IN THE CENTRAL FAMILY COURT

Neutral Citation Number: [2022] EWFC 162

BETWEEN:

WD

Applicant

-and-

MH

Respondent

Judgment of Recorder R Taylor dated 18 November 2022

Mr George Harley (Counsel instructed by Gately Legal) on behalf of the Applicant husband

The Respondent wife appeared in person

Contents

This application was heard on the 23 and 24 August 2022. A draft judgment was dated 5 September 2022 and reached the parties on or about the 12 September 2022. The matter was

due to be handed down on the 19 September 2022 but was adjourned due to the late Queen's funeral. A combination of court room and judicial availability has therefore resulted in the formal handing down taking place on the 18 November 2022.

Introduction

1. These proceedings concern what is to happen in 2022, following a short marriage which resulted in a separation and agreement back in 2008.

2. The parties separated in about September 2008. In November 2008, the parties reached a financial agreement. With the assistance of solicitors, they recorded their agreement (the "2008 agreement") in a consent order approved by District Judge Allen sitting in the Brentford County Court on 17 November 2008.

3. The order was approved in judicial separation proceedings brought by MH ("W"). These proceedings were never concluded by a decree and were later dismissed in 2019.

4. I have been told that the judicial separation proceedings may simply have been a mistake at the time. I do not need to know precisely the reasons – the fact of the matter is that the 17 November 2008 order never attained the status of an enforceable order, for want of a decree in the judicial separation proceedings.

5. Upon dismissal of the judicial separation proceedings in 2019, the status of 2008 agreement morphed into a simple post-nuptial marital agreement, entered into with the assistance of solicitors (and, incidentally, approved by a court).

6. The applicant, WD ("H") invites me to hold the parties to the 2008 agreement. In effect, he invites me to summarily turn the agreement into an order of the court within the current divorce proceedings which he commenced in 2019. This would be an order for £30,000.

7. W invites me to implement the 2008 agreement in such a way as to give her the opportunity to have the former matrimonial home transferred to her or, in the alternative sold, and the proceeds divided equally and H's equity to be shared between the parties. This would amount to an order in the region of about £250,000 - £300,000.

8. I have before me an application made in a Form A dated 23 November 2021, which commenced proceedings on the fast-track under FPR 9.9B(3). H's counsel accepts this was

the wrong procedure, and the matter should have been issued under the standard financial remedy procedure.

9. It seems to me that H's fast-track application looks like a misfired attempt at an application for notice to show cause as to why the agreement should not be turned into an order of the court under the procedure adopted in *Dean v Dean* [1978] Fam 161.

The order of 13 June 2022

10. Before I turn to the history, I need to reflect upon the order of District Judge Jenkins on 13 June 2022. On that occasion the court made the following recitals:

> "(3) And upon the court noting that in the course of Judicial Separation proceedings a final order by consent dated 24 December 2008 was submitted to Brentford County Court and approved by DJ Allen on 7th January 2009.
>
> (4) And upon the court further noting that no decree of Judicial Separation was ever pronounced and the Judicial Separation proceedings were subsequently dismissed, and therefore the order would appear to be a nullity, but the underlying agreement is nevertheless an agreed proposed order settling all claims between the parties.
>
> (5) And upon both parties indicating that they are still content with the terms of such proposed consent order.
>
> (6) And upon noting that the proposed consent order provided among other things for the applicant to make an initial payment to the respondent of £45,000, then for the respondent to buy the applicant out of the former family home in return for a payment of £245,000, and in default for the applicant to buy the respondent out of the former family home for £30,000.
>
> (7) And upon the applicant asserting that the proposed consent order has been implemented in part by payment to the respondent of the sum of £45,000, but that the respondent failed to make payment of £245,000, and that the proposed consent order should now be fully implemented by transfer of the former family home to him in return for a payment by him to the respondent of £30,000.

(8) And upon the respondent asserting that the applicant thwarted her attempts to obtain a mortgage unfairly, preventing her from taking ownership of the former family home in return for a payment of £245,000, and that the consent order should now be fully implemented by transferring the home to her.

