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

Neutral Citation Number: [2024] EWFC 184

Case No: 1696-3544-7398-6915

IN THE FAMILY COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15 July 2024

Before :

MR JUSTICE PEEL

- -

Between :

N	**Applicant**
- and -	
J	**Respondent**

- -
- -

Geoffrey Kingscote KC (instructed by **Withers LLP**) for the **Applicant**
Michael Glaser KC and Helen Williams (instructed by **Russell Cooke**) for the **Respondent**

Hearing date: 17 June 2024

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 15 July 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR JUSTICE PEEL

Mr Justice Peel :

Introduction

1. In this judgment, I address the difficult and sensitive topic of the interplay between domestic abuse and conduct in the context of financial remedy proceedings. Although in this case the parties are male civil partners, the principles are equally applicable to all relationships where financial remedies proceedings are brought under the Matrimonial Causes Act 1973 or the Civil Partnership Act 2004.

2. The question is not whether domestic abuse per se is vile and indefensible, for it indubitably is. The question is whether the domestic abuse alleged in this case is potentially a relevant factor in financial remedies litigation, in circumstances where "conduct" is, in accordance with both statute and case law, only to be taken into account if it is of a highly exceptional nature.

3. In **Tsvetkov v Khayrova [2023] EWFC 130** I said this at paras 43-46:

> "43. A party asserting conduct must, in my judgment, prove:
>
> i) the facts relied upon;
>
> ii) if established, that those facts meet the conduct threshold, which has consistently been set at a high or exceptional level; and
>
> iii) that there is an identifiable (even if not always easily measurable) negative financial impact upon the parties which has been generated by the alleged wrongdoing. A causative link between act/omission and financial loss is required. Sometimes the loss can be precisely quantified, sometimes it may require a broader evaluation. But I doubt very much that the quantification of loss can or should range beyond the financial consequences caused by the pleaded grounds.
>
> This is stage one.
>
> 44. If stage one is established, the court will go on to consider how the misconduct, and its financial consequences, should impact upon the outcome of the financial remedies proceedings, undertaking the familiar s25 exercise which requires balancing all the relevant factors.
>
> This is stage two.
>
> 45. I have noted an increasing tendency for parties to fill in Box 4.4 (the conduct box) of their Form E by either (i) reserving their position on conduct or (ii) recounting a litany of prejudicial comments which do not remotely approach the requisite threshold. These practices are to be strongly deprecated and should be abandoned. The former leaves an issue hanging in the air. The latter muddies the waters and raises the temperature unjustifiably.
>
> 46. In my view, the following procedure should normally be followed when there are, or may be, conduct issues:

i) Conduct is a specific s25 factor and must always be pleaded as such. It is wholly inappropriate to advance matters at final hearing as being part of the general circumstances of the case which do not meet the high threshold for conduct. That approach is forensically dishonest; it impermissibly uses the back door when the front door is not available: para 29 of **RM v TM [2020] EWFC 41**.

ii) A party who seeks to rely upon the other's iniquitous behaviour must say so at the earliest opportunity, and in so doing should; (a) state with particularised specificity the allegations, (b) state how the allegations meet the threshold criteria for a conduct claim, and (c) identify the financial impact caused by the alleged conduct. The author of the alleged misconduct is entitled to know with precision what case he/she must meet.

iii) Usually, if relied upon, the conduct allegations should be clearly set out at Box 4.4 of a party's Form E which exists for that very purpose.

iv) The court is duty bound by FPR 2010 1.1 to have regard to the overriding objective:

> (1) These rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly, having regard to any welfare issues involved.
> (2) Dealing with a case justly includes, so far as is practicable –
> (a) ensuring that it is dealt with expeditiously and fairly;
> (b) dealing with the case in ways which are proportionate to the nature, importance and complexity of the issues;
> (c) ensuring that the parties are on an equal footing;
> (d) saving expense; and
> (e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.

v) In furtherance of the overriding objective, it is required to identify the issues and empowered to determine which issues should be investigated. At FPR 2010 1.4:

