Case No: NP20D02617

IN THE FAMILY COURT
SITTING AT THE ROYAL COURTS OF JUSTICE

NCN: [2022] EWFC 27

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31/03/2022

Before:

SIR JONATHAN COHEN

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Between:

Amanda Judith Traharne	**Applicant**
- and -	
Christopher Limb	**Respondent**

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- -

Justin Warshaw QC & Charlotte Proudman (instructed by **Kingsley Napley**) for the **Applicant**
Richard Bates (instructed by **Lux Family Law**) for the **Respondent**

Hearing dates: 28 Feb – 3 March 2022

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Approved Judgment

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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. 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 have heard over 4 days the wife's ("W") application for financial remedy orders. The husband ("H") had applied for W to show cause why she should receive any award in excess of the terms of the post nuptial agreement ("PNA") entered into by the parties on 4 November 2018 but subsequently modified his case to argue that the PNA was a "magnetic factor".

2. This is not a big money case. The total assets of the parties are only a little over £4m. They have been severely depleted by the wasteful expenditure on costs and the misconceived steps taken by each of them in this litigation, so that the total costs incurred exceed £650,000.

3. W's case is that she was subjected to coercive and controlling behaviour perpetrated by H which had the consequence that she was unable freely to enter into the PNA. She says that it should be afforded no effect.

4. She argues by way of fallback position that:

    i) The agreement does not in any event meet her needs; and

    ii) She has a sharing claim in the same value as her needs claim so that if I were to assess her needs at lower than the sum she claims, her sharing or entitlement claim would prevail.

5. H denies all the allegations made by W. He points out that W made the running and largely dictated the terms of the PNA. He argues that she should be held to it.

6. He further argues that the PNA properly meets her needs but that if I were to take a different view, her needs award would be small. He denies that she has any entitlement claim.

7. As I made clear during argument, it seemed clear to me that the PNA did not meet W's needs, which was unsurprising as it was negotiated against the backdrop of a reconciliation which had already been implemented and left the issue of pensions unresolved. Mr Warshaw QC, appearing with Ms Proudman for W, responded that if only H had taken that view the matter could have been dealt with in half a day before a district judge. Whilst that time estimate might have been optimistic, it illustrated how this litigation has lost focus.

<u>The parties</u>

8. W is aged 59. She has 4 children by her first marriage, this being a second marriage for both parties. She is by occupation a film maker. Both prior to her marriage to H and following its breakdown, she has lived at her home in Wales.

9. She has a relevant medical history. She has been assessed at the end of last year as suffering from Complex PTSD ("CPTSD") and a depressive disorder. It is material to note that at the end of both her first marriage and a subsequent relationship she suffered from reactive depression.

10. H is aged 68. He retired from practice as a barrister in August 2021. He remains in part-time employment. He lived before this marriage in his former matrimonial home about 1.5 hours away and he remains living there now. He has two grown-up children by his first marriage.

11. The parties met and began a relationship in 2008. They commenced cohabitation in summer 2012, when W moved into H's home. She was accompanied by her 3 youngest children, who were all in education.

12. The parties married on 6 January 2013. Both had considerable doubts about the prospective marriage and there had already been arguments and an incident between the parties, to which I will return. They had each both separately seen and confided in a priest.

13. In summer 2013 W purchased a small home and moved there with her youngest daughter. She says that her primary reason was H's intolerable behaviour and that her daughter's unhappiness in her new school was only a secondary motive. She could not move back into her former home because that had been rented out. Her middle two children remained living with H in his home and attending school locally. The parties continued to spend weekends together, normally at H's home, and during the school holidays W returned to his home. This situation continued until summer 2016 when W moved back full-time to H's home.

14. There was a further separation in early 2018 and W petitioned for judicial separation. The judicial separation application was never progressed and was ultimately dismissed on 22 July 2020.

15. In May 2018 the parties entered into negotiations in relation to the execution of a separation agreement. As time went on the parties ultimately instead executed the PNA on 4 November 2018. Notwithstanding these legal manoeuvres, the parties had in fact reconciled to the extent that W resumed her residence with H in June 2018.

16. They remained living together until either February or March 2020. There is a minor disagreement between the parties on a number of dates but none of them make any difference to the outcome of the case.