11. The following points emerge from these recitals:

i. On 13 June 2022 neither party was seeking to resile from the effect of the agreement. Their dispute was to the circumstances as to why it was not implemented at the time and what the consequences of that should be in 2022. From both parties, it comes close to being something akin to "liberty to apply" situation as to how an order should be worked out.

ii. The date of the original order in the recital is suggested to be 2009. This is not the date on the document I have in my bundle, but I think little turns on that.

iii. The district judge does not appear to have been addressed about the fact that the wrong procedure had been adopted. H had the benefit of counsel and W was in person. H accepts before me that the wrong fast-track procedure was adopted. Had the court previously been addressed about this, no doubt case management decisions would have been made to place this application on the proper procedural track.

iv. An inevitable consequence of pondering the procedural track would have been to reflect upon the nature of application before the court. This is an application made by Form A. It is an application for financial remedies made in divorce proceedings. The 2008 agreement (or an unenforceable order, during the life of the judicial separation proceedings) was never a final order made in a divorce. A lot of water has passed under the bridge since 2008. It therefore seems to me that I am duty bound not to simply interpret and implement the 2008 agreement as if this was a "liberty to apply" application, but to look at fairness afresh in 2022, applying s.25 of the Matrimonial Causes Act 1973. The fact of the agreement, and the weight that the parties have attached to it, looms large in the discretionary exercise. However, it seems to me that to do justice to the parties in this application, I have to make a full determination under s.25 and not simply seek to implement an agreement as if time stood still between 2008 and 2022.

Resolution of a procedural problem

12. At the outset of the hearing on 23 August 2022, I invited the parties to suggest a way forward in light of my procedural and substantive observations, noted above. H accepted the wrong procedure had been adopted and that the court did have jurisdiction to make a "full determination." H remained neutral as to an adjournment. W wanted the court to proceed to make a determination.

13. Given that the application had commenced as a fast-track application, the court only has the benefit of Forms E2 rather than the fuller Form E (in particular, I do not have any pension information). No questionnaires have been directed. There has been no FDR. Had the application commenced as a notice to show cause application, proper consideration could have been given as to what case management was appropriate in all the circumstances. This court was therefore placed in an invidious position. However, my view is that the overriding objective requires the case to be determined rather than simply adjourned.

14. Each party is weary of these proceedings, and I was not satisfied that expensive further directions would add anything material to the picture I have been able to glean from the Forms E2. To require the parties to comply with more case management and disclosure seemed disproportionate given that I have good enough information before me, in circumstances where the marriage was short and the 2008 agreement has a certain magnetism, even if it does deliver a knock-out blow on its own.

15. Accordingly, I transferred the matter to the standard procedure under FPR 9.9B(4) and dispensed, in the exceptional circumstances of this case, with the requirement for an FDR.

The parties

16. W appeared in person. She is of AB heritage and had the benefit of an interpreter who came along on both days. I note that W has had some assistance from "Support Through Court" in the drafting of the witness statement she has filed.

17. W has suffered with mental health difficulties for many years. Earlier in these proceedings her capacity to litigate on her own behalf was the subject of assessment. W's recent mental health challenges are noted in a letter from Dr FA dated 9 May 2022, concluding,

> "… there is no indication at all that MH lacks capacity, should she choose to do so, to conduct any legal affairs/court hearings. She has been strongly advised that given the stresses and challenges of any legal procedures, that she should appoint a legal advocate/officer to support her during court procedures. I believe that MH is able to weigh up the pros and cons of her current choice."

18. W instructed solicitors until 27 June, when her solicitors came off record and she became a litigant in person.

19. At the outset of the hearing, I asked W whether there was anything the court could reasonably do to assist her to comfortably take part in the proceedings. W made no suggestions to me and indicated that she simply wished me to proceed with the hearing.

20. Each party has filed a Form E2 and a witness statement, setting out their rival contentions as to how the 2008 agreement should now work. I have a bundle, which I have read, and skeleton arguments from each side.

21. Further, although not in the paginated bundle, there was produced an Abbey mortgage offer letter dated 31 July 2009 and a letter from W to H dated 15 May 2010. No objection was taken to their admission into the bundle.

