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.

Neutral Citation Number: [2023] EWFC 2

**IN THE FAMILY COURT**
**SITTING AT THE ROYAL COURTS OF JUSTICE**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13 January 2023

**Before** :

**MR JUSTICE PEEL**

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**Between :**

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|---|---|
| **HD** | **Applicant** |
| **- and -** | |
| **WB** | **Respondent** |

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**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**

Hearing dates: 23-29 November, and 2 December 2022

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# Approved Judgment

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MR JUSTICE PEEL

**Mr Justice Peel :**

## 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 s25 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 s25 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 3500 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 £450,000pa. 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 v Credit Suisse [2013] EWHC 3560 (Comm)**, and repeated in a family context by, for example, Mostyn J in **Lachaux v Lachaux [2017] EWHC 385**. 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** [**2007] EWCA Civ 503.**

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 in 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 i.e 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 i.e £12.8m gross. In his s25 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 two 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 or H's interest. The MCA 1973 at s25(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** at 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 and Thomas [1995] 2 FLR 68** 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:

> "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 **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.**

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.

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.

**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 riding 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, i.e 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 <u>was</u> 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 two 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 i.e 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, i.e 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 (8 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 3 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, 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 enquiry.

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 3 ½ 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 i.e 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 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 says he needs a 6000 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 £200,000pa and £235,000pa on a reverse Duxbury basis.

103. W produces 3 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 £30,000pa although H suggested it would cost £70,000pa) 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 £268,000pa, 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 3 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 (e.g. 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 £533,000pa, including business related expenditure. In his open offer he puts them at £449,000pa. Stripping out proposed business costs, and the children's costs, his personal needs are £235,073pa. 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 £100,000pa 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 s25 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, i.e 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 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 28.3(6) 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. Rule 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 **Rothschild v de Souza** [**2020] EWCA 1215** 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 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 **Traherne v Limb [2022] EWFC 27,** Francis J in **WG v HG [2018] EWFC 70** and my own decisions in **WC v HC [2022] EWFC 40** and **VV v VV [2022] EWFC 46**.

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.