17. On 22 July 2020 W issued her divorce petition and the Form A followed on 13 October 2020. That was countered by H's notice to show cause application on 25 November 2020. A decree nisi was pronounced on 10 February 2021 and the decree has not yet been made absolute.

The proceedings

18. There have been a large number of interlocutory hearings. The first appointment took place before Mostyn J on 5 February 2021. Paragraph 14 of the order reads:

> "The applicant confirms that issues of conduct are relevant only to the question of whether or not she freely entered into the [PNA] with a full appreciation of its implications".

19. The directions made included the appointment of Dr Clifford as a single joint expert to give her opinion:

"a) As to whether the applicant was subjected to coercive and controlling behaviour in 2018 during the period in which the separation agreement/post nuptial agreement was negotiated and signed; and if so

b) What the impact of such behaviour would likely have been on the applicant's psychological state, specifically (but not limited to) her mental freedom to enter in freely into that agreement".

20. For various reasons, caused largely by the failings of W's then solicitors, the expert's report was not progressed and subsequently Dr Jones was appointed in place of Dr Clifford.

21. At a pre-trial review on 2 February 2022, Mostyn J directed that W serve a schedule of the findings sought by her and which she said should be determined at the final hearing and the respondent should file his response. In her schedule dated 10 February 2022, W set out that she seeks the following findings as to the controlling and coercive behaviour she says she was subjected to by H:

i) Verbal abuse, shouting and screaming including threats of physical violence;

ii) Denigration, belittling and demeaning W to make her feel subordinate;

iii) Financial control to make W feel dependent on H;

iv) Ignoring, sulking and withdrawing affection if W refused to do as she was instructed, including to have sexual intercourse with H;

v) The behaviour described at iv) above was then followed by showering W with affection and gifts when she did bend to his will (known as 'love bombing');

vi) Gaslighting her: refusing to acknowledge instances of physical violence or his coercive and controlling behaviour and suggesting that any concerns expressed by W were made-up so as to undermine W's own understanding of the abuse and to erode her sense of lived reality and personal autonomy, resulting in a distorted sense of reality according to him;

vii) Controlling the running of the family home, regulating her everyday behaviour and coercing W into how exactly to run the family home and limiting W's ability to live freely in the home;

viii) Control of W's life and time outside the home including persistent requests for W to allow the respondent to place a tracker on her phone, not allowing her to have hobbies or attend clubs (despite him doing so) as he said this took time away from him, and not allowing her to do anything which she had not sought his prior approval for by noting it on a shared calendar in the kitchen of the family home;

ix) Restricting W's contact with her wider support network, limiting or controlling interactions, telling W that her family and friends didn't care about her, telling

W that she must not discuss their relationship with any third parties and restricting W's access to her mobile phone;

x) Discouraging W from attending her church in order to restrict her time away from H, limit her independence and isolate her from a source of support;

xi) Pressuring W to drink alcohol with him, even when she indicated that she did not wish to, and putting pressure on W to not eat her supper until he was also ready to do so, regardless of how late he returned home from work or how hungry she was;

xii) Restricting W's ability to travel, especially to visit her family and friends by discouraging her from doing so and then, if she did, ignoring her or criticising her for doing so on her return resulting in her feeling intimidated, downtrodden and low in confidence;

xiii) Driving recklessly with the aim of scaring and intimidating W if she disagreed with him or made mistake when giving the respondent directions; and

xiv) The above behaviours were all exacerbated by H's heavy drinking.

22. H's response was to deny the allegations and to argue that it mattered not whether they were true as there was no causal connection between the allegations and W's state of mind at the time that she negotiated and entered into the agreement. He argued that W entered into the PNA freely and with a full understanding of its implications.