22. Each party gave oral evidence before me and I allowed for more extensive evidence in chief, to fill any evidential gaps by reason of the fact that I have only Forms E2 and not the fuller picture I would have benefitted from with Forms E.

23. I need to say a little about the impression each party made upon me.

    i. H came across as a reasonable, honest and kind individual. H is weary of lawyers, litigation, W, and trying to bring a settlement to final concluded agreement.

    ii. As I will describe in a moment, H gave his evidence in a matter of fact way. When he could not remember details and dates, he said so. There were two particularly

unpleasant incidents of domestic abuse (there may have been more, but I heard detail about two only) during the marriage and H described how he considered himself to be the victim in each incident. However, whilst describing one incident he did not seek to portray himself in any exculpatory light and volunteered details which a more calculating witness might have feared would count against them.

iii. I found H's account to be basically truthful and accurate.

iv. His inability to be precise about some of the finer details all these years on does not detract from the basic truthfulness of his account.

24. W's understanding of the history differs from H's. In some very material respects the contemporaneous documents do not bear out W's account.

25. I have listened very carefully to what each party has to say and, on the balance of probabilities, where there is a difference as to the history between the parties, I prefer H's account to W's.

Background

26. H is 66 and W is 61. They commenced a relationship in 2002 and cohabited from 2003. They married in April 2004 and separated in September 2008. This is a marriage of no longer than 5 years when the pre-marital cohabitation is account for.

27. Prior to the marriage, H had been the sole legal and beneficial owner, subject to mortgage, of a property known as 'Property X'. This became the matrimonial home. At the time of separation, it was worth somewhere between £270,000 and £295,000 and the interest only mortgage was in the order of about £210,000 - £220,000.

28. W had also owned a property. It was not totally clear whether the property had been sold prior to marriage or shortly after marriage. Nothing turns on that. Upon sale there was net equity of about £130,000.

29. At the time of the marriage W ran three shops. They were struggling and the landlord of one property appears to have attempted to forfeit the lease on it. There was litigation. Some kind of attempt at settlement was made, where W was offered £20,000 in full and final settlement. W was not happy with the offer and continued in the litigation, which she

appears to have then lost. It was H's evidence that the £130,000 was swallowed up in lawyers' costs and outstanding rent which W then had to pay.

30. W asserted that the £130,000 was paid into an account in H's name and that he has taken it and kept it for himself. H could not recall whether the conveyancing solicitor paid the money into his account or to W's, but he was clear in his recollection that it was eaten up as I have described.

31. He further stated that, contrary to W's case that the parties' pooled their assets, it was he who had unwisely sought to prop up W's ailing businesses by paying his income and savings to assist with rent and the costs of litigation. H said that at the time he was doing well with an IT job in the City and was able to afford to do so. He now regretted having done so as the businesses were failing and he was throwing good money after bad.

32. With the effluxion of time, I have no documents or bank statements which assist me either way on this point. As W alleges that H had taken a large sum of her money it was for her to prove this. W has been unable to do so in circumstances where I have found H to be the more credible witness.

33. Having lost the commercial litigation W, H said, embarked on a long campaign of doomed appeal attempts, which included some kind of attempted challenge to a European Court. All avenues of appeal have proved to be fruitless. I am told that W was later convicted of trying to cause damage to a court. W was remanded but later found unfit to plead and detained in a hospital until she was fit for her release. H suggested there was a civil restraint order barring her from making further applications in the civil courts, relating to her commercial dispute.

Domestic abuse incidents

34. When the parties were together, H's daughter from a previous relationship was about 8 and she would come and stay with H and W. W went to collect daughter from school but the daughter had apparently been lost in a book in the library. W was very cross that the little girl had not been ready for collection and was very angry with her and also with H upon her return to the matrimonial home.

35. As the evening progressed H thought that W had calmed down. However, at some point in the evening W took an old style VDU monitor and threw it on to the child's bed with her in it, causing the child to scream.