> (1) The court must further the overriding objective by actively managing cases.
>
> (2) Active case management includes—
>
> (b) identifying at an early stage—
> (i) the issues
>
> (c) deciding promptly—
> (i) which issues need full investigation and hearing and which do not; and
> (ii) the procedure to be followed in the case;
>
> (d) deciding the order in which issues are to be resolved;

vi) The court should determine at the First Appointment how to case manage the alleged misconduct. In my judgment, in furtherance of the overriding objective and FPR 2010 1.4, the court is entitled at that stage to make an order preventing the party who pleads conduct from relying upon it, if the court is

satisfied that the exceptionality threshold required to bring it within s25(2)(g) would not be met. The court should also take into account whether it is proportionate to permit the allegation to proceed, for a pleaded conduct claim usually has the effect of increasing costs and diminishing the prospects of settlement. Finally, the court should take into account whether the allegation, even if proved, would be material to the outcome.

vii) Of course, in some instances alleged conduct may rear its head after provision of Forms E. One obvious instance is where a party wantonly dissipates monies in the lead up to trial. Should a party seek to advance a conduct claim, this must be brought before the court as soon as possible so that it can be case managed appropriately.

viii) Wherever conduct is relied upon, and the court permits it to be advanced at trial, it should be pleaded. It will be for the court to decide how best to manage the issue. Usually, an exchange of short, focussed narrative statements will suffice (page limits are an indispensable tool in the judicial armoury and should be deployed) but such statements must set out in particularised detail (a) the facts asserted, (b) how such facts meet the conduct threshold, and (c) what consequential financial loss or detriment has occurred.

4. I shall refer to the parties as "N" (the Applicant) and "J" (the Respondent).

5. Before me is a case management hearing. One of the issues for determination is whether N's conduct case against J should be excluded from consideration at the final hearing.

The background

6. N is 56; he works in the creative industry. J is 60. He is a retired businessman.

7. In 2004, they met. According to N, they started living together in 2006, whereas according to J it was in 2009. Whichever is correct, it is common ground that N had negligible assets at the time of cohabitation and did not earn, or accrue, any significant sums during the period of cohabitation/partnership. By contrast, J, in the middle of a successful career, already had (as it seems to me) substantial wealth, and continued to be a high earner thereafter.

8. N had had mental health issues, including a diagnosis of bipolar affective disorder, for many years prior to the relationship; a background of depressive illness, anxiety, anti-depressant medication, poor sleep, low moods, suicidal ideation, and panic episodes. It appears that his mental health deteriorated from about mid 2012 onwards, with particular severity from 2016, on his case because of J's conduct; in particular, J's denial of paid sexual encounters with masseurs from at least 2011 onwards. N was hospitalised, spent time in rehabilitation and attempted suicide on two occasions.

9. On 25 June 2012, N and J appear to have entered into a Partnership Agreement (I put it this way because N is not convinced he signed it). The Agreement made provision for N to receive:

i) a property in country A.

ii) 30% of a property in country B.

iii) 50% of a property in country C.

The value to N in today's terms is about £2.6m.

10. In 2012 they entered into a Civil Partnership. They lived in country A.

11. In July 2023, they separated when J left the FMH. Thus, the period of cohabitation/civil partnership lasted about 17 years (per N) or 14 years (per J). Upon separation, J gave N $1 million. It appears that much of that has been dissipated by N on paid escorts and drugs.

12. N issued his Form A in October 2023. In his Form E, at Box 4.4, he said "I reserve my position as to conduct", the very practice which I deprecated at para 45 of **Tsvetkov v Khayrova (supra).**

13. On 31 January 2024, HHJ Hess at the Central Family Court allocated the case (with my approval) to High Court level, and made a series of directions to take the matter up to a FDR, followed by a post FDR directions hearing in front of me. HHJ Hess put over the conduct issue to this hearing for me, as the allocated judge, to determine, and made an order for narrative statements on conduct. Usually, it would not be necessary or appropriate to adjourn a conduct issue in this way; in the ordinary run of cases, it should be addressed at the First Appointment. But in this case, it was clearly sensible to do so, given the re-allocation to High Court level, the scale of the assets and the desirability of me, as the putative trial judge, to case manage this issue.