23. On the first day of the hearing, I was required to deal with various preliminary issues including:

i) Further participation directions. Mostyn J, as the allocated judge, had directed that the hearing should take place remotely. At the pre-trial review, W had confirmed to the judge that she was content for H to be able to see her on screen giving her evidence but by the time of the final hearing she had changed her mind and said that she was worried about giving evidence in front of him. There was no satisfactory explanation for this development. Nevertheless, it seemed to me that H was not unduly prejudiced if he could hear but not see W and I particularly bore in mind that if this had been an in-person hearing, W would in all probability have been screened from H. I therefore acceded to W's request that H be not permitted to visually observe her evidence. In addition, I agreed to allow W a break when she wanted and the court took a break at her request approximately every 45 minutes during her evidence; and

ii) Mostyn J had permitted W to call as a similar fact witness a previous girlfriend of H. However, notice of her intended calling was given by W excessively late and the judge prohibited W from relying on the evidence if she was unable to make the former partner available. Just a few days before the final hearing began, W served a long statement from the witness containing a whole raft of new allegations. I refused to admit that statement or to allow evidence to be given of its contents as it was thoroughly unfair to H as he had been deprived of the opportunity to call evidence in reply. I gave W the opportunity of applying to adjourn that part of the evidence if she so wished, but no such application was

made. Accordingly, the evidence of that witness was confined to those matters which had been raised in W's section 25 statement in November 2021.

The law

24. The starting point of the law on agreements is the well-known case of Edgar v Edgar [1981] 2 FLR 19 where at page 25 Ormrod LJ said:

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.

25. The Edgar approach was approved by the Supreme Court in Radmacher v Granatino [2010] 2 FLR 1900 where Lord Phillips said at paragraph 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.

26. I have been asked to consider whether coercive and controlling behaviour, if proved, falls within the pre-existing Edgar criteria or whether it represents a new category of circumstances which can vitiate/taint an agreement.

27. In my judgment, Ormrod LJ's words are as relevant now as they were when uttered over 40 years ago. They stand the test of time. Coercive and controlling behaviour would plainly be an example of undue pressure, exploitation of a dominant position or

of relevant conduct. It would be part of all the circumstances as they affect the two parties in "the complex relationship of marriage". If Ormrod LJ were writing his judgment today, he might have employed words such as "coercive and controlling behaviour".

28. The parties agreed that in considering the allegations of behaviour I should approach the matter in this way:

    i) H's behaviour to fit within the definition of coercive and controlling behaviour must objectively meet that description. It was immaterial whether he intended his behaviour to have an effect on W; the test for the court is whether objectively his behaviour was coercive and controlling; and

    ii) Subjectively, that same behaviour must have the effect on W of depriving her of the ability to enter into the PNA of her own free will.

29. I must look at the allegations in a broad, holistic manner. They are, to the extent that they are proved, part and parcel of a course of conduct. I cannot avoid looking at the allegations individually so as to determine their veracity, but I do not lose sight of the purpose of the exercise which is to assess W's state of mind when entering the agreement.

30. Although pleaded very widely as set out at paragraph 21 above, the evidence that I heard was confined to certain specific areas. Some of the allegations were not pursued and some were not supported by any evidence. Others were the subject of close examination. I now turn to them.

<u>The allegations of coercive and controlling behaviour</u>

31. <u>Physical violence</u>: There were a number of specific incidents on which W relied, both for what happened by way of incident, but also as examples of H's temper and lack of control:

    i) In December 2012 the parties had an argument relating to the very recent death of H's mother. W was in bed under the bedclothes and H was sitting on the bed undressing when in frustration (as he says) he brought his hand down on the bed from on high, holding the shoe or shoes which he had just taken off. In doing so he hit W's leg which was under the covers. It was a forceful blow. W did not seek any medical advice but reported it to the priest and a Women's Centre recorded bruising. She has described it as inadvertent and I do not think that H intended to hit her, but he was plainly reckless in what he did. It was this event that led both parties to question the forthcoming marriage;

    ii) In March 2013 in the course of another argument, W threw a cup onto the floor in exasperation, whereupon H took hold of some books and threw them in the air. One of them hit W on the head leaving an abrasion and bruise and at hospital she was also diagnosed with concussion. W agrees that the books were not thrown at her but once again, I find that H was reckless. I agree with W that on each occasion he showed a temper which should have been controlled;

iii) In March 2017 W says that she ruffled H's hair as she was walking past him, and that he then grabbed her arm and twisted it. There were others present whom she would have expected to have intervened if they had seen it. There is scope for the twisting being accidental as she was walking past as he took hold of her arm. H has no recollection of the incident. No injury was sustained. I accept that it happened, but I do not find that it was a cause of any deliberate or reckless injury; and

iv) On 25 March 2018 there was a further argument which resulted in H grabbing the duvet from the bed and marching off downstairs to sleep on the sofa leaving W naked on the bed.

