mike would require and rely upon an oral promise alone from Victoria. Mr Mapstone said in his oral evidence that a week or so *before* the actual transfer Victoria told him 'I assume you know my father has made me promise not to mortgage it, or sell it or use it as collateral for any form of debt'.

[43] I am in no doubt that that promise was given. Mr Marks submits that a gift is a gift and that such a promise is not legally binding. Further, that if it

was legally binding it would have just the same effect upon inheritance tax as if it had been a written promise or entered as a charge upon the Land Register. However the legal status of the promise is irrelevant, as is the correct application of tax law to these events. The promise most certainly does not in any way bind this court or fetter my powers. The relevance of the promise is that it is part of the context of Mike's threat to stop all allowances and school fees to which I refer later.

Levelling up

[44] Understandly, Mike wished to treat his two children broadly equally and insisted on levelling up. Victoria knew that she had to level up. She did not know (and I understand still does not know) the extent of provision that her father had made to Adam, nor the value of any assets he had given to Adam. Mike did his own calculations as to levelling up and made his own decision as to the value of the assets he had transferred, which ranged from cash, forgiveness of a loan to Adam, shares to Adam and the property purchases or transfer made for or to Victoria. It is clear that in financial matters such as this Victoria just did as she was told, and that she accepted, with little or no question, figures proffered by her father. There was much cross-examination of both Victoria and Mike about levelling up and the figures, and, most particularly, whether the £2m had anything to do with levelling up at all. Victoria was very unclear whether the £2m was anything to do with levelling up. She thought she had just decided to give it to her father. Mike was adamant that it was calculated as part of levelling up.

[45] The family's accountant is Mr Nicolas Gollings FCA of Gollings and Co. He was away on holiday during the first week of the hearing. On his return he made a statement dated 17 February 2014 and gave oral evidence the next day. As a result of that statement and evidence, and the attached contemporary email dated 21 January 2008 and the spreadsheet that was attached to the email, I am quite satisfied that the figure of £2m did indeed emerge as part of the calculation of levelling up. The email (to Mike) said:

> '… we factored in Avonmore being worth circa £1.5 net of sale costs. These funds would be paid over to you along with the Elm Row proceeds and after off setting your other gifts would equate to you giving approx £1 million to both AL and VL.'

The spreadsheet clearly shows those sums being payable by Victoria to Mike to create levelling up between herself and Adam and each having then received about £1m net from him. It is important to note that that email and the spreadsheet date from 21 January 2008.

[46] As part of levelling up Mike then calculated that Victoria should pay £600,000 to Adam, as recorded in the summary of her assets and income in the SSA. Mike later did a recalculation of share values and decided that Victoria needed to pay Adam only £500,000 which she duly did by instalments in March and July 2008. Nothing turns in this case on the reduction from £600,000 to £500,000 payable to Adam.

The £2 million

[47] Of course in relation to the £2m, levelling up could have been achieved by Victoria paying a further £1m to Adam rather than £2m to her father. If, therefore, it was merely levelling up, why was £2m paid to her father rather than £1m to Adam? Both Victoria and Mike were pressed very strongly about this. Mr Marks stressed that in the summary of Victoria's assets in the appendix to the SSA the words are that Victoria *intends to make* a gift of approximately £600,000 to Adam, but only that she *may* make a further gift of £2m to her father. Victoria's own evidence under cross-examination (in the absence of her father, whom I directed temporarily to leave the court) was that the payment of the £2m 'was completely voluntary'. 'I decided to make the gifts because why would I not?' 'It was not a condition. It was a discussion'. Mr Marks submits that in a context in which Mike was attentive to minimising inheritance tax (see Mr Mapstone's notes and the decision for inheritance tax reasons not to enter a charge or restriction on the Land Register) it is odd that Mike himself decided to receive back £2m from Victoria which, unless he later spent it, merely added £2m back to his wealth and estate.

[48] In their written closing submissions at point 16.2 Mr Marks and Miss Faggionato say: '(1) £2 million is held for the wife, (2) [it is] a resource of hers'. They say, correctly, that when a child pays money to a parent there is no presumption of advancement, and so they submit that the presumption is that Mike holds £2m on a resulting trust for Victoria. When I commented that to establish that factual and legal outcome might require litigation between Victoria and her father, Mr Marks hastily said that they and Frankie 'are not targeting the £2 million'.

[49] In my view the £2m simply is not a resource of Victoria's at all. She paid it to her father and cannot now recover it from him. I am quite clear that it was not a mere gift by Victoria and, notwithstanding the use of the word 'may' in the asset summary, was a payment which Mike wished her to make, although he did not go so far as to require her to make it. As he put it, they talked about it and she agreed without demur. His reasons were threefold. First, he wished there to be levelling up, but he did not wish to be generous to the point of providing a further £1m (still less, £2m) to Adam. He said in oral evidence that if Victoria had not given him that money he might have felt obliged to give a further £2m to Adam and he did not think that was appropriate. He thought that net gifts to each of them of about £1m were enough. Secondly, he did not wish either of his children to have a substantial fund of cash. Thirdly, in the case of Victoria he was undoubtedly keen to avoid money being available 'for the predator' (this being the context in which he used that description).

[50] As well as referring to the £2m, the summary of Victoria's assets and income in the SSA refers to the intention of Mike to increase her allowance from £12,000 to £36,000 pa and to be responsible for the school fees. Mike himself said during cross-examination about the £2m that:

> 'I was willing to give her the allowance so it was a monthly allowance which could not be got at by Frankie. I thought a monthly allowance was better to avoid more money [being available] for the predator.'

Mr Marks and Miss Faggionato accordingly submit that, having received the £2m, Mike is at least morally, if not legally enforceably, now obliged to continue to pay the allowance and the school fees, a point to which I return in paras [90]–[100] below.

2008

[51] In spring 2008 Mike moved out from Connaught Square and the parties began to occupy the whole house. The formal transfer was registered at the Land Registry on 2 April 2008.

[52] In March 2008 the parties' second child, a son, was born. He is now aged almost 6.

[53] In May 2008 Frankie was unfortunately made redundant by Glassworks. He was quickly offered a job at a slightly higher rate of pay by the then CEO of a company called UNIT in which Mike was the majority shareholder but in the running of which he was not then actively involved. Mike said in evidence, and I accept, that he told the then CEO that he would prefer it that Frankie did not get a job with UNIT. He requested the CEO not to employ him. Mike said he was in the USA (where he has a home) when he discovered that Frankie was working for UNIT and he was displeased. Apart from his low regard for Frankie, whom he considers to be lazy, his main reason was that he knew that it was his intention to make Adam the CEO, as he later did, and he did not think it a good idea to have his son-in-law as an employee of his son. He thought it was an unhealthy scenario.

[54] Mike's instinct was clearly right and it now seems clear that if Frankie had not worked for UNIT a great deal of anguish might have been avoided.

[55] At Christmas 2008 there was what was intended to be a happy family holiday in Barbados, in a villa, with Mike, Mary, Victoria, Frankie, Adam and the now two children. It was not a success. Both Adam and, later, Mike, left before the end of it and before they had planned to leave. The only relevance, if any, of the holiday to this case is that it clearly triggered huge upset in this family. It clearly emerged during the holiday that Mike planned to appoint Adam as CEO of UNIT and that if Adam did become the CEO he would, or might, fire Frankie. Quite who said what to whom about this is, frankly, irrelevant. Victoria supported her husband. In the aftermath of the holiday:

(i) in February 2009 Victoria became for a period seriously psychiatrically unwell;
(ii) in March 2009 Frankie was indeed fired or sacked by Adam;
(iii) very sadly indeed, Victoria has never since seen or communicated with Adam for, now, over 5 years, with the exception of 3 hours that he spent with her at Christmas 2009; and
(iv) Mary told me that since the holiday she and Mike barely communicate at all.

2009–2011

[56] In mid-February 2009 Victoria was admitted as an in-patient to a private psychiatric hospital. She remained there for about 3 months until May 2009. The immediately precipitating events and medical diagnosis and

treatment are irrelevant to this case. It must patently have been a stressful time for her, for Frankie, and, no doubt, for her parents (her father was apparently prevented from visiting her).