14. The litigation has been exceptionally fractious. Every point seems to be argued over. The combined costs to date are about £1 million and I would not be surprised to see that double to a final hearing.

The resources

15. The assets are about £32 million net. Of that, N has £3.25m being his 50% share of two jointly owned properties in country A and about £43,000 in bank accounts. The balance is held by J, and is largely liquid.

The issues in the substantive case

16. The principal issues between the parties for the final hearing appear to be:

i) When they started cohabiting.

ii) The extent of J's assets at the start of cohabitation. He has produced calculations which, he says, show that:

a) In 2006 (N's asserted start of cohabitation) his wealth, in today's value (some assets remain in specie and have grown passively, to others he has applied an inflationary index) was $19.2m.

b) In 2009 (J's asserted date of cohabitation) his wealth, again uprated by passive growth/inflation, was $18.3m.

N challenges the methodology and calculations, and in any event will argue that any pre-acquired wealth has, over time, become part of the matrimonial assets susceptible to the sharing principle.

iii) Whether the court should take into account the provisions of the Partnership Agreement.

iv) Conduct. N alleges that during their relationship, J lied about his cheating and infidelity. As a result, says N, he increasingly required treatment (hospitalisation, rehabilitation, medication and Electroconvulsive Therapy) based on false assumptions that he was paranoid, delusional and psychotic. He says he felt he had lost his mind and "embraced madness", believing he was delusional when in fact J was indeed liaising sexually with other men. It was not until August 2021 that J admitted he had had paid sexual encounters with other men from 2011 onwards.

17. J has made a recent open offer. He proposes that N shall receive:

i) the property in country A.

ii) 30% of a property in country B.

iii) 50% of a property in country C.

iv) 50% of a second property in country A.

This is approximately £5m.

18. N has not made an open proposal. His leading counsel told me that he is likely to argue for £16m (50% of the assets) under the sharing principle, or a greater sum if his needs so warrant.

Conduct: the context

19. Practice Direction 12J of the Family Procedure Rules 2010 provides definitions of aspects of domestic abuse:

> 'Domestic violence' includes any incident or pattern of incidents of controlling, coercive or threatening behaviour, violence or abuse between those aged 16 or over who are or have been intimate partners or family members regardless of gender or sexuality. This can encompass, but is not limited to, psychological, physical, sexual, financial, or emotional abuse.
>
> 'Controlling behaviour' means an act or pattern of acts designed to make a person subordinate and/or dependent by isolating them from sources of support, exploiting their resources and capacities for personal gain, depriving them of the means needed for independence, resistance and escape and regulating their everyday behaviour.
>
> 'Coercive behaviour' means an act or a pattern of acts of assault, threats, humiliation and intimidation or other abuse that is used to harm, punish, or frighten the victim.

20. The Domestic Abuse Act 2021 at s1 provides:

1) This section defines "domestic abuse" for the purposes of this Act.
2) Behaviour of a person ("A") towards another person ("B") is "domestic abuse" if—
   a) A and B are each aged 16 or over and are personally connected to each other, and
   b) the behaviour is abusive.
3) Behaviour is "abusive" if it consists of any of the following—
   a) physical or sexual abuse;
   b) violent or threatening behaviour;
   c) controlling or coercive behaviour;
   d) economic abuse (see subsection (4));
   e) psychological, emotional or other abuse; and it does not matter whether the behaviour consists of a single incident or a course of conduct.
4) "Economic abuse" means any behaviour that has a substantial adverse effect on B's ability to—
   a) acquire, use or maintain money or other property, or
   b) obtain goods or services.
5) For the purposes of this Act A's behaviour may be behaviour "towards" B despite the fact that it consists of conduct directed at another person (for example, B's child).