36. H rushed into the child's bedroom and a violent scuffle ensued as H sought to eject W from the girl's bedroom. He said that they ended up on the floor in their bedroom. H accepted that he had held W down. He said he was scared that she was going to further hurt his daughter. He said "I probably did threaten her" explaining this is the context of him saying that if she ever did anything like this again there would be a serious consequence. I accept H's account in this respect.

37. He did not need to volunteer that he had threatened W. That he did so speaks well of his attempts to be an honest historian before me. I accept he would have uttered any threat in the heat of the moment in circumstances when he had been provoked by a wholly unwarranted attack on his daughter. H also accepts that he may have hurt W in the incident. He did not need to be as candid as he was to describe the situation. Again, this speaks well of him. The police were called and W agreed to go and stay with friends. In the event no criminal prosecution ensued and the parties resumed their relationship a few weeks later.

38. There was a further occasion when H was subjected to an assault from W. W wanted £10,000 from H to invest in a parcel of land in a sub-divided field which H considered to be a scam. H refused to pay £10,000 and W then punched H in the face. His lip became swollen and it bled. H went to X police station. W was arrested and the relationship did not resume after this incident.

39. H did not provide any other details but said that W had hit him on other occasions. It was she who was the aggressor, not him.

Other relevant background history

40. During the course of the marriage, W's daughter from a previous relationship came to live with the parties. H has always remained on good terms with this lady who remained living with H at the former matrimonial home after the marriage ended. She still comes to stay from time to time and H said that the only good thing to come out of the marriage was his friendly relationship with W's daughter. H came across as a generous individual who was happy to provide free board and lodge to this lady as and when required.

41. Also during the marriage, W's nephew from AB Country came to stay. Again, H welcomed the nephew into the house. There was an initial suggestion of some board and lodge being paid by his parents this never materialised (or if it did, H never received any of it). H really did not seem to mind and spoke fondly of the nephew's stay. After the marriage broke down the nephew left the matrimonial home but then later returned to stay with H again. After a time, the nephew's visa ran out and he had to return to AB Country. H took him to the airport and spoke of a tearful farewell. He remains in contact with this man. Again, H appeared generous in his approach and happy to open his home and provide free board and lodge.

42. He spoke of happy times with the himself, W's daughter and nephew after the marriage had broken down.

The 2008 agreement

43. In about November 2008 the parties reached terms. H does not appear to have been enamoured by his then solicitor and wisely sought to avoid a final hearing.

44. With the value of the former matrimonial home at about, say, £280,000 and the mortgage being about, say £220,000 there was equity of about £60,000 odd before costs of sale were taken into account. The value may have been a bit higher (a mortgage valuation the following year suggested £295,000), but these figures explain well enough the rationale behind the deal. There was about £60,000 or so equity in the house.

45. H was content for W to take over the mortgage with a payment to him of £245,000. This would have left him with about £25,000 after the mortgage was cleared. He said he was content for her to have it at something of a discount. If she could not buy out within a reasonable period of time, then he was happy to pay her £30,000, reflecting "her share" in the former matrimonial home.

46. As the property had been his prior to the short marriage, it was not a given that there should be a broad equal division of the capital, but this was how the parties view fairness at the time.

47. H said that he also agreed to pay £45,000. The rationale for this appeared to be this is what W needed to pay some solicitors' costs at the time. He thought, but could not recall

precisely, that was the rationale behind this sum of money. He said this was after he had paid out a lot during the marriage in support of W.

48. After a short marriage it is not a given that a court would have ordered precisely this amount, but again, this is how the parties viewed fairness at the time.

The 21 January 2009 part payment

49. At [C28] in the bundle there is a signed receipt for the £45,000 which H paid on the 21 January 2009. It was a little late (a few weeks), but at this distance nothing turns on that. Clearly the parties were relying on and implementing the agreement at this point.

The 10 June 2009 agreement

50. At [C30] in bundle there is a letter dated 10 June 2009. It is countersigned by both parties. In it the parties agree that in final settlement of *divorce* [sic] H would transfer £15,000 into a trust in W's nephew's name and pay £15,000 in cash to W at her request.