[57] It was in that context that Frankie sent an email to Mike on 2 March 2009, now at bundle B/G1, which Mike produced during the hearing. It was clearly a request to open a dialogue between Mike and Frankie, Frankie saying: '… I have lost sight of whether you are friend or foe'. It was clearly an implicit request for more financial support, for he continued: 'These points are hard for me to express in Victoria's absence without raising suspicions that I am just avaricious'. He continued, in a sentence upon which Mike wishes to place weight: 'I would be more than happy to sign legal documents forbidding me to personally financially benefit from any generosity passed on to Victoria [and the names of the two children]'. It is clear from Mike's later letter dated 4 March (see below) that it was on the next day (3 March) that Frankie told Mike that what would make Victoria feel a lot better was if Mike would give her a substantial cash sum. According to Mike, the figure mentioned was £8m, later increased to £10m.

[58] During his cross-examination of Mike, Mr Marks produced, without any prior disclosure, an intensely personal letter dated 4 March 2009 which was actually sent by Mike by email to Frankie and others on 6 March 2009. It was not sent to Mary in 2009 and had never been seen by her. It must have been deeply distressing for Mary when this letter was suddenly produced in a public court room in 2014, and she learned of its existence and read its content for the first time. The letter is long and ranges over many family issues, going back into the childhood of Mary and the marriage and divorce of Mike and Mary. The main focus of the letter is, indeed, to counter a range of things which Mike understood that Mary had been saying about Mike. It harks back to the Barbados holiday and does refer at some length to Frankie's position at UNIT. It does include the following passages upon which, amongst others, Mr Marks placed reliance:

> 'I did not say, as I gather Mary relayed, that Frankie was a "profligate fortune hunter" and have never said that nor, more importantly, believed that. I believe he loves Victoria and that the feeling is mutual …'

[59] Mike conceded in his oral evidence that he thought that probably Frankie did love Victoria and she loved him. However it is quite clear that the emollient words '… I … have never … believed that …' were not Mike's true state of mind. He had believed for many years that Frankie was both profligate and a fortune hunter.

[60] The letter continues:

> 'I have always treated Victoria and Adam absolutely equally. Victoria and Adam stand to inherit the vast bulk of anything that may be left when I die – absolutely equally. This has not changed …'

[61] Mike said that since that letter in 2009 he has made a further will, the contents of which (which have not been disclosed) are different from that current in 2009.

[62] Further on, the letter makes reference to the conversation in which Frankie had asked for a substantial sum of money to be paid to Victoria:

> 'Frankie mentioned to me, during our 90 minute call yesterday, [on 3 March] that one solution might be for me to just write a very large cheque to Victoria, big enough that Victoria and her family could, for the rest their lives, feel totally secure and be able to have a good life … although he said that he was not necessarily pushing for that. I explained that I did not feel comfortable with his proposal. It does not seem sensible to put a virtually unlimited sum into an account to be administered by two people, one of whom is unwell and the other with no basic maths – nor do I have the money to do that.'

[63] As Mike pointed out, if he had given £8–10m to Victoria, as Frankie suggested, levelling up would have required him also to give £8–10m to Adam.

[64] Other than evidencing the terrible stresses within this family, I gain little from either of these emails.

[65] Not long afterwards, still in March 2009 and while Victoria was still an in-patient, Adam did sack or fire Frankie from UNIT. In August 2009, after about 4 months of being unemployed, Frankie began a job, at a slightly lower salary, at Rushes Post Production. In December 2009 Victoria completed the sale of Avonmore Road and paid the balance of the £2m to her father. At the same time he increased her allowance to the current rate of £51,000 pa (plus school fees) and in January 2010 Mary increased her allowance to the current rate of £30,000 pa.

[66] The year 2010 was relatively uneventful. In 2011 Frankie changed employment from Rushes Post Production to Prime Focus, at a salary of £62,000 gross pa.

[67] In September 2011 Frankie saw a consultant psychiatrist, Dr Michael Craig, whose report dated 3 September 2011 is now at bundle B/B10. That reveals that Frankie himself had been receiving psychiatric help and medication since the time Victoria was an in-patient in 2009. It is not necessary to quote extensively from the intimate report. In its conclusion Dr Craig wrote:

> 'After a period of having little direction, he gravitated towards the film business where he has been working since the age of 22 years old. Unfortunately, however, this has involved him, in more recent years, becoming enmeshed with businesses that are connected (directly or indirectly) with his father-in-law. My overall understanding of this situation is that this has not being particularly helpful for Frankie and has continued to undermine his self-confidence.
>
> My overall impression of Frankie was that he probably suffers from deep-rooted personality difficulties, which have made it difficult for him to form meaningful relationships. This has been associated with recurrent symptoms of anxiety and depression. It is also probable that these symptoms have had a significant negative effect of his ability to focus and concentrate throughout much of his education and

> occupational life. On balance, I am of the opinion that a diagnosis at Attention Deficit Hyperactivity Disorder (ADHD) is improbable.'

2012–2013, the separation and divorce

[68] The third child, and second son, was born in January 2012. He is now aged 2. He was born with certain serious medical problems and the period following his birth must have been one of great anxiety and stress for the whole family.

[69] In April 2012 Frankie was made redundant by Prime Focus and became unemployed for the rest of the marriage.

[70] On 18 November 2012 there was a sad and unfortunate episode when Victoria and Frankie were together in a pub. In an irrational gesture of self-harm Frankie deliberately broke a glass against his head, which required considerable stitches. It was then agreed that he would temporarily leave Connaught Square. The marriage was by now clearly at a nadir and, in the event, he never returned to live at Connaught Square. He did, however, continue to visit frequently to see the children, including bathing them and putting them to bed.

[71] During February 2013 there was heightened tension between Victoria and Frankie as Victoria believed that Frankie had deliberately removed and secreted her keys to the house. Although there is considerable warmth in some of the texts between Victoria and Frankie during February 2013, it is, to my mind, quite clear that around 27 and 28 February 2013 Victoria was concerned about the keys and was making plain that she would prefer that Frankie kept away from the house for a short period. On 28 February 2013 at 3.24 pm she texted:

> 'Please do not come over today. I can't deal with any more. If you would like to see the children, Grandma Mary is very happy to make arrangements [to take them] wherever suits [you].'

He replied at 5.43 pm that he intended to come round 'unless you say otherwise'. She did say otherwise, for she replied at once: 'why don't you see them tomorrow. Tensions are running high today …'. As Frankie knew, Victoria herself was then on her way to the airport to fly, briefly, to Monaco. Despite that clearly expressed wish by Victoria that he did not go to the house that night, Frankie did do so. When he arrived, the front door was open because a locksmith was changing the locks. He walked straight in, and altercations then ensued involving Mary, who was present, Mike, who was summoned, and eventually the police, which Frankie found deeply humiliating and 'a horrible experience like having a gun poked at me in my own house'. The following day, Friday, 1 March 2013, Victoria's solicitors applied without notice to a district judge and obtained non-molestation injunctions and an order prohibiting him from going to the house, or into Connaught Square, save for contact expressly agreed in writing.

[72] Mr Marks has been highly critical of Victoria and her solicitors for seeking and obtaining that injunction, and of the district judge for making it.

[73] I have read the statement of Victoria (prepared on her instructions while she herself was in Monaco) which was placed before the district judge. On the basis of that evidence I do not consider that the district judge could

fairly be criticised for making *some* injunction of *very short* duration on the without notice application. But the non-molestation order, particularly in relation to the children, was very hurtful and was unnecessary if he was not to go at all to the house or even into Connaught Square for a limited period. The order was made on a Friday. It should have provided a return date in the following week. It was wrong that the return date given on a without notice injunction, which included a prohibition on visiting what was still his home, and where he regularly saw his children, was 2 months later, namely 1 May 2013. I understand that this came about because the district judge left it to a court official to identify and insert a date convenient to the court after the judge had made the order. That should not have happened and should not happen again. It did not, in my view, comply with the requirements of s 45(3) of the Family Law Act 1996. Section 45(3) requires the court to fix a return date which is not only 'convenient' but 'just'. It was the responsibility both of the solicitors who made the application, and of the district judge who made the order, to ensure that on a without notice order of this kind a rapid return date was given.

[74] If Frankie had already instructed solicitors by then, it would have been very wrong to apply for an injunction at all without notice to them. But he did not at that stage have any solicitors. It was a Friday. His precise whereabouts during that day may not have been known to Victoria's solicitors, and I do not go so far as Mr Marks in criticising Victoria's solicitors for making the application without notice. It did, however, put them, as well as the court, under a high duty to ensure that a rapid return date was set.