32. The clear impression that I have is that this was a relationship that at times was tempestuous and that H would on occasions lose his temper. W says that they had major arguments about once a month. I do not accept that W was in fear of physical harm. There was no reason for her to be and she expressly told the police that she did not have such a fear. I do accept that the arguments and H's temper during them caused her distress.

33. With hindsight it is not difficult to see how these arguments came about because the parties are of very different character. H has the louder voice and speaks at length. He loves conversation and vigorous debate. W on the other hand is quieter, she retreats from confrontation, and bottles things up. She does not enjoy verbal jousting but dealt with her complaints of H in long accusatory emails. Each was capable of intensely frustrating the other.

34. W said that her complaint about H's behaviour was more of what she describes as his emotional treatment of her than his physical treatment of her or any perceived risk of violence. I accept that this was her perception.

35. Control of daily life: W says that H controlled where she went and what she did. She accepted that he never stopped her doing what she wanted, although he might 'send her to Coventry'. When pressed, she could not give any example of an activity that he stopped her doing, but said that he frowned on them. I see nothing controlling in H's request that W mark on the big calendar hanging in the kitchen when she was going to be out, as did H. This did not amount to her requiring his approval, but simply enabled each to know when the other was to be in or out.

36. There was no evidence of H restricting W's contact with family or friends or seeking to keep tabs on her. The allegation that he sought to put a tracker on her phone was a complete misunderstanding. She had twice lost her phone and H simply passed on a suggestion made by one of his children that she install a "find my phone" app.

37. Finances: Once again, although the allegation is made, there is no evidence at all of H seeking financially to control W. The parties always kept their finances separate. H paid for all the expenses of his home and when they were together. W ran her own finances and looked after her homes and their lettings. W accepted that H was supportive of her attempts to set up her own film business and provided her with financial support during the 2018 separation.

38. Drinking: I accept W's complaint that H on occasions drank more than she approved of, and that he should have given weight to her feelings. Midweek he would abstain or have a modest amount of wine in the evening but at weekends and when in company and not driving he might over the course of an evening consume a bottle of wine. He accepts that this might make him louder than otherwise would be the case. W says that the various incidents created an intimidating and threatening home environment. W says that there was a cycle of argument: cold shouldering; being 'sent to Coventry'; love bombing; and making up, all conducted by H.

39. W became convinced that H suffered from alcoholism, anger management issues, and Asperger's syndrome. To show that he was not dependent on alcohol, H volunteered to and did abstain from alcohol for a month. I find that there was never any evidence of him being dependent on alcohol. Likewise, there has never been any evidence that he suffers from Asperger's or any similar such condition.

40. Dr Jones cast helpful light on these accusations. She explained that W was desperate to remain in the relationship with H and in order to rationalise that, she created the scenario whereby H suffered from a condition from which she could help him be 'cured' and thus rectify what she saw as the defects in their marriage. This intense desire to retain the relationship explains a lot of what happened when the separation agreement and PNA were being discussed in 2018.

41. Following the incident on 25 March 2018, W left H's home and consulted solicitors. It is absolutely clear from the solicitor's file that:

    i) It was W who made the running in the negotiations with H;

    ii) She set out what she regarded as her essential terms, namely the clearing of the mortgages on the two properties that she owned;

    iii) She was the one who took the lead in the change from there being a separation agreement to a post nuptial agreement;

    iv) She was well advised throughout by her solicitor who had said that:

        a) She should not enter into an agreement without there being full disclosure; and

        b) The agreement would not be in her interest particularly if the marriage were to endure for many years.

42. I would not have found the absence of disclosure to be a vitiating factor. W knew what assets H had and that he was relatively speaking a wealthy man. H had expressed disinclination to file a Form E, as he had been requested, but there is no suggestion that he had failed to answer any questions put to him about his means. The solicitor's second reservation about the agreement was well founded. So concerned was the solicitor that she required W to sign a disclaimer.

The post nuptial agreement

43. The post nuptial agreement recites the following which are particularly material:

Recitals

3: The parties have reconciled their differences and agreed to stay the [judicial separation] *proceedings on the basis that*

a) *The parties will engage in marriage guidance and counselling;*

b) *The husband has paid £10,000 to the wife to enable her to relocate [this was in the early days of their separation]*

c) *The husband has discharged the mortgage of £83,000*

d) *The parties will spend the majority of their time together at the former matrimonial home which will be their principal dwelling but the wife will also maintain her own dwelling.*

7: Each party acknowledges that they are entering into this agreement of their own free will.