21. PD12J is applicable to children proceedings, and not (at any rate directly) to financial remedy proceedings. The Domestic Abuse Act creates new powers and provisions to protect victims of domestic abuse. Neither amends or supplements the statutory definition of conduct in financial remedies proceedings as interpreted by case law. Nevertheless, the provisions to which I have referred are plainly contextually important and relevant to all family proceedings, including financial remedies.

22. Authorities in private law children cases, such as **Re H-N and Others (children) (domestic abuse: finding of fact hearings) [2021] EWCA 448**, **K v K [2022] EWCA Civ 468** and **F v M [2021] EWFC 4** have brought into sharp focus the Family Court's treatment of allegations of domestic abuse in the context of the welfare of children. It is, I think, fair to say that the courts have grappled with some of the difficulties thrown up in these cases including:

i) Assessing the impact upon both the victim and the child.

ii) Establishing whether the asserted domestic abuse has taken place.

iii) Evaluating whether, even if domestic abuse has taken place, it is likely to have a material impact on the outcome of child arrangements proceedings.

iv) The need for Qualified Legal Representatives, who are in short supply.

v) The concern that the very fact of an elongated court process to consider the conduct complained of, and its impact, perpetuates the alleged abuse.

vi) Case management, including whether to hold an inquiry into the facts alleged at all and, if so, whether before or at the intended welfare disposal hearing.

23. Although the focus of domestic abuse has been within private law proceedings, research shows that many parties within financial remedy proceedings are thought to be victims of domestic abuse; see, for example, the Fair Shares report produced in 2023 by the University of Bristol and funded by the Nuffield Foundation.

Conduct: financial remedy proceedings

24. S25(2)(g) of the Matrimonial Causes Act 1973 (as amended) includes within the factors for consideration "the conduct of each of the parties, if that conduct is such that it would in the opinion of the court be inequitable to disregard it". Para 21(2)(g) of Schedule 5 of the Civil Partnership Act 2004 is in identical terms.

25. The Law Commission report no 112 dated 14 December 1981 and titled "The Financial Consequences of Divorce says this at pages 13-14:

> "We adhere to the view expressed by us in the Discussion Paper that the courts as now constituted cannot reasonably be expected to apportion responsibility for breakdown save in exceptional circumstances. This is because, in the words of Ormrod J [first instance decision in **Wachtel v Wachtel [1973] Fam 72**] –
>
> "the forensic process is reasonably well adapted to determining in broad terms the share of responsibility of each party for an accident on the road or at work because the issues are relatively confined in scope, but it is much too clumsy a tool for dissecting the complex inter-actions which go on all the time in a family. Shares in responsibility for breakdown cannot be properly assessed without a meticulous examination and understanding of the characters and personalities of the spouses concerned….."
>
> It seems to us…that it would be quite wrong to require the court to hear the parties' mutual recriminations at enormous expense…..in those cases where such findings as the court would make would have little effect on the order made. Nor do we think that to expose the parties to this kind of remorseless investigation into the, sometimes distant, past would be helpful in encouraging them to come to terms with their new situation".
>
> These words seem to me to resonate today as much as they did in 1973.

26. In **OG v AG [2020] EWFC 52,** Mostyn J said:

> "34. Conduct rears its head in financial remedy cases in four distinct scenarios. First, there is gross and obvious personal misconduct meted out by one party against the other, normally, but not necessarily, during the marriage. The House of Lords in *Miller v Miller* [2006] UKHL 24 confirmed that such conduct will only be taken into account in very rare circumstances. The authorities clearly indicate that such conduct would only be reflected where there is a financial consequence to its impact. In one case the husband had stabbed the wife and the wound had impaired her earning capacity. The impact of such conduct was properly reflected in the discretionary disposition made in the wife's favour. Mrs Miller alleged that Mr Miller had unjustifiably ended the marriage discarding her in favour of another woman. Therefore, she argued that Mr Miller should not be permitted to argue that their marriage was short. This argument was rejected by the House of Lords which held that the conduct in question, although greatly distressing to Mrs Miller, should not find independent reflection in the court's decision.
>
> 35. The conduct under this head, can extend, obviously, to economic misconduct such as is alleged in this case. If one party economically oppresses the other for selfish or malicious reasons then, provided the high standard of "inequitable to disregard" is met, it may be reflected in the substantive award.
>
> 36. Second, there is the "add-back" jurisprudence. This arises where one party has wantonly and recklessly dissipated assets which would otherwise have formed part of the divisible matrimonial property. Again, it will only be in a clear and obvious, and therefore rare, case that this principle is applied. In *M v M* [1995] 2 FCR 321 Thorpe J found that the husband had dissipated his capital by his obsessive approach to the litigation, which had included