51. H said that this was because W's failed commercial litigation risked and later caused W's insolvency and she did not want funds in her account which would be taken by creditors. By agreeing to pay £30,000 in this way the spirit of the 2008 agreement was satisfied whilst avoiding the risk of the money falling into the creditors.

52. The fact that this letter was signed on 10 June 2009 also suggests that at that time the parties were (a) continuing to abide by the 2008 agreement, and (b) were implementing option 2 in the 2008 agreement, namely H buying out W's interest rather than the other way around.

W's failure to buy out H's interest in the former matrimonial home

53. W never bought H out of the former matrimonial home. She says that this was not her fault.

    i. W refers to having obtained a mortgage offer of £200,000 and "Despite that, the applicant has refused to accept the property valuation and has refused to answer his telephone or respond to any letters from the bank. The application [sic] refusal to cooperate has resulted my application to fail."

ii. The order provided that W buy out H by no later than 17 November 2009. As I have noted, W provided to the court an Abbey mortgage offer dated 31 July 2009. The offer is for £200,000 and is based on a valuation of £295,000.

iii. In her oral evidence, W asserted that H failed to cooperate with allowing the property to be valued and that the Abbey mortgage offer was conditional upon there being such a valuation. Whilst W was giving evidence, the Abbey document was carefully scrutinised and W was unable to show in any part of the letter that it was conditional or that a further valuation was required. It is an offer with a valuation figure having been arrived at (whether by inspection or otherwise). The offer refers to the fact that any fees paid up to that stage are now non-refundable.

iv. W also said that she could easily have her then boyfriend to have paid the missing £45,000 to make the global amount up to £245,000. There is no contemporaneous evidence to support this assertion.

v. Given the inconsistency with her oral evidence and the Abbey mortgage offer, the court is not satisfied that W has proved, on the balance of probability, that she had an offer of £245,000 in place within the time agreed, or that H had obstructed the process.

vi. On the contrary, H said that he did not really care at the time if W took the house or not. In either scenario they were getting broad equality of equity out of the house. I accept that evidence.

vii. My views in this respect are burnished by the 10 June 2009 letter which suggests it was agreed that it was H who would buy out W for £30,000.

W's 15 May 2010 letter

54. H accepted that he had probably been sent the letter from W dated 15 May 2010. This was not in the bundle but admitted during the course of the hearing. He said he probably paid little attention to it as it was so wrong in many respects.

55. The letter asserts, *inter alia,* that:

i. H has failed to provide funds for her nephew's studies;

ii. H was physically abusive;

iii. Assets were pooled in the marriage;

iv. H was controlling, secretive and selfish about money in the marriage;

v. H poisoned the minds of W's daughter and nephew against W;

vi. The agreement (endorsed by the court) was "coerced from me by you on the basis that you promised to look after me for the result of my life, when I developed serious eye problems."

56. I do not accept any of these assertions:

i. H never agreed to pay for W's nephew's studies. He was generous in offering board and lodge and friendship, but that is as far as it went. I accept that the 10 June 2009 letter refers to £15,000 in trust for the nephew, but it makes no reference to education. H stated that W kept changing her mind about things and then the nephew's visa ran out. It made no sense to set up a trust for him, which H did not think would be of any use to him once in AB Country, due to currency controls. Also, the nephew's studies were in the field of improving his English and £15,000 would have been way over the top of those costs. So, whilst I accept that no trust was ever set up as agreed, I do not accept that H ever agreed to pay for W's nephew's educational costs.

ii. I do not accept that H was physically abusive. I heard about two incidents which I accept were a limited snapshot. However, on both occasions it was W who was the aggressor (and both in unusual and entirely unprovoked circumstances). On the balance of probabilities there is simply no evidence that H was ever violent, beyond that which he volunteered and explained to this court (and which I find to have been in the nature of self/his daughter's defence in the heat of an unprovoked attack by W).

iii. There is no evidence the assets were pooled in the marriage. The evidence, such as I can piece together, paints a picture of W's shops failing with H trying to help prop W up in this regard and with respect to her ill-fated commercial litigation dispute.