8: For the avoidance of doubt, it is confirmed by the wife and the husband that they have signed this agreement without there being full disclosure of the parties' financial position…

Agreement and declaration

2: It is agreed between the parties that the husband shall within 28 days discharge the mortgage on (W's second property) …

4: The parties agree their claims for financial provision and property adjustment orders do stand dismissed and neither the husband nor the wife shall be entitled to make any further application in relation to the marriage under the Matrimonial Causes Act 1973 section 23(1)(a) or (b) or section 24.

44. W said that her priorities in the negotiations were:

i) To be financially secure;

ii) To be safe;

iii) For the parties to get back together again; and

iv) For the parties to engage in couples' counselling.

She was satisfied that the PNA financially met these priorities.

Dr Jones

45. Dr Jones is a forensic and chartered psychologist. She explained the difference between PTSD which is particularly associated with single events of trauma and CPTSD which is characterised by difficulty in regulating emotions and low self-esteem which is likely to be the consequence of a combination of events rather than a single occasion. The sufferer of CPTSD is likely to find it hard to manage events.

46. In this context it is important to note that W had at least 2 or, as it was sometimes put, 3 bouts of reactive depression following the breakdown of relationships.

47. Dr Jones explained that previous life events are predisposing factors to a further relapse. A further relapse becomes the more likely the more events that there have been in the past. Potentially, a lesser trigger could set off the symptoms particularly if the new life experience replicates previous ones.

48. This is plainly a very important piece of evidence in understanding W's state of mind at the time the agreement was signed.

49. W's religious faith is important to her and placed further demands on her to stay within the marriage. Her desperation to maintain the relationship is to be contrasted with what she was told and probably knew to be in her best interests. To put it another way, her need to maintain the relationship eclipsed her cognitive understanding.

50. Dr Jones explained the limitation of the exercise she was asked to carry out. The main challenge in the assessment that she was asked to do, namely to cast light on W's state of mind when the PNA was signed, was the lack of information. Working with one party alone, and she never spoke to H, made her reliant on that party's account. Her assessment of W was carried out on the basis that everything that W said was correct. It is for me as judge to determine whether in fact her account is accurate.

51. Dr Jones thinks it likely that the diagnosis that she has made in 2021 was one that would have been valid in 2018. Of course, she cannot know with any certainty how W was in 2018 as there was no assessment carried out then. Dr Wood in September 2020 diagnosed W as suffering from PTSD rather than CPTSD. At about the same time Dr Green diagnosed PTSD and a co-morbid recurrent depressive episode of moderate severity.

Drawing the threads together

52. I am satisfied that at the time the PNA was negotiated and signed W was vulnerable by reason of her past experiences. She was desperate for the relationship to work for all sorts of reasons of which her faith was just one. She had invested a huge amount emotionally in this relationship and could not contemplate any other scenario. However, the pressure that she was under was self-created.

53. H's behaviour is relevant only as to whether it led to W entering into the agreement. I do not find that H's behaviour can objectively be described as coercive or controlling or that it led to her entering into the PNA. To put it another way, whilst W's psychological makeup and previous history of relationship breakups had deprived her of being able to make a rational and considered decision as to what was in her best interests, this was not caused by H's conduct.

54. I very much regret that so much energy has been devoted to exploring this subject. The emotional and financial consequences on the parties has been considerable. It has also been entirely unnecessary.

55. In my view it is clear that this agreement did not adequately meet W's financial needs. H's argument that it put W into a far better position than she had been before the parties

were married is valid but only insofar as it goes. True it is that W having signed the agreement had the benefit of (a) her main property with its mortgage of £83,000 paid off and (b) the small home that she purchased in 2013 mortgage free when H had discharged the mortgage of £53,000. That meant that she had a rental income from that property of some £7,000pa gross of expenses and tax which she had not had before.