starting completely unnecessary proceedings in the Chancery Division. That dissipation was reflected in the substantive award. Properly analysed, that decision can be seen as a harbinger of the add-back doctrine rather than a sanction reflecting a moral judicial condemnation.

37. In this case the sums loaned by the husband to TT will all be added back to the matrimonial pot at full value. The husband does not resist this.

38. Third, there is litigation misconduct. Where proved, this should be severely penalised in costs. However, it is very difficult to conceive of any circumstances where litigation misconduct should affect the substantive disposition.

39. Fourth, there is the evidential technique of drawing inferences as to the existence of assets from a party's conduct in failing to give full and frank disclosure. The taking of account of such conduct is part of the process of computation rather than distribution. I endeavoured to summarise the relevant principles in *NG v SG (Appeal: Non-Disclosure)* [2012] 1 FLR 1211, which was generally upheld by the Court of Appeal in *Moher v Moher* [2019] EWCA Civ 1482. In that latter case Moylan LJ confirmed that while the court should strive to quantify the scale of undisclosed assets it is not obliged to pluck a figure from the air where even a ballpark figure is in fact evidentially impossible to establish. Plainly, it will only be in a very rare case that the court would be unable even to hazard a ballpark figure for the scale of undisclosed assets. Normally, the court would be able to make the necessary assessment of the approximate scale of the non-visible assets, which is, of course, an indispensable datum when computing the matrimonial property and applying to it the equal sharing principle."

27. It is the first of these scenarios (personal misconduct) which concerns me today.

28. There is no doubt, in my judgment, that personal misconduct, including domestic abuse, must be of a high degree of exceptionality to be capable of consideration under the Act. In **Wachtel v Wachtel [1973] Fam 72,** at p.80, the Court of Appeal endorsed the words of Ormrod J who said that the conduct must be "both obvious and gross", a formulation which was approved by Baroness Hale in **Miller, McFarlane [2006] UKHL 24** at para 145:

"This approach is not only just, it is also the only practicable one. It is simply not possible for any outsider to pick over the events of a marriage and decide who was the more to blame for what went wrong, save in the most obvious and gross cases."

29. That remains the law. The increasing awareness of the incidence of domestic abuse, and its harmful and pernicious effects, does not lower the conduct hurdle to be surmounted in financial remedy proceedings.

30. What, then of Mostyn J's dictum that "The authorities clearly indicate that such conduct would only be reflected where there is a financial consequence to its impact"? I interpret this as a direct impact on the resources (e.g. something which leads to a diminution in resources, including earning capacity) or something which necessarily has a financial impact on one of the other s25 criteria; for example, increased needs.

31. Although the words of the statute do not limit, or define, conduct in this way, nevertheless in the reported cases a financial consequence of the conduct is almost

always discernible. For example, in **Jones v Jones [1975] 2 AER 12**, the husband attacked the wife with a razor, causing permanent disability, and preventing her from being able to work as a nurse. In **H v H (Financial Relief: Attempted Murder as Conduct) [2005] EWHC 2911 (Fam)** the husband attempted to murder the wife in the presence of the children and was convicted to 12 years' imprisonment; the wife's earning capacity was impacted and her housing and income needs increased. In **Clark v Clark [1999] 2 FLR 498** the court found that the wife had emotionally and financially abused the husband; there was a direct financial consequence in that she had coerced him into parting with property, cash and other assets, much of which she had dissipated. **In AF v SF [2019] EWHC 1224 (Fam)** Moor J rejected the wife's conduct claim because (para 62): "it is difficult to see how it has affected her reasonable needs". More recently in **DP v EP (Conduct: Economic Abuse: Needs) [2023] EWFC 6** HHJ Reardon made findings of economic abuse which had had a direct adverse financial effect on the husband. In a recent case in Northern Ireland, **Seales v Seales (Ancillary Relief: Murder and Coercive Control as Conduct [2023] NI Master 6**, the husband's conduct, which encompassed (i) domestic abuse and (ii) including the parties' children in committing a murder for which he was convicted, had a clear impact on the wife's employment prospects and future needs.