[75] This case got off to a very bad start and it is my clear impression that Frankie has felt that he was on the back foot from the outset.

[76] Victoria presented a petition for divorce later in March. There has been a decree nisi but no decree absolute.

The parties' circumstances since February 2013

[77] Victoria continues to live at Connaught Square, with the help of a live-in nanny during the week and a different one at weekends. She continues to receive £81,000 pa from her parents. She has made six foreign trips in the last year or so, to Austria (skiing), Monaco (twice), Dubai, Cyprus and Majorca. Some have been client trips in connection with Mary's business or that of Victoria's boyfriend.

[78] By contrast, the circumstances of Frankie have been bleak. For about a year he moved from room to room in his own mother's bed and breakfast hotel, depending on which room (if any) was vacant. When the hotel was full he slept on the sofa or a spare bed at various other addresses. He said he was living like a tramp, with his possessions in bin bags. He often had to eat out at an expense which he could ill afford. He described himself as living in an ad hoc way with feelings of displacement, sadness, confusion, and loss of identity as a small provider [for his wife and children].

[79] In November 2013 Frankie obtained a facility as part of his litigation loan which enabled him to pay 6 months' rent on a flat in Leinster Square, London W2. This is very close to Connaught Square and the children's schools. The rent is about £11,000 for 6 months. He did not have this. He has merely borrowed it, adding to his debts. He described the flat as a godsend. It has two bedrooms and, as I understand, two of the three children can stay with

him at any given time. Like Connaught Square, Leinster Square has a garden in which he and the children can play. At the moment he has no means of paying the rent or staying there after the 6 months end in May.

[80] Frankie is currently working part time in his mother's hotel and is paid £6.50 per hour, at or about the minimum wage. He is undertaking a degree in art with the Open University which he hopes to complete by spring 2017.

The parties' current income and assets

[81] Victoria's sole, but generous, source of income is the allowances from her parents. She has not worked in paid employment since the marriage and it is not suggested that she should do so. She does, however, perform work and valuable services for her mother in connection with her mother's property developments. She receives no direct remuneration for this although, as indicated above, it has led to her having several foreign trips or holidays and of course her mother does pay her the regular allowance.

[82] Frankie has no income apart from the £6.50 per hour from his mother for such hours as she is able to employ him.

[83] Counsel agreed a 'Revised asset schedule' dated '18.02.14' which includes some minute detail (including a bank account of Frankie containing 20 pence and one of Victoria containing £89). I propose to describe and treat the assets much more simply, ignoring the trivial and the detail.

[84] On Victoria's side, she has the equity in Connaught Square, agreed at £6,740,000. I ignore her jewellery and watches. These are said to be worth £40,000 and £10,000 respectively, and in the context of this case are for her adornment, not capital. In any event no value has been attributed to the contents generally of Connaught Square.

[85] If Westbourne Terrace sells for £850,000 (it is on the market for £895,000 but has not sold) Victoria's calculated share of the proceeds is, rounded, £400,000. She now has debts or liabilities, principally for costs, and including her estimated liability for capital gains tax on Westbourne Terrace, also of £400,000. Her debts are attracting interest and the capital gains tax will increase if, as seems increasingly likely, the sale of Westbourne Terrace is after April 2014.

[86] On Frankie's side, I ignore the £20,500 which he has in pension funds. This is not available to him now and is, in the context of this case, both a negligible sum and a pitiful level of pension funding for a man of 45.

[87] His calculated share of the net proceeds of sale of Westbourne Terrace is, rounded, £228,000. His debts and liabilities, including his estimated liability for capital gains tax on Westbourne Terrace, are now, rounded, £454,000. In his case, too, these are attracting interest and the capital gains tax will increase if the sale is after April. His current net indebtedness is, accordingly, £454,000–£228,000, or £226,000 and rising.

[88] Amongst the listed debts of both Victoria and Frankie are loans from their respective mothers. It would not be fair to treat one as 'hard' and the other as 'soft' and, as the agreed schedule depicts, both loans are treated in the above figures as being due and repayable.

[89] Neither party currently owns a car, although Victoria has the use of a Range Rover which belongs to her boyfriend but is registered in her name so she can (legitimately) obtain a parking permit for use in Connaught Square.

The threats to cease paying the allowances

[90] At para 21 of his written statement dated 17 December 2013, now at bundle A/E 226, Mike wrote:

> '21 I became frustrated when I was continuing to pay the allowance to Victoria while Francesco was unemployed and did not obtain a new job. I understand that after I transferred Connaught Square to Victoria she and Francesco had several arguments about the promises Victoria had made to me. Francesco had asked Victoria on numerous occasions to sell the property in order to release capital so that they could enjoy a higher standard of living when he was unemployed. Victoria insisted that she could not sell the property because she was under a moral obligation to me not to sell or mortgage the property and that if she did, I would stop paying the children's school fees and her allowance. She knew that I meant it which is why she did not agree to sell, or even charge, the property. It remains in her sole name and unencumbered.'

[91] At paras 23 and 24 Mike wrote:

> '23 I was alarmed to discover that Francesco is seeking a share of Victoria's assets. He always knew that in the event of a divorce, Victoria would seek to rely upon the Pre-Marital and Supplemental Agreements and yet he did not take any steps to save money, or secure new employment after he lost his job in April 2012 and he continued to have children with Victoria. I would never have transferred Connaught Square to her if I had known that there was any risk that the property would not be retained by Victoria for her and the children. I have made clear to Victoria, that if Connaught Square is sold or mortgaged in order to raise capital for Francesco as part of the divorce, I will stop paying the allowances to Victoria and I will stop paying the children's school fees. If Victoria is able to retain the property unencumbered, as was always intended by me and Victoria, I will continue to pay the children's school fees and I will continue to support Victoria by way of the allowance.
> 24 Finally, I understand that Francesco's solicitors have contended in correspondence with Victoria's solicitors that I will ultimately pay any settlement that is ordered to Francesco so that Victoria is not required to sell, mortgage or otherwise charge Connaught Square and can stay there with the children. That is absolutely absurd. I have made my position clear. I have no obligation to Francesco and I have no intention of paying him anything.'

[92] Mike's oral evidence, upon oath and under sustained cross-examination by Mr Marks QC, was repeatedly and consistently to the same effect. He said that he will not pay any money for Frankie, under no circumstances whatsoever. He will do nothing to encourage a situation whereby Frankie gets any money. He said with absolute clarity and firmness that if Connaught Square is sold he will not continue to pay either the allowance or the school fees:

> 'That was not the arrangement with my daughter. I made an arrangement that I would give her that house as her patrimony … If she is forced to sell it and break her promise to me I will be shocked. He has frequently said unsolicited that he will never take money from my daughter. I think it is disgusting that he comes to court to try to force my daughter and his children out of their home.'

[93] Mike disagreed that the £2m and the allowances were 'directly linked' such that he was now morally, if not legally, obliged to maintain the allowances. When Mr Marks suggested that he would be exacting 'penalties' upon his daughter and grandchildren, he said that he would not call them penalties. He would call them consequences. He said that he had made very clear to both Victoria and Frankie during the marriage that if she sold or mortgaged Connaught Square in breach of her promise he would cut off the allowances and that remained his position.

[94] At para 17 of their written closing submissions, Mr Marks and Miss Faggionato submitted that this evidence should be disbelieved and that Mike was not being truthful with regard to his intentions. He is merely threatening, bluffing, and, as Mr Marks orally put it, holding a pistol to the head of the court. I should call his bluff and conclude that he will not in fact cut off the allowances even if Connaught Square has to be sold. Both in their written submissions and in Mr Marks' closing oral submissions they submit that the threat is inherently implausible, lacks logic, and is irrational, but that Mike is a rational man. Mr Marks pointed out that Mike also pays an allowance to Adam and that if he cuts off the allowance to Victoria he would have, consistent with equal treatment, to cut off that to Adam as well. Mike's answer to that would, I suspect, be that Adam has not broken any promise to him. Mr Marks submitted that the threat is so deeply improbable and so irrational that, even if he means it now, when it came to it, Mike would not do it. It would be so damaging to Victoria, so damaging to Adam (if his allowance was cut too) and so damaging to the grandchildren.

[95] It could, of course, be tempting simply to call Mike's bluff; and in any event I could not and would not yield to a mere threat or pistol to the head of the court. I must, however, make a finding whether Mike does or does not mean what he says and intend to carry it out.