56. But, whilst the agreement provided for the meeting of W's short-term needs, provided her earned income held up, it failed to enable her to meet long-term needs. Once her working days were over, W would have been left with her rental income, her state pension and a pension from employment of some £6,000pa net. This was not an adequate provision for someone who had been for the best part of 8 years (summer 2012-March 2020) the wife of a relatively prosperous professional person and did not enable her to meet her needs at much more than a near-subsistence level.

57. H at the time seemed to have accepted this. The parties discussed H providing by will for W from his pension fund in the event of him predeceasing her, which actuarially was likely. He had agreed to take advice from his IFA, but he says that he was later advised that such provision was not possible, although he could not recall why.

Matrimonial acquest

58. W's case on this is unsustainable. Nearly all the valuable assets that H owns were purchased before the parties began to cohabit. During the marriage he purchased two relatively modest investment properties, one of which was funded by his share of his mother's estate and the other largely if not entirely from pre-existing savings.

59. W's assertion that because she moved into H's property and resided in it as the matrimonial home for some of the period between 2012-2020 and because she visited his holiday home in France for short stays between 1-3 times a year she is entitled to share in the value of those assets, is in my judgment mistaken. She does not suggest that she made any direct or financial contribution to either property.

60. There is no evidence of H's assets increasing in value during their marriage; indeed, the sums spent on costs in these proceedings which have largely been funded by H would have been likely to eliminate any increase in value.

61. The one asset that can be shown to have increased in value is the capital value of H's pension. W will share in that growth by way of pension share.

62. On the other hand, W's capital position has undoubtedly improved as a result of the marriage. H has provided her with the funds to redeem the mortgage and she has her investment property which is now worth £110,000 mortgage free which she did not have before, albeit that she paid the deposit of some £35,000 from her own resources. Of course, H spent weekends at that property too and so on W's argument H should logically be entitled to a sharing interest in them.

63. I therefore reject W's sharing claim but insofar as she does have a claim, it is clear that it would be outweighed in value by her needs-based claim.

Other evidence

64. In reaching my conclusions as to the evidence, I have taken into the account the evidence of the witnesses who I did not hear as well as that of H's former partner. I have to say that I did not find any of the other witnesses (other than Dr Jones) to be of material assistance. They all confirmed that there were difficulties between the parties. H's former partner, plainly and self admittedly a lady of very strong character, claimed that H tried unsuccessfully to control whom she saw and what she did in the short time that they were together between about 2002-2003. Insofar as H may have exhibited such conduct it plainly had little effect upon her. The other witnesses did not advance the matter any further than I have mentioned.

The parties' open offers

65. The open negotiations can be summarised as follows:

    i) On 20 January 2021, H offered to pay a lump sum of £75,000.

    ii) On 21 June 2021, H offered to pay a lump sum of £375,000. At that stage W's outstanding costs were said to be something in excess of £30,000, so that the offer would have been worth some £340,000 to her.

    iii) On 8 July 2021, W sought a lump sum of £1,030,096 and a pension sharing order over 14.3% of H's SIPP.

    iv) On 19 October 2021, H offered to pay a lump sum of £465,091 to be reduced pound-for-pound with the amount paid by way of LSPO and MPS. Mr Bates, on behalf of H, calculated the net lump sum offered as being £305,685.

    v) On 2 November 2021, W sought a lump sum of £1,050,601 and a pension sharing order over 14.3% of H's SIPP.

66. The open offers above were all made on a clean break basis.

67. The parties did not modify their open positions during the course of the final hearing.

Assets

68. The parties have agreed a schedule of assets with only one small dispute for me to resolve.

69. W's capital: She owns her home, with a net equity of just under £400,000 and her investment property valued at £110,000 but subject now to a mortgage of £69,000 taken out to meet various liabilities and living expenses. From her evidence, it appears that about £40,000 of the mortgage monies was utilised towards living expenses and £30,000 on legal fees. It has a net equity of £33,000, giving W property assets of approximately £430,000.

70. W has liabilities totalling some £166,000 of which £155,000 are outstanding legal fees. For the avoidance of doubt, I do not include as a liability the costs order made in a small sum against W in October 2021 which will need to be paid from the award that I make.

71. W has a pension fund with a value of £193,000 which produces an income of £6,100pa net.

72. H's capital: H has property assets worth just under £1.1m. He has a little over £123,000 in bank accounts and has other investments worth some £907,000. I take H's figure for his likely realisable aged debt rather than its book value for the reasons that he explained, namely the very likely reduction in his outstanding CFA fees. He has outstanding legal fees of nearly £54,000 and other liabilities which take his total indebtedness to some £62,000.