iv. I do not find that H was controlling, secretive or selfish with money. On the contrary, H came across as a kind a generous individual who had tried to support his W and gladly provided free board and lodgings to young adults from W's side of the family, even after the marriage had broken down.

v. I have no evidence that H poisoned the minds of W's daughter and nephew. H stated that he encourages the daughter to visit her mother. I accept that. The nephew originally left the matrimonial home on the breakdown of the marriage but later returned of his own volition.

vi. The suggestion of a coerced agreement based upon H's promise to care for W for life is also not founded in reality. H gave evidence that W became unwell and it was feared for a time that she may become blind. After the marriage break down H had gone to a medical appointment, largely to support W's daughter who in turn was supporting W. When the news appeared grim, H accepts that he did say something along the lines that W would be able to come and stay with him for a time. However, he says that a kind gesture made when W was in a low place has been twisted in the letter. Logically, why would someone who is separating offer to look after their ex-partner for life? Further, to the best of H's recollection, this episode occurred after the 2009 agreement had been reached. I do not accept this aspect of W's letter.

57. The 15 May 2010 letter, which appears full of W's perceived grievances at the time, is notable for what it does not say. There is no reference to H having taken £130,000 of W's money. This contemporaneous omission casts further doubt on the allegation now made about this sum in 2022.

The intervening years

58. The years have rumbled on with situation never being finally resolved.

59. H says W has suffered recurring bouts of poor mental health and his forbearance has been kindness rather than simply drift.

60. It remains the position that W has not made any application to resolve matters once and for all.

The law

61. As I have described above, I consider that I am not confined to a "liberty to apply" or indeed *Dean v Dean* application, but that the Form A allows me to fully consider the settlement afresh in 2022, albeit with the 2008 agreement weighing heavily in the discretionary scales.

62. I must consider s.25(2) of the Matrimonial Causes Act 1973.

63. The shortness of the marriage is a material factor (s.25(2)(d)).

64. In the 2008 agreement, it appears that the only matrimonial asset (or matrimonialised, it having been H's prior to marriage) was the home which was agreed to be shared equally. Each came into the relationship with other assets which neither were bound to share with the other save by reference to needs. The parties agreed a figure of £45,000 beyond the basic sharing of the house equity, which was approved by a district judge.

65. Applying the well traversed authorities in the area of matrimonial agreements (*Radmacher v Granatino* [2010] UKSC 42 being the most authoritative), 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 the agreement.

66. The court can also factor in delay. The authorities (e.g. *Briers v Briers* [2017] EWCA Civ 15) are clear that the effluxion of time may reduce the potency of a previously otherwise forceful claim, even if as a matter of law there is no limitation period.

67. There has been very significant delay in this case, but when weighing that I also bear in mind that some part of the delay has been caused by W's mental health difficulties, which in fairness should not be held against her.

68. I also note the case of *AR v JR (Financial Remedies)* [2018] EWHC 3626 (Fam), [2019] 1 FLR 919 where Cohen J was faced with an application for financial remedies in divorce proceedings, following a financial order which had been made in previous judicial separation proceedings.

69. The facts and scale of wealth are of a wholly different order to this case. However, one feature of note is that the specialist legal teams in the judicial separation proceedings did not provide for the financial order within those proceedings to be in full and final settlement of any financial matters arising out of a divorce. Cohen J placed weight on this factor in determining the treatment of a subsequent application for financial remedies in later divorce proceedings.

70. In this case, H was baffled as to why there were judicial separation proceedings rather than divorce proceedings back in 2008. He even wondered, as I have noted, if this might simply have been a mistake.

71. There is confusion in the 2008 agreement order, which provides for income and capital clean breaks and dismissal of pension sharing order claims. These are not powers available to the court on judicial separation.

72. Further, the 10 June 2009 letter refers to an agreement "…to finalise the *divorce* settlement between ourselves…" (my emphasis). Unlike *AR v JR* the parties in this case did appear to be intending for there to be a final settlement, albeit I accept the position is somewhat confused given that this was purported to be done in judicial separation proceedings.