[96] Mike has been described variously by people who know him very well as 'determined', 'hard', and, by Frankie, as 'controlling' and having 'fixed and determined views'. It is Frankie's own evidence that throughout the marriage Victoria was in 'terror' that her father would cut off her allowances or her inheritance. He wrote 'Victoria was told on many occasions both prior to and during the marriage that, if she did not follow her father's orders, he would withdraw all financial support'. (See his statement dated 23 January 2014 at paras 18 and 19, now at bundle A/E 260.)

[97] At para 31 of her written statement dated 14 January 2014, now at bundle A/E 243, Victoria wrote:

> '… I had promised my father that I would not [sell the house] and I knew that if I broke that promise he would immediately stop paying my allowance and stop paying the children's school fees. I had no doubt that my father would stop the payments in those circumstances.'

During the course of her oral evidence, whilst her father was absent, Victoria said: 'I have pleaded with him. I asked him yesterday. He has always been immovable on this point. Flexible is not something I would call my father'.

[98] In my view, Mike is not merely bluffing nor lying with regard to his intentions. He does definitely mean what he says. In their open offer letter of 29 May 2013, Hughes Fowler Carruthers wrote: 'My client's father is extremely cross about these proceedings'. That was 9 months ago. Although his behaviour in the courtroom is of course controlled, restrained and very courteous, I am in no doubt that he is now little short of seething with anger about the proceedings. He knows the enormous cost. He regards Frankie's claim as 'disgusting'. He said that he considered it would be 'outrageous' if the court makes any award. He has clearly always attached enormous significance to the promise. So far as he is concerned, Victoria will break it if she sells, although he was earlier willing to permit her to raise a mortgage as in the open offer. Being so determined, hard and inflexible a man (not my words, but those variously of his family) he has the willpower to carry his threat out. Since he has repeated it so resolutely for so long, including publicly upon oath in the witness box, I must conclude on a balance of probability that he will do so.

[99] I must accordingly consider this case and its outcome on the clear basis, as a reality, that if I make any award at all for Frankie, which will necessarily require Victoria to sell Connaught Square, as she has no other assets and (without the co-operation of her father) no borrowing capacity, her allowance of £51,000 pa from her father and payment of all the school fees by him will immediately cease.

[100] These are facts. It is not for me to make any comment or moral observation upon the decision and intentions of Mike.

[101] I now turn to the position of Mary. At para 11 of her written statement dated 17 December 2013, now at bundle A/E 231, Mary wrote:

> 'The allowances were all part and parcel of the transfer of Connaught Square and would not have been paid, or continued to be paid, by Mike or me unless all the agreements had been entered into by Francesco and Victoria, Francesco had acknowledged them as binding which he did, and Victoria had promised not to sell or charge the property without Mike's agreement.'

[102] At para 15 Mary wrote:

> 'I was present for a number of arguments between Victoria and Francesco. On several occasions, he wanted Victoria to sell the property and down grade to a less expensive, smaller house in order to release some capital so that they could fund a lifestyle which was above their means. Victoria insisted that she could not do so because she had made a promise to her father, which she felt morally obliged to stick to. Francesco became increasingly resentful and angry about Victoria's promise to Mike and tried to persuade her to beak it. Victoria, of course, was adamant that she could not. This issue caused a great deal of marital conflict between them and, as I say, I witnessed a number of arguments about it.'

[103] At para 18 Mary wrote:

> 'I know that Victoria wants to keep the promise she has made to her father because she told me. I also have no doubt that Mike will stop paying the allowance and the school fees if she is forced to sell or charge Connaught Square to raise capital for Francesco. I have known Mike for many years. He is a very successful businessman. He would not have transferred Connaught Square to her if he did not trust Victoria to stick to her promise and he will be very cross if she breaches, whether or not out of choice, the promise she made. I have no doubt that in that scenario he will stop the allowance and the payment of school fees. I am obviously worried about the effect that would have on Victoria and the children. I may, or may not, keep paying her an allowance. I am not sure, however, how long I would be able to continue to pay an allowance to Victoria because I do not have the same financial means as Mike.'

[104] At paras 19 and 20 Mary wrote:

> '19 Victoria's only source of income is allowances from Mike and me. In return for the allowance that I pay to her, Victoria helps me out with the development at MP. The development is a multi-million project. It involves a property on a large site in MP … The project involves complex planning and legal matters. Victoria has had the benefit of training over many years from her father in these areas particularly in relation to legal matters. She has been a great help to me and carried out a lot of work on my behalf.
> 20 I do not pay Victoria for the assistance that she gives me … She assists me with my work on the MP project in exchange for the allowance that I pay her of £30,000 pa and, of course, in exchange for my assistance with the children. I see no reason why I should also pay her for the work she helps me with in relation to MP. Victoria is extremely grateful for my support and has always been keen to do what she can to help me in return.'

[105] It is clear from the above passages that the written position of Mary before the hearing was different from that of Mike in two significant respects. First, she said at para 18 that Mike will definitely stop the allowance, but that she 'may, or may not' keep paying it. Secondly, in the case of Mary, unlike Mike, Victoria provides services to her business 'in return' or 'in exchange' for an allowance.

[106] During her oral evidence, towards the end of the hearing, and after having observed the evidence of Mike, Mary said: 'I decided the day before yesterday I will not go on paying the allowance if there is a sale'. She referred to the upheaval for the children in particular of a sale and said: 'It's not right'. Later she said: 'I want to back my ex-husband because I think he is right. It is a matter of principle'.

[107] However Mary also said that she does not do a levelling up between Victoria and Adam. She pays what she can when they need it. If she were to sell the MP development 'I might give Victoria some money if she needs it'.

She also said that if she terminates the allowance 'I might have to pay her a wage. I will have to think about that one'.

[108] Mary also said that, in contrast with Mike, her relationship with Frankie had been very good.

[109] In the case of Mary, I consider on a balance of probability that, when it came to it, she would in fact continue to pay the allowance she currently pays even if there is a sale of Connaught Square. I do not question the sincerity of her oral evidence at the time she gave it. But there are many points of difference between her and Mike. Her position was very recent, formed only during the hearing and expressed after just listening to the trenchant evidence of Mike. She is a less hard and determined person than Mike. Her attitude is concerned less with patrimony and more with helping her children when they need it. The promise was not given to her but to him, and she was not the donor of Connaught Square. She is much more involved than Mike in the daily life of Victoria and the children. Finally, it is obviously significant that Victoria performs many services for Mary. If Mary stopped the allowance she would inevitably have to pay Victoria for the services.

[110] I proceed, therefore, on the basis that even if Connaught Square is sold Victoria will continue to receive the current allowance of £30,000 pa from her mother. Mr Marks made a somewhat curious submission that if I reached that conclusion in relation to Mary, it somehow impacts upon the decision in relation to Mike. I do not think that it does. They are different personalities and, as indicated in para [109] above, there are many points of difference between their respective situations.

Earnings and earning capacity

[111] Victoria has not been in paid employment since the marriage and, apart from her continuing to perform services for her mother, it is not suggested that she should now do so.

[112] Frankie was in paid employment before, and throughout most of, the marriage. His final annual salary at MPC was just under £50,000 pa, at Glassworks £65,000, at UNIT £67,000, at Rushes £64,000 and at Prime Focus £62,000.

[113] Frankie has not had well-paid employment since he was made redundant by Prime Focus in April 2012, now nearly 2 years ago. He says, although it is strongly denied, that Mike or Adam have been spreading bad gossip about him in the media and advertising industry such that he cannot now obtain further employment in that industry. Further, he says that his previous selling point was his contacts and clients and that these have now dwindled. He believes, therefore, that there is no longer a future for him in that industry and that he must branch out into a different field. He believes that he has a flair for art and has embarked on a modular degree course with the Open University. He hopes to complete this in the spring of 2017 at which point (but apparently not before) he would look for employment with an art gallery or auction house, or perhaps 'doing fraud work with the police', or marketing art as an offshoot of a luxury brand such as Hermes or Louis Vuitton.

[114] During the course of Frankie's evidence I made a comment that, in the witness box, Frankie seemed to be something of a 'broken reed'. Victoria and her father later disagreed with that, saying that to them his demeanour

appeared similar to what it has always normally been. Mike, in particular, considers that Frankie is once again being simply lazy and that if he chose to do so he could go out now and obtain employment in the advertising, media or post production field. He says that Frankie's main roles have been in client entertaining and that the idea that his employability depended on a client list is incorrect.