73. It therefore follows that H has non-pension assets worth some £2.06m and his pension funds have a total value of some £1.513m.

74. W's current income is agreed to be just under £23,000pa comprising earned income from her film making business of some £12,000 and rental and pension income between them producing £10,900.

75. It is right to point out that W's earned income has fluctuated significantly, with her taking from her business anything between £0 and £23,000pa. Her business has recently obtained a contract to produce a film for £100,000 gross of expenses over two years. Whilst I accept that she is now taking £12,000pa, there is scope for this increasing.

76. H's total income is slightly more at the sum of £27,000 but with a likely rental income in addition and the capacity if he so wishes to increase his part-time earnings of £15,000pa which approximates to 30 working days a year.

77. The standard of living of the parties was comfortable without being in any way luxurious.

The PNA assessed

78. I ask myself the questions posed at paragraph 67 of Radmacher. First, were there circumstances that detract from the weight that should be accorded to the PNA. There seem to me to be three:

    i) The fact that the parties had already reconciled and so were not negotiating against the background of a separation;

    ii) W's need to keep the marriage going plainly impaired her judgment; and

    iii) The parties had left open the question of pension provision as an unresolved issue.

79. I ask whether there are particular factors that enhance the weight to be given to the agreement. There seem to me to be two:

    i) W proposed the terms of the PNA; and

    ii) W was satisfied that the PNA met her needs.

80. Applying the test set out in MacLeod v MacLeod [2008] UKSC 64, I ask whether "in the circumstances prevailing it would be fair to hold the parties to their agreement". I consider (as per paragraph 81 of Radmacher) that the parties are unlikely to have intended that their (in that case ante-nuptial) agreement should result, in the event of their marriage breaking up, one partner being left in a predicament of real need while

the other partner enjoys a sufficiency of wealth and that if this is the result it would be likely to be unfair to hold the parties to their agreement.

W's needs

81. In order to test the fairness of the PNA, it is necessary to assess W's needs. I start with her capital needs, excluding costs to which I shall return.

82. She has two small liabilities which need to be paid off. Servicing these debts is a poor use of her income. They are

Barclaycard	£4,593
Haford Energy	£7,155
	£11,748

In addition, I allow £10,000 for works on her home, bearing in mind that H has already provided a similar sum in 2018.

83. I delete from her capital needs the following:

i) The payment off of her investment property mortgage. I will return to this;

ii) The provision of a garden office. If W wishes to have an office in the garden, which she has never had before, then it is a matter for her to marshal her finances to achieve that;

iii) An element of the sum that she wishes to spend on her house. There is significant betterment and I have no evidence that the sums that she would like to spend are urgent; and

iv) A capital fund for replacement cars. The concept of requiring £80,000 for what might be 3 replacement cars over the rest of W's driving life when she has never spent more than very modest sums on used cars is excessive. Depreciation can be built into her budget.

84. Income need: W claims an income need of £51,600pa. It is obvious that this is far more than she has ever had available or spent at any time that I have been told of. Her budget is to that extent artificial. I have had regard to her Form E budget and have removed from it the repayments to Haford Energy, Barclaycard, her father and a builder who has since been paid which together total some £900pm. I also park the monthly sums claimed for long-term counselling and family therapy which together total £370pm. Taking those two totals off her Form E budget reduces it to some £3,000pm. This figure includes the costs of her car HP.

85. In looking at a budget, it is important to look at the context. On W's own evidence she has never at any time had a net income of near £3,000pm. I have no doubt that W can and will live at a lesser rate than this and still have capacity to meet the costs of any therapy that she needs together with any other unbudgeted expenditure without any significant diminution in the quality of her life.

86. The income in this case is now modest, with H having retired. It seems to me taking everything into account that W has an additional income need of some £10,000pa net until retirement. At that stage, she will lose her earned income but will receive instead her state pension and also a pension share.

87. When considering the pension share calculations that I have been given, I take W's retirement age as being 67, when she will reach state retirement age. Not only does that approximate to the date that H retired as a barrister, but it seems to me to be fair to expect W to work until that age. She loves her work and wants to continue with it.