32. It is, in fact, hard to find any cases where a financial impact is not discernible even if the judgments have not directly addressed the point. O points me to **K v L [2010] EWCA Civ 125** where the husband had sexually abused the wife's grandchildren but (i) that is a Permission to Appeal report after a short, one sided hearing and therefore not ordinarily citable, (ii) although conduct was found to be relevant (unsurprisingly on the facts), it is not at all clear how it sounded in the overall award and (iii) there were plenty of other factors justifying the ultimate order (see para 14). In **FRB v DCA (No 2) [2020] EWHC (Fam)** the wife's conduct in allowing the husband to believe that he was the child's biological father did amount to conduct that was inequitable to disregard (again, unsurprisingly). It is not hard to see how that may have caused the husband financial as well as emotional damage, as he paid for the child's upbringing, but on the facts of that case the conduct in fact was not reflected in the award save as a counterweight to the husband's non-disclosure. In **Al Khatib v Masry [2002] EWHC 108**, where the husband abducted the children to Saudi Arabia and did not return them, the conduct was reflected in the award principally by reference to provision of a £2.5m litigation fighting find for W to attempt to secure their return, which seems to me to be an example of conduct generated need.

33. In **Goddard-Watts v Goddard-Watts [2023] EWCA Civ 115**, there is a suggestion that Macur LJ departed from the orthodox approach requiring a financial consequence of misconduct. I observe that the case was strictly about financial non-disclosure, and not personal misconduct.

34. At para 70 she said that the "authorities clearly indicate that [gross and obvious personal misconduct] would only be reflected where there is a financial consequence to its impact" and at para 71 that "the principle and accepted view to be derived from the authorities is that the misconduct envisaged by section 25(2) must necessarily be quantifiable in monetary terms rather than seen as a penalty to be imposed against the errant partner …".

35. However, she said at para 74: "I agree with the husband that there is no direct financial consequence to his fraudulent misconduct so as to enable its monetary evaluation. However, I take the view that the husband's fraud is 'conduct' for the purpose of subsection 2(g) in that it

provides 'the glass' through which to address the unnecessary delay in achieving finality of the wife's overall claim, including her unanticipated contribution to the welfare of the family post 2010**.** I make clear that I do not suggest that this necessarily means that she will receive an increased award, whether on the basis of a 'sharing' or 'needs' approach, but that she is entitled to seek to make her case on a blank page approach".

36. On the face of it, these words in para 74, suggesting that conduct was relevant even though there was no direct financial consequence, appear to contradict paras 70 and 71. I confess to being unclear why the fact of fraudulent non-disclosure seems to have fallen into the category of personal misconduct. It seems to me to sit far more easily in litigation misconduct, one of the other categories listed by Mostyn J in **OG v AG (supra)**. Furthermore, although it was argued that there had been no direct financial consequence on the wife, the original order was set aside because the wife had lost the opportunity of seeking a higher award which does seem to me of itself to have been at the very least a potential financial consequence; otherwise, why would the order have been set aside?

37. I tentatively take the view that the words at para 74 of **Goddard-Watts** do not in fact represent a new departure from the traditional view (endorsed by the Court of Appeal at paras 70 and 71) that financial consequence is invariably a necessary ingredient for conduct to be reflected in the award. In my judgment, there should be an identifiable financial impact even if it is not always easily measurable. And as I said in **Tsvetkov v Khayrova** there must be a causative link between the conduct and the financial consequence.