[115] I have to say that Frankie does not strike me as currently readily employable at any very high level. He is now aged 45. His mental health has been unstable and he has suffered depression. His employment CV is not impressive. The numerous changes of job have not been career progression but redundancies and, in the case of UNIT, dismissal. His qualifications are very few and he is not numerate. I am myself sceptical about the wisdom of spending 3 years on the art course and in the process accumulating yet further debts with a student loan. But he said in his Form E at para 4.5(a) that if he did so: 'I anticipate that I will earn similar amounts to that earned in the media (perhaps £40,000 to £60,000 pa gross) in other fields. It is likely to take me several years to reach this point'.

[116] In my view, he ought to be able to go out now and obtain employment grossing at any rate £30,000 pa. Ignoring inflation, that would equate to £600,000 over his normal remaining period of employment to, say, 65. If, alternatively, he is able to improve his prospects to at least £50,000 pa starting in 3½ years' time, then he would gross over £800,000 by the age of 65. That being so, I will treat him as a man who could earn £30,000 relatively soon; or whose current earning capacity is low (a maximum of £10,000 pa), whilst he also pursues his course, but who can gross at least £50,000 pa from September 2017.

Matrimonial Causes Act 1973, s 25

[117] It is my statutory duty to apply s 25 of the Matrimonial Causes Act 1973 (the MCA 1973). So far as material that provides as follows:

> '(1) It shall be the duty of the court in deciding whether to exercise its powers … and, if so, in what manner, to have regard to all the circumstances of the case, first consideration being given to the welfare while a minor of any child of the family who has not attained the age of eighteen.
>
> (2) As regards the exercise of the powers of the court … in relation to a party to the marriage, the court shall in particular have regard to the following matters—
>
> (a) the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future, including in the case of earning capacity any increase in that capacity which it would in the opinion of the court be reasonable to expect a party to the marriage to take steps to acquire;
>
> (b) the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future;
>
> (c) the standard of living enjoyed by the family before the breakdown of the marriage;

(d) the age of each party to the marriage and the duration of the marriage;
(e) any physical or mental disability of either of the parties to the marriage;
(f) the contributions which each of the parties has made or is likely in the foreseeable future to make to the welfare of the family, including any contribution by looking after the home or caring for the family;
(g) the conduct of each of the parties, if that conduct is such that it would in the opinion of the court be inequitable to disregard it;
(h) in the case of proceedings for divorce or nullity of marriage, the value to each of the parties to the marriage of any benefit … which, by reason of the dissolution or annulment of the marriage, that party will lose the chance of acquiring.'

[118] Although there is no claim by Frankie on behalf of the children, it is relevant that in relation to the children s 25(3)(d) requires the court to have regard to 'the manner in which he was being and in which the parties expected him to be educated or trained'.

[119] A highly relevant circumstance of the case in this case is, of course, the fact of the agreements and the promise, and the history in relation to them. At this stage, however, it is convenient to address and have regard to the relevant matters listed in s 25(2). After the above detailed narrative, I can now do so quite briefly, in a somewhat shorthand fashion, without in any way diminishing the importance of the statutory matters.

[120] ***(a) Resources*** Victoria has no earned income. She currently receives the allowances totalling £81,000 pa and payment of all school fees. If an order is made which forces her to sell Connaught Square (as *any* order inevitably will do) her allowances will reduce at once to £30,000 pa, and payment of the school fees will cease. Victoria has no earning capacity. Since I have concluded that her mother will continue to pay her allowance, she must, of course, continue to perform unpaid service for her mother and could not work for anyone else. Frankie could earn a maximum of about £30,000 pa relatively soon; or about £10,000 pa gross at the moment and £50,000 pa from September 2017. Once Westbourne Terrace is sold, they will both have no other income. Frankie will have net debts of £226,000. Victoria will have the equity in Connaught Square of £6,740,000 and net debts of currently around zero. In each case their debts are rising fast with high rates of interest. Whilst the summaries of Victoria's assets in each of the agreements all refer to her having 'substantial inheritance prospects from parents', I cannot take those into account as resources which she is 'likely to have in the foreseeable future'. Her father's current actuarial life expectancy is about a further 16 years. Her mother's is over 20. I do not know their current testamentary intentions and they may change. Mike said that his will has been changed since 2009. I leave possible future inheritance entirely out of account, and patently it could do nothing to meet the needs of either Victoria or Frankie now.

[121] ***(b) Needs etc*** They do both need a suitable home in which to live. Victoria has one. Frankie does not. He has only been able to afford to rent Leinster Square because of an increase in his Novitas litigation loan. Patently he cannot raise a mortgage or buy anywhere at all without funds from Victoria. On his current and medium-term income he has no capacity to rent anywhere which bears the slightest relationship in location, size or quality with Connaught Square or any alternative home that Victoria conceivably might buy. I will refer to the cost of alternative homes for each of them at paras [156] and [165] below.

[122] The reality of this case is that the entire financial responsibility for the children will be borne by Victoria, with the allowances from both her parents if she does not sell, and from her mother alone if she does.

[123] ***(c) The standard of living*** This was high. They lived in a large and fine house in Connaught Square. They had good and expensive foreign holidays. They had a nanny for their children. They frequently ate out at expensive restaurants. They had a Porsche Cayenne car.

[124] ***(d) Ages and duration*** Frankie is 45. Victoria is 37. I treat the duration of the marriage as 8 years from the start of cohabitation in summer 2004 until the separation in November 2012. Although not especially long, it cannot be characterised as 'a short marriage'.

[125] ***(e) Disability*** Neither has any physical disability. Each has experienced mental ill health or frailty. Victoria was an inpatient for 3 months in early 2009. Frankie has received psychiatric investigation and treatment, and at para 5 of her statement in support of the application for an injunction on 1 March 2013 Victoria wrote: '[Frankie] has been emotionally vulnerable and distressed for a number of years'.

[126] ***(f) Contributions*** Until the separation, each played their part to the full as involved and committed parents. Since the injunction in March 2013 Frankie has, to his great regret, been restricted in the amount of time he can spend with the children and, because of his lack of accommodation, can only have them to stay for short periods. In their closing documents Mr Marks and Miss Faggionato produced a schedule headed 'Limata – Revenue Contributions (approx)'. This was designed to show that from his earnings when working, and an inheritance from his grandfather (£160,000) and other sources, the total financial contribution of Frankie was similar to the 'non-property' contribution of Victoria, crediting to her the value of the allowances paid by her parents, plus the school fees and many of the holidays for which they paid. Mr Marks said in his closing oral submissions 'the non-property contributions are pretty well the same'. Although it is the view of Victoria and Mike that actually Frankie frittered much of his money on himself on wasteful luxuries such as the Porsche, I am prepared to accept that overall submission of Mr Marks. What it leaves out of account, of course, is the property contribution of Victoria. The lifestyle could never have been funded by Frankie and, viewing the marriage as a whole, the total financial contribution made by Victoria dwarfed that made by Frankie. It has been calculated that the net value of all the capital gifts made by her parents was of the order of £3.7m, now of course worth almost double that. Further, the entire future financial contribution to the needs and welfare of the children will inevitably be made by Victoria.

[127] ***(g) Conduct*** The signing of the agreements could of course be viewed as 'conduct'. I will treat them as part of all the other circumstances of the case. There is no other conduct by either party in the sense of para (g) which it would be inequitable to disregard.
[128] ***(h) Loss of benefits*** There is no loss of benefit by either party in the sense of para (h).

Matrimonial Causes Act 1973, s 25(1) and the agreements
[129] There is no doubt that the decision of the Supreme Court in *Granatino v Radmacher (Formerly Granatino)* [2010] UKSC 42, [2011] 1 AC 534, [2010] 3 WLR 1367, [2010] 2 FLR 1900, [2011] 1 All ER 373 represented, and now requires, a significant shift in the approach to, and weight to be given to, negotiated, drafted and freely signed nuptial agreements of the kinds in the present case when there is no vitiating factor.
[130] I said at the outset of this judgment that the law is not difficult to state. Such agreements must always be given weight, and often decisive weight as part of the circumstances of the case. They may affect not only whether to make any award at all, but also the size and the structure of any award. I could at this point cite passages from the majority judgment in *Granatino v Radmacher* but, helpfully, all three counsel have agreed the following propositions of law which are drawn from *Granatino v Radmacher* and which I gratefully adopt. (They were first drafted by Mr Marks and Miss Faggionato, but I quote them with the additions made by Mr Howard.)