88. At age 67 it is agreed that to provide each party with the same pension income of that part of H's pension which has been earned during their time together there would need to be a 12.1% share of the benefits accrued by H within the AJ Bell SIPP. The value of the credit is £165,284 which would produce W with £6,177pa. When aggregated with a state pension of £11,663pa W would have a gross pension income of £17,840pa. When added to her net rental income and private pension her income will total some £29,000pa gross or about £25,000pa net.

89. I have accordingly fed into the Capitalise programme calculations an income need of £35,000 pa, but with W having a gross income until retirement of £25,000pa and a net income of £25,000pa post retirement. This produces the figure of £191,513.

90. Putting to one side W's costs liability, I therefore assess W's needs as being

Income fund	£191,513
Capital requirement	£21,748
Pension share	£165,284
Total	£378,545

Costs

91. The disparity between the parties' costs is stark. H having paid almost all the expert fees has incurred costs of £257,255. W, without that expenditure, has incurred costs of £403,150. This is woefully excessive for what should have been a standard financial remedy case. She was attended at trial by leading and junior counsel and by a senior partner and an associate of her central London solicitors.

92. W told Mostyn J at the pre-trial review held very shortly before the final hearing that her costs incurred were some £230,000 with a further £151,000 anticipated. Even these very large figures were over £20,000 short.

93. I regard the sum expended by W as excessive for the following reasons

i) It is disproportionate both as between the parties when their costs are compared but also when compared with the value of the assets; and

ii) W's approach was misconceived. The conduct argument took at least two days of the hearing and it added nothing. Her sharing claim was unarguable.

94. I must also have regard to the parties' open offers. There is an obligation on the parties to negotiate reasonably as provided for in FPR, PD 28A at paragraph 4.4 which reads:

> *In considering the conduct of the parties for the purposes of rule 28.3(6) and (7) (including any open offers to settle), the court will have regard to the obligation of the parties to help the court to further the overriding objective (see rules 1.1 and 1.3) and will take into account the nature, importance and complexity of the issues in the case. This may be of particular significance in applications for variation orders and interim variation orders or other cases where there is a risk of the costs becoming disproportionate to the amounts in dispute. 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. Where an order for costs is made at an interim stage the court will not usually allow any resulting liability to be reckoned as a debt in the computation of the assets.*

95. I find that W has set her sights far too high. She has increased her claim rather than sought to mitigate it. H's offer is far closer to the mark that of W. W should have responded to what was a realistic offer in a constructive manner.

96. H is not exempt from criticism. His somewhat half-hearted reliance on the PNA was not realistic.

97. H has already paid under LSPOs the sum of £211,000 to W. It would not be fair in the light of the above to require H to (i) clear W's mortgage on the investment property or (ii) to clear all W's outstanding costs. I have already commented that rather less than half the outstanding mortgage was used to pay costs. In addition, I have assessed W's rental income after deduction of the costs of her mortgage. I therefore leave her with that debt.

98. I have decided that H should pay to W a further sum of £80,000 on account of W's costs. That will mean that H will have paid some £290,000 towards her costs.

99. I have of course looked at where this would leave the parties. W will have a liability to her solicitors of some £70-80,000. I cannot be more precise because (i) there is an unexplained discrepancy between the asset schedule and the Form H1; and (ii) W is seeking a refund from her previous solicitors. That W is left with a costs bill to pay is entirely the result of her prodigal expenditure on costs and her approach to this litigation.

100. I am satisfied that she can meet that liability, whatever it turns out to be. She will have the choice of dipping into her income fund or raising a mortgage of a similar size to that which she had before. Either way, I am satisfied that she can manage the debt.

101. I am equally satisfied that H can meet the payment required of him and it is comfortably within his means. He may regard himself as hard done by in having to contribute further to W's costs but there is no other way of meeting her needs.

102. I have looked at the matter globally and stepping back, I am satisfied that the outcome is fair given all the circumstances set out in this judgment.

103. The result therefore is that H will pay a lump sum of £293,261 plus a pension share of 12.1% of the SIPP benefits. He may offset against the lump sum the figure of £2,013 (if that be the agreed figure) pursuant to the order of 4 October 2021.

POSTSCRIPT

The parties have agreed redactions to the judgment and have not sought any further anonymisation including of their respective identities.