Section 25 factors.

73. I turn now to the factors set out in s.25(2) of the Matrimonial Causes Act 1973.

    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 which it would in the opinion of the court be reasonable to expect a party to the marriage to take steps to acquire;*

        i. H is retired and in receipt of about £22,000 net per annum from pensions. I do not know the capital value of his pensions but given the facts of this case and the shortness of the marriage and the effluxion of time since the 2008 agreement, I do not think it is proportionate for me to even attempt to make an assessment of the capital value.

        ii. H says the former matrimonial home is worth about £525,000 and now subject to a mortgage of about £212,000. With 2 - 3% costs of sale there is roughly just shy of £300,000 equity in the property.

        iii. H also has about £203,752 in savings

        iv. W is in receipt of Universal Credit. I doubt that she will ever work again. W does not appear to have debt and has a modest balance of £2,000 in her current account. W appears to be living within her means.

v. W lives in a council property for which she has security of tenure and a right to buy with a level of discount attached to that right. Her housing needs are met, although she would like to be able to buy the property with any settlement the court may award.

vi. H said that W has property in AB Country. W denied this but went on to give a confusing and unsatisfactory explanation of what resources may be at her disposal. W stated that she intended to visit AB Country in the near future and would ultimately return to AB Country. She said at first that her mother would provide for her. In cross-examination she readily accepted that her mother had already died and stated that she meant her mother's estate. She denied any outright entitlement to property/inheritance but said that her younger brother would look after her if that was what her mother wished. She said she had not spoken to her brother about this. H said that W has an interest in a property which is rented in AB Country and that her sister retains the rents which has been used to purchase a property on the coast in AB Country. W denies this. Given that W has not fallen into debt, despite being in receipt of Universal Credit, it may be that W is already in receipt of some family support or inheritance. I do not have the material on which to make a finding. I doubt that with any procedure it would be possible to get to the bottom of all of this. The best I can do is say that I am satisfied, on the balance of probabilities, that W will have resources that will assist with living and housing costs when she chooses to return to AB Country, which she will do at some point.

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.*

i. Each party is a single person with a need for a home. This does not necessarily need to be privately owned accommodation and W has lived in council owned accommodation for long enough to have acquired a Right to Buy entitlement with a discount attached to it.

ii. Neither of them have responsibilities beyond themselves and each appears to live according to their means.

c. *The standard of living enjoyed by the family before the breakdown of the marriage.*

i. Given the effluxion of time since separation and the fact that the marriage was short in duration, I do not consider this factor to have particular potency.

ii. The parties have each had many years to settle into a new standard of living.

d. *The age of each party to the marriage and the duration of the marriage.*

i. The marriage was short in duration. Beyond any possible sharing claim relating to the matrimonial home (which the parties factored into their 2008 agreement), the shortness of the marriage and lack of asset pooling/mingling means that W's claims to H's other assets are limited to needs.

ii. Needs are an elastic concept and I am entitled to bear in mind the shortness of the marriage when considering what needs are casually related to a relationship.

iii. I am very mindful that each party is either at or very close to an age when they might legitimately hope to retire. The potential significant capital value of H's pensions, relative to other assets in the case, are not lost on me. However, I simply do not find it helpful to delve into this following a short marriage. It cannot usually be right that a wife can make a significant claim to her husband's pension after such a short marriage. Still less so when there has been a very long delay before claims are resolved by the court. Especially in circumstances when the parties appear to have agreed a settlement back in 2008.

e. *Any physical or mental disability of either of the parties to the marriage*

i. W has suffered with mental health difficulties for many years but retains capacity to conduct this litigation.

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.*

i. This was a short marriage. Finances were not pooled. H's home became the matrimonial home.

ii. H provided W with some significant level of financial support for her business and her commercial litigation.

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.*

i. Neither party has urged conduct upon me and nothing I have heard would justify this being weighed in the scales in this case.

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.*

i. Upon the granting of a decree absolute at the conclusion of the divorce proceedings W will lose any widow's entitlements she may have in respect of H's pensions.