(1) It is the court, and not the parties, that decides the ultimate question of what provision is to be made;
(2) The over-arching criterion remains the search for 'fairness', in accordance with s 25 of the MCA 1973 as explained by the House of Lords in *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24, [2006] 2 AC 618, [2006] 2 WLR 1283, [2006] 1 FLR 1186 (ie needs, sharing and compensation). But an agreement is capable of altering what is fair, including in relation to 'need';
(3) An agreement (assuming it is not 'impugned' for procedural unfairness, such as duress) should be given weight in that process, although that weight may be anything from slight to decisive in an appropriate case;
(4) The weight to be given to an agreement may be enhanced or reduced by a variety of factors;
(5) Effect should be given to an agreement that is entered into freely with full appreciation of the implications unless in the circumstances prevailing it would not be fair to hold the parties to that agreement. That is, there is at least a burden on the husband to show that the agreement should not prevail;
(6) Whether it will 'not be fair to hold the parties to the agreement' will necessarily depend on the facts, but some guidance can be given:
    (i) A nuptial agreement cannot be allowed to prejudice the reasonable requirements of any children;
    (ii) Respect for autonomy, including a decision as to the

manner in which their financial affairs should be regulated, may be particularly relevant where the agreement addresses the existing circumstances and not merely the contingencies of an uncertain future;

(iii) There is nothing inherently unfair in an agreement making provision dealing with existing non-marital property including anticipated future receipts, and there may be good objective justifications for it, such as obligations towards family members;

(iv) The longer the marriage has lasted the more likely it is that events have rendered what might have seemed fair at the time of the making of the agreement unfair now, particularly if the position is not as envisaged;

(v) It is unlikely to be fair that one party is left 'in a predicament of real need' while the other has 'a sufficiency or more';

(vi) Where each party is able to meet his or her needs, fairness may well not require a departure from the agreement.

[131] In elaboration of proposition (6)(i) above, I should stress that part of the express statutory duty of the court under s 25(1) of the MCA 1973 is to give first consideration to the welfare while a minor of any child of the family who has not attained the age of 18. As in *Granatino v Radmacher*, the children in the present case spend time with each of their parents, and the financial circumstances of each of their parents are likely to impact upon their welfare. The facts of the two cases differ markedly – Mrs Radmacher was far, far richer than is Victoria – but in *Granatino v Radmacher* quite significant financial provision was made for the husband, in his role as father, until the younger child attained 22. In that case, however, the children were broadly evenly residing with each of the parents.

[132] To counsel's propositions of law I add one other, which needs no citation of authority. The court must be scrupulous to avoid gender discrimination or gender bias. Of course gender may, and often does, impact heavily on outcome. If in fact a wife, in her role as mother, is the primary carer for the children, then her need for secure and suitable accommodation may outweigh that of the husband. If a wife, due to her commitments to caring for the children, is less able to work than is the husband, than that is likely to impact upon maintenance needs. So, too, if it is a fact of a case that a wife has lower earning capacity because of gender discrimination in the relevant employment markets. But there must be no discrimination or bias based on gender alone, nor on any stereotypical view that a wife may be dependent upon her husband but not vice versa.

Performing the balance

[133] There is no doubt that very great weight indeed should be given to the agreements in this case. There are no vitiating factors such as duress or non-disclosure. They were entered into freely by a mature man after expert legal advice. The agreements each contemplated that there would be one or more children (Victoria was pregnant with their first child at the time of the PMA, and with their second at the time of the SSA). By the time of the gift of Connaught Square, the valuable asset now in point, there had been not just

one but three agreements, each reinforcing the first. Mike would never have given Connaught Square to Victoria but for the agreements, and Frankie knew it. In this regard I reject Mr Marks' closing submission that three signatures and three agreements 'are only the same as one'. That might be true about three documents all signed at the same time. But it is, in my view, highly significant that Frankie repeatedly signed three agreements spaced out over 2½ years, and well aware how much fresh reliance was being placed upon each. Frankie was not 'lying' (as Mike would have it) when he signed each of the agreements. He absolutely intended to be bound by them. If I make any award at all, that will inevitably trigger a sale of Connaught Square, for Victoria now has no means at all except for Connaught Square (unless Mike and/or Mary very fundamentally change their present positions, which I do not expect, and make more capital available). A sale and trade down to a smaller home, in a less expensive and less central area of London, and probably at a much further distance from the children's schools, would inevitably be destabilising for the children (whose welfare is the first consideration) and mean an overall reduction in the living standards to which they are accustomed, living with their mother. There is the additional and very cogent fact in this case that if I make any award at all, thereby triggering sale, there will be an immediate and dramatic reduction in Victoria's income stream of £51,000 pa plus all the school fees.

[134] Frankie has no claim at all based on contributions, compensation or sharing. Victoria has already made by far the greater contribution, when the gifted properties are taken into account (exceeding that of Frankie by about £3.7m). At the time of the marriage Frankie's only asset was the equity in Eastlake House, believed in the PMA to be £50,000 less costs of sale, and in the event £30,000 when it was sold. On the date of final breakdown, in early March 2013, he had a share in Westbourne Terrace, then estimated by him in his Form E to be worth about £277,000 less capital gains tax. His debts then, other than costs, were about £50,000. So he was in surplus by at least £200,000. That he now has a net debt of £226,000 is almost entirely attributable to the costs of these proceedings. There is nothing to compensate. There is nothing to share, for there is now no remaining matrimonial acquest apart from Westbourne Terrace. So Mr Howard asks rhetorically, and with considerable force, if the agreements do not prevail in this case, when could agreements of this kind ever prevail, notwithstanding all that was said in *Granatino v Radmacher* with regard, in particular, to autonomy and reliance?

[135] In *Granatino v Radmacher (Formerly Granatino)* [2010] UKSC 42, [2011] 1 AC 534, [2010] 3 WLR 1367, [2010] 2 FLR 1900, [2011] 1 All ER 373, at para [72], the Supreme Court commented:

> 'Another important factor may be whether the marriage would have gone ahead without an agreement, or without the terms which had been agreed. This may cut either way.'

But Mr Howard submits with force that if Victoria cannot rely on the agreements even on the facts of this case, then the richer party may in future be strongly deterred from marrying at all.

[136] And if benevolent parents wish to provide gifts to their child, but not to his or her spouse, how (in the absence of any legislative change) can they ever safely do so in reliance upon agreements of this kind if they do not prevail in this case?

[137] These are all very powerful arguments and submissions, and I perfectly understood the position of Mike when he said during his evidence that it would be outrageous if the court made an order at all.

[138] On the facts of this case there is only one consideration which is capable of outweighing the above considerations and capable of having the effect that the agreements should not be applied rigorously and to the letter. That consideration is current and likely future need. During the course of his oral argument Mr Marks submitted that 'needs trump the agreement(s)'. I profoundly disagree with that submission. There is no question of needs being a 'trump card'. They may, however, outweigh the fact of an agreement in the overall circumstances of a particular case.

[139] At para [73] of its judgment in *Granatino v Radmacher*, the Supreme Court said:

> 'If the terms of the agreement are unfair from the start, this will reduce its weight, although this question will be subsumed in practice in the question of whether the agreement operates unfairly having regard to the circumstances prevailing at the time of the breakdown of the marriage.'

The weakness, or even unfairness, of the agreements from the start in the present case was that they provided nothing at all for Frankie in any circumstances, no matter how long the marriage may have lasted nor how great his need upon breakdown. They made no attempt, for instance by a formula or by some reference to house price indices, to pre-assess any provision for his own accommodation or needs in the event of breakdown, perhaps after many years of dependence by him upon Victoria for his accommodation. As indicated in para [73] of *Granatino v Radmacher*, however, it is upon the present circumstances that I now focus.

[140] At para [75] of its judgment in *Granatino v Radmacher* the Supreme Court said:

> 'The problem arises where the agreement makes provisions that conflict with what the court would otherwise consider to be the requirements of fairness. The fact of the agreement is capable of altering what is fair. It is an important factor to be weighed in the balance … The court should give effect to a nuptial agreement that is freely entered into by each party with a full appreciation of its implications unless in the circumstances prevailing [which clearly include the fact and content of the agreement] it would not be fair to hold the parties to their agreement. That leaves outstanding the difficult questions of the circumstance in which it will not be fair to hold the parties to their agreement.'

[141] In *Granatino v Radmacher*, after then referring to the impact of children (para [77]), autonomy (para [78]), non-matrimonial property (para [79]), and unforeseen future circumstances (para [80]), the court said at paras [81] and [82]:

> '… it is … needs … which can most readily render it unfair to hold the parties to an ante-nuptial agreement. The parties are unlikely to have intended that their ante-nuptial agreement should result, in the event of the marriage breaking up, in one party being left in a predicament of real need, while the other enjoys a sufficiency or more, and such a result is likely to render it unfair to hold the parties to their agreement … Where, however, these considerations do not apply and each party is in a position to meet his or her needs, fairness may well not require a departure from their agreement …'

[142] In that passage I emphasise the phrases and the contrast between 'one party being left in a predicament of real need', while the other 'enjoys a sufficiency or more'. That does seem to me to encapsulate the respective present positions of the parties in this case.

[143] The plain fact is that over the period since 2006, when the parties moved from the jointly owned Westbourne Terrace to Avonmore Road, solely owned by Victoria, a situation developed in which Frankie became completely dependent upon Victoria for provision of his home. He is now, on any view, and in the context of this case, in a 'predicament of real need'. He has no home, no current income, no capital, considerable debts, and absolutely no further borrowing capacity. Although he is temporarily housed in Leinster Square, he currently has no prospect of paying the rent again when his upfront payment (all borrowed) for 6 months ends in May. Victoria, by contrast, does have 'a sufficiency', if not more. All her capital is, of course, currently tied up in her home, but the contrast between a wife on the one hand with net worth of £6.7m, and a husband on the other with net debts of £226,000 is striking and bleak. This is a situation in which, in the words of the Supreme Court at para [75]: '… the agreement makes provisions that conflict with what the court would otherwise consider to be the requirements of fairness'. In the absence of the agreements it is inconceivable that any court would not make a substantial award to the husband. Further, if all the facts were the same but the genders reversed, it is, in my view, inconceivable that the agreements would outweigh making a substantial award to the wife, even if the children were primarily living with the husband and only intermittently staying with her.

[144] By s 25(1) of the MCA 1973 I must give first consideration to the welfare, while minors, of the children. At para [77] of *Granatino v Radmacher*, the Supreme Court said: 'A nuptial agreement cannot be allowed to prejudice the reasonable requirements of any children of the family'. The position and welfare of the children undoubtedly cuts both ways in this case. Mary expressed her shock and disgust at Frankie seeking 'to evict' his children from their home. Any order at all will undoubtedly require the damaging upheavals of sale, moving to a smaller house in a less fashionable and less central location, and either a change of schools or much longer journey times to and from schools. But if there is no provision for Frankie at all, then the damaging situation will persist, almost certainly throughout their

childhoods, that they live with their mother in relative luxury and see and stay (if at all) with their father in relative penury. Even if not in his capacity as a former husband, then certainly in his role as a loving and committed father, Frankie has a very pressing need for secure accommodation in which he can accommodate all three children together and which does not demean him too much relative to their mother.

[145] It is scarcely necessary to cite any authority for the importance, when achievable, of each of the two parents having at least adequate homes in which their children can visit them and stay. That has been clearly recognised in the approach to matrimonial financial cases throughout my time as a family lawyer, now over 40 years. But, if any citation be necessary, I quote the words of a wise judge, Sheldon J, in *Cartwright v Cartwright* (1983) 4 FLR 463, at 471 where he said:

> '… when considering the financial background of the parties, the standard of life that they and the children have been accustomed to, and that the children will undoubtedly continue to enjoy while living with [their mother], I am of the opinion that it is of importance to the children, to their enjoyment of their father's company and of their visits to him, as well as to the maintenance of good relations between them, that he too should have a settled and secure home to which they can come …'

[146] In *M v B (Ancillary Proceedings: Lump Sum)* [1998] 1 FLR 53, the facts were very different and there were no nuptial agreements. But in a now famous passage Thorpe LJ said at 60E–G:

> '… it is of importance, albeit of lesser importance, that the other parent should have a home of his own where the children can enjoy their contact time with him … in any case where there is … the possibility of a division to enable both to rehouse themselves, that is an exceptionally important consideration …'

[147] I highlight, too, the passage in the judgment of Baroness Hale of Richmond in *Granatino v Radmacher*, at para [190], where she said:

> '… since there are ample means available to enable them to do so, the children should be able to enjoy the same standard of living while they are with their father as they have when they are with their mother …'

[148] The present case is markedly different from *Granatino v Radmacher*. There, the means of the wife were so great that suitable provision could be made for the father to accommodate the children without impacting in the slightest on the lifestyle and accommodation provided by the mother. Here, as I have said, there would be upheaval. Nevertheless, I have concluded that the need to provide an adequate home in which the children can visit and stay with their father is very important and, insofar as the balance of welfare considerations is concerned, does outweigh the upheaval. As I will later describe, adequate accommodation can be provided for the children when

with their father whilst still preserving their security, their private schooling and comfortable, albeit reduced, accommodation with their mother.

[149] The welfare of the children is not the paramount consideration, but only the first consideration. But their overall welfare is better safeguarded and promoted by making some award to their father.

[150] For these reasons I have concluded that notwithstanding the fact and terms of the three agreements I must make some capital provision for Frankie. If any provision is made at all, then, if the purpose of adequate housing is to be achieved, that provision will necessarily have to be measured in many hundreds of thousand pounds. There is no room and no purpose in this case for an award merely of a low number of hundreds of thousands. That much is clearly recognised by and on behalf of Victoria. In her open proposal dated 4 February 2014, immediately before the hearing, now at bundle A/C 36, her primary position was, as it remains, to offer nothing. But her fall-back position, in the 'scenario' that the court does make any capital provision, is to propose up to £850,000 being used to purchase a property for the use of Frankie until the later of the youngest child attaining 18 or completing a first university degree.

Duration and terms

[151] Before discussing figures, I now consider the duration and broad terms of any provision. This was the issue upon which Baroness Hale of Richmond disagreed with all the other Justices of the Supreme Court and, indeed, the Court of Appeal in *Granatino v Radmacher (Formerly Granatino)* [2010] UKSC 42, [2011] 1 AC 534, [2010] 3 WLR 1367, [2010] 2 FLR 1900, [2011] 1 All ER 373. The majority upheld the decision of the Court of Appeal that the housing element of the award should end and revert to the wife when the younger child (they had two) attained the age of 22. Baroness Hale of Richmond said at para [191]:

> 'The issue is whether this should all come to an abrupt end when the youngest child grows up … Married parents are different, in that the court has power to make provision, not only for the child, but also for the parent. There is no reason in principle why the court should limit its support in the same way that it has to limit its support for the unmarried parent. Quite the reverse: this is what distinguishes marriage from cohabitation in our law. Where parents are married, the court can look beyond the needs of the child while growing up and look independently at the needs of the parent, and in particular those generated as a result of parenthood. Not only this, these days parents often expect to be a resource for their grown-up children, a base to which they can return and a source of the unconditional love and support which is what parenthood is all about.'

[152] Baroness Hale of Richmond would accordingly have enabled the husband to use his English home for life (para [194]). Upon the facts of that case, the rest of the court disagreed.

[153] There are two important differences in the facts between those in *Granatino v Radmacher* and those in this case. In that case, when the younger child attains 22 the husband will be aged about 54 or 55. In the present case,

the husband will be a decade older. When their younger son attains 22 Frankie will be one month short of 65. In that case, the husband is 'extremely able and has added to his qualifications by pursuing a D Phil in biotechnology' (para [119]). In the present case, Frankie is much less able and his capacity to make any provision at all for his older age and retirement is highly speculative and, frankly, very doubtful.