The magnetic features to this case

74. The magnetic features to this case, in my judgment, are threefold:

i. A short marriage.

ii. An agreement made in 2008, which the parties appeared to consider to be a final settlement at the time (even if that was not possible as a matter of law within judicial separation proceedings).

iii. Delay in the bringing of any further financial remedy proceedings (although the effect of this is somewhat dampened by the fact that I accept that W's mental health difficulties may have made it more difficult for her at some points).

75. I have not read or heard any compelling needs' based evidence. W said that whilst she had security of tenure in her council property, she would like the opportunity to buy it. In the particular circumstances of this case this seems more like a want rather than a need to me. Looking to the future, W will either rely on welfare benefits to provide an income or, more likely, she will return to AB Country and draw upon her family's resources in AB Country, as I have already outlined above.

Analysis and order I propose to make

76. I remind myself that I should give effect to the parties' agreement unless in the circumstances prevailing it would not be fair to hold the parties to their agreement.

77. Having carefully weighed all the circumstances as described above, the only reason why I do not consider the parties should be held to the agreement is due to the passage of time and the change in the value of money. I consider that H's offer of £10,000 to uprate the £30,000 is not enough in the circumstances.

78. I would prefer to look at what the £30,000 was a percentage of the gross value in 2008 (say 30/280 = 10.71%) and then apply that to the gross value of the property in 2022, which I am told is in the order of £525,000, making the 2022 figure £56,227.

79. In all the circumstances, I propose to round that up to £60,000 which is to be paid in full and final settlement of all claims within 28 days of the making of this order.

80. I am mindful that this will not be enough to buy her council property, but as I have already said, I do not think that she needs to do so.

81. I am well aware that the receipt of such capital not intended for the immediate or near immediate purchase of property will have an adverse effect upon her Universal Credit claim. I cannot help that. It is right in principle that W should support herself with private funds if she has capital in excess of the Universal Credit limit of £16,000.

H's open offer

82. H made an open offer on 21 November 2021. In it he offered W the £30,000, uprated by £10,000 to take inflation into account. H stated that he had done this with a compounded interest calculation and that he had made generous assumptions in the hope that W would consider settlement.

83. H also offered a further £30,000 to avoid the costs of proceedings. The total offer was £70,000.

Costs

84. H made an open offer on 21 November 2021 which was £70,000. Part of the rationale was to avoid the costs of the final hearing. They have now been spent.

85. H's global costs amount to £30,990.10 and I have a Form N260 for the costs of the final two-day hearing which amount to £17,054.50.

86. As with her civil trial all those years ago, W would have done better had she accepted the offer which was made to her.

87. By FPR 28.3(5) the usual order in an application for a financial remedy is that each party bears their own costs.

88. However, by FPR 28.3(6) the court may depart from this presumption "… where it considers it appropriate to do so because of the conduct of a party in relation to the proceedings."

89. At FPR 28.3(7)(b) the court is directed to consider open offers to settle.

90. I also have in mind PD28A paragraph 4.4 and 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."

91. W's refusal to engage openly with H's open offer might ordinarily result in a full costs order.

92. However, here costs may have been unnecessarily incurred by the absence of proper procedure having been followed. Had a standard track application been made the parties may have had their respective cases subjected to an evaluation at FDR which may have assisted in settlement. This opportunity was lost by reason of H following the wrong procedure.

93. I am also mindful of W's mental health difficulties, albeit that she has capacity to litigate.

94. By FPR 28.3(7)(f) I am also enjoined to look upon the financial effect of any costs order.

95. Here I am aware that my substantive order will disentitle W to her Universal Credit until she is back below the £16,000 capital limit.

96. Given that on the question of costs I am expressly enjoined to look at the financial effect on the parties, I am minded to make a £5,000 costs order. This reflects the factors I have set out above and will simply mean that W will be back at her Universal Credit limit sooner than she otherwise would have been.

97. I propose that the £5,000 costs order is set off against the £60,000, reducing it to an overall lump sum of £55,000 to be paid (expressed as £60,000 with a £5,000 costs' set off).

98. This is my judgment.

Recorder R Taylor

18 November 2022