[154] For these reasons, but still affording as much weight as possible to the fact and contents of the agreements, I have concluded that there must be a stepped approach to provision of a housing fund. A larger fund is required until the youngest surviving child attains the age of 22, during a period when the children may be expected to stay frequently, and together, with their father. At that point capital must be released back to Victoria (or her nominee). But it could not be right or fair on the facts of this case to leave Frankie homeless and possibly a burden on the state at the age of 65. Further, although the rest of the Supreme Court did not agree with Baroness Hale of Richmond on the facts of *Granatino v Radmacher*, her words in para [191], quoted above, still resonate with force. Parenthood does not end when a child attains 18 or even 22. Frankie will still need some home at which the children can visit him and which they can view as a base with their father. But it can be a smaller and perhaps less well located one. It could indeed be highly damaging to the children, on the threshold of adult independence, to see their father effectively 'evicted' (to borrow Mary's phrase) and homeless just as he himself reaches retirement and older age. Further, s 25(2)(f) of the MCA 1973 expressly refers to 'the contributions which each of the parents … is likely in the foreseeable future to make to the welfare of the family …'. It is likely that Frankie, as father, no less than Victoria, as mother, will make a very significant contribution to the welfare, though not the finances, of the children for many years to come.

Outcome

[155] I intend by this judgment to express the outcome only broadly. I will leave it to the parties in the first instance to decide how to give effect to it, especially as there may be more or less tax efficient ways of lawfully doing so.

[156] Frankie's most pressing need is for an adequate home where, during their education, including likely university education, the children can regularly stay with him. Each side has produced ranges of property particulars designed respectively to augment their own need and to depress that of the other. I have given careful consideration to all these particulars but, in the end, outcome is driven by available resources more than by either side's wish list. I am satisfied that an adequate three-bedroomed house can be bought for a gross price of £900,000, and, as will be seen, that no more than that can fairly and sensibly be made available. Compromises will have to be made between size and location, and the essential choice will be with Frankie. But for the agreements, I would have awarded that sum (and more) outright as a housing sum. But in order to give as much weight as possible to the agreements Frankie can only have the use and not the ownership of the property.

[157] Victoria must therefore produce funds for:

(i) the purchase of a house (or flat, if he prefers) for the use of Frankie at a gross price (subject to para [167] below) not exceeding £900,000; and
(ii) non-returnably, the necessary legal costs of purchase, including stamp duty.

[158] When the youngest surviving child attains the age of 22 (or on earlier further order, on application by Victoria, if there should be some significant and unforeseen change in Frankie's circumstances) that property must be sold. Forty-five per cent of the net proceeds must at that point revert to Victoria or her nominee. The balance must be reinvested in a smaller home (probably a flat) for the use of Frankie for the rest of his life (or earlier further order as above). The purchase costs of the new home, including stamp duty, must be met out of the net proceeds of the previous one, which is why I am providing for 45% to revert and 55% to be retained. Ignoring property inflation, it should be possible to purchase at around £450,000. Frankie may have to move to a less prosperous or less central area, but, at present property values, he can unquestionably find a small flat for himself at that sum.
[159] Victoria must in addition make outright capital provision for Frankie in the aggregate of the following components:

(i) the amount actually required to discharge his actual liability to capital gains tax upon the sale of Westbourne Terrace; and
(ii) £435,000, being his current debts per the revised asset schedule dated 18 February 2014, but less the figure of £19,819 included in that schedule for estimated capital gains tax (now provided for by (i) above); and
(iii) £40,000, for the purchase of furniture, furnishings and a second-hand car, and for general moving-in expenses; and
(iv) £25,000 which I allow towards rent and living expenses while he resettles; and
(v) the interest actually incurred on his Novitas loan between now and the date of payment; but
(vi) *less* the amount actually receivable by Frankie as his share of the net proceeds of sale of Westbourne Terrace.

[160] On present figures that will require Victoria to produce £20,000 (capital gains tax), plus £435,000 (to clear debts), plus £40,000 (for furniture and car), plus £25,000 (for interim support), minus £228,000, or a net £292,000.
[161] The justification and necessity for each of the above components is as follows. There is simply no point in providing a home for Frankie but leaving him with enormous debts which he has no prospect at all of servicing or repaying. If his debts are not paid there is a real risk of bankruptcy, and he has to be enabled to start with a clean sheet. I appreciate, of course, that the bulk of his debts are costs. His most pressing need at the moment, apart from a home, is to have those debts paid. In a needs-based exercise such as this, costs are a debt which simply have to be paid. The capital gains tax must be paid, but instead of making some estimated provision for it, it is more sensible and fair that Victoria should simply pay the assessed amount whatever that may

be. Frankie has no furniture and will inevitably need to furnish a new home adequately to accommodate the children. He does not have a car but reasonably needs one for contact. The decision whether to continue in very low paid, part-time employment while he completes his course at the Open University, or to seek better employment now, is one for Frankie to make. The fact is that at the moment he has no real job. He will now be busy for a period finding and moving into a new home. He pressingly needs to be able to fund rent from May until a new home has been purchased. He needs the sum of £25,000 to tide him over. The escalating interest on the Novitas loan will have to be paid. He must of course credit the whole of the amount actually receivable by him when Westbourne Terrace is sold.

[162] The effect of the above is to require Victoria to produce in the near future £900,000 for housing (subject to para [167] below), plus purchase costs, plus about £300,000, a total of about £1,240,000. That will leave to her £6,740,000 less £1,240,000, or about £5,500,000.

[163] The two elder children are at private schools and clearly both parents expected that all three would attend private schools throughout. Indeed Frankie hoped that his sons would go to Eton. It has been established that funding for the future education of all three children at good London private day schools will require a capital sum to be reserved now (and suitably invested) of about £1,100,000. Victoria will need to set that aside, thereby reducing her capital for other purposes to £4,400,000.

[164] Various calculations have been produced as to the capital that Victoria will need to set aside in order to provide for the needs of all the children during their childhoods and of herself for the remainder of her life expectancy of a little over 50 years. Mr Howard produced some calculations based on £50,000 a year for herself (indexed) for the rest of her life and £10,000 a year for each of the children (indexed) to the age of 23. The starting annual figures total £80,000 and obviously reflect the current level of the allowances. Mr Howard's figures were £1,250,000 for Victoria, £118,000 for the eldest child, £133,000 for the second, and £147,000 for the third, or £1,648,000 in total. Mr Marks and Miss Faggionato produced some calculations which assume that the needs of the children end at the age of 18 (after which student loans would be available to them) and that Mary will in fact, as I have held, continue to contribute £30,000 pa for at least the next 10 years. On those assumptions Mr Marks' and Miss Faggionato's figure is £1,300,000.

[165] All these figures of course include huge elements of speculation. Further, the current allowances of £81,000 are being paid to meet the high costs of Connaught Square. It will be recalled that in the SSA there is express reference to Mike increasing his allowance 'to cover the costs of Connaught Square'. If Victoria has to trade down to a smaller house in a less expensive area her outgoings should reduce. Her reserves will in fact augment when she receives back 45% of the net proceeds of sale when Frankie has to trade down. But on any view she would need to set aside at least £1,400,000 for future expenditure. That further reduces her capital to £3,000,000. Whilst it will obviously involve a considerable fall in her living standards, property particulars produced by Victoria herself, now at bundle G, do indicate that comfortable family houses in West London or South Hampstead can be bought for around that sum. I am therefore satisfied that if provision is made for Frankie as indicated above, sufficient will be left to Victoria to enable her

to house and support herself and the children, and to educate the children, all still to a high and comfortable standard. It will be noted that the value of the housing contemplated for Frankie is about one third of that contemplated for Victoria.

[166] This is a decision and judgment based entirely upon the needs of Frankie, considered in conjunction with his role as father. Whilst not implementing the agreements, it still affords great weight to them. But for the agreements, I would have awarded a larger housing fund and the whole of it outright. As it is, all of it is provided only for a term, and much of it only during the dependency of the children. He only ever gets the use of it in the form of housing. He can never touch the capital.

[167] There is one qualification upon the figure of £900,000 for the purchase cost of a house. That is based upon current estimated net proceeds of Connaught Square. We are, however, in a period of apparently rapidly increasing house prices. If the £900,000 is provided before 30 June 2014, then it will remain as that fixed figure. If it is provided after that date, then the sum to be provided must be £900,000 plus X% £900,000, where X% is the percentage increase between £6,950,000 (being the current estimated gross selling price of Connaught Square) and the actual gross selling price of Connaught Square. If Connaught Square sells for *less* than £6,950,000 there will be no reduction in the £900,000.

[168] There are many details now to be worked out as to implementation of the above. In view of the distinguished legal representation, and with the assistance of Mr Gollings, I am expecting that this will be done co-operatively and by agreement. If not, I will rule at a later hearing.

Order accordingly.

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SAMANTHA BANGHAM
Law Reporter