38. To these observations, I add a few further comments:

i) It is not altogether surprising that the authorities suggest a financial consequence is required. The s25 criteria (and their equivalent in the Civil Partnership Act 2004) are listed as signposts for the court in considering what financial remedy orders to make. In other words, they are taken into account by the court to the extent that they affect the distributive process under s23 and s24. It would be highly unusual to include a factor which has no financial consequence under the terms of an Act which is directed to reordering the finances of the parties.

ii) Even in those very rare cases where there is a possible financial consequence of the alleged conduct, the court must decide whether there is any need to litigate the allegations. It seems to me that in the great majority of cases, the impact on the alleged victim can and ordinarily will be taken into account by reference to the conventional criteria regardless of whether domestic abuse has in fact taken place. One example is behaviour which affects somebody's earning capacity. Courts routinely weigh in the balance diminished earning capacity (and of course earning capacity is a specific consideration under s25). It is hard to see why there would be any need to embark upon a lengthy and conflicted dispute about the cause of the diminished earning capacity. What matters is reflecting the limited earning capacity in the overall award. Another example might be behaviour which leads to additional needs such as medical costs. Again, it is hard to see how a court will be assisted by detailed inquiry into the cause of the need; what matters is the individual's requirements and the extent to which they should be met going forward. In other words, I doubt

very much that domestic abuse would have a material impact on the vast majority of cases, such that it needs to be litigated.

iii) It is important to remember that the court has a duty to consider all the s25 criteria. It seems to me that ordinarily the court will be able to arrive at a fair and balanced decision by reference to the usual factors such as needs, resources, contributions**,** health, age, and duration of relationship without any reference to conduct. I struggle to envisage many situations where personal misconduct will have a material impact on the ultimate evaluation.

iv) It is not for the financial remedies court to impose a fine, a penalty, or damages upon a party for conduct. Nor is it for the financial remedies court to moralise or apportion blame in how the parties behaved towards each other during their time together. I consider such a task, looking at the whole history of the nuances and complexities of a relationship, would be fraught with difficulty, and one which is not generally required in the overall exercise of broad discretion which is entrusted to the court.

v) I do not find it easy to see how personal misconduct, with no adverse financial consequence, could readily be quantified in a principled manner. If the court increases the award because of misconduct, but in the absence of any identifiable financial impact, how is that added sum to be quantified?

vi) I occasionally have the sense that parties who wish to rely upon conduct do so in order to seek from the court validation and justification of their own sense of ill treatment at the hands of their partner during the marriage, and/or condemnation of the other party; in short, personal vindication. Whilst that may be understandable at a personal and human level, it is not the function of the court to make findings for the sake of it and simply to assuage one or other party's sense of grievance and injustice. I repeat, misconduct must be directly relevant to the distribution of finances to be entertained.

vii) As identified by the Law Commission report all those years ago: "Nor do we think that to expose the parties to this kind of remorseless investigation into the, sometimes distant, past would be helpful in encouraging them to come to terms with their new situation". To expose parties, in particular the alleged victim of domestic abuse, to unforgiving litigation which explores in detail that very domestic abuse, is not a step to take lightly.

viii) The task of the court in these cases is to look forward, not back; to set the parties as far as possible on the road to financial independence. To embark on a detailed inquiry into conduct seems to me to be a retrograde step, particularly as divorces and dissolutions now proceed on a no-fault basis.

ix) If domestic abuse is routinely litigated as a conduct factor, there would undoubtedly be a proliferation of such cases, and a direct impact on court resources. Domestic abuse allegations are almost always disputed, and frequently met with cross allegations. Cases would need more hearings and longer time estimates. The need for Qualified Legal Representatives where the parties are litigants in person would expand dramatically. Applications for additional evidence (police, medical, psychiatric and so on) would ensue.

Costs would increase markedly. It is hard to see how cases involving allegations of domestic abuse would settle before final hearing, given the charged nature of the subject matter. The implications for the system of financial remedies are profound.

Conclusions

39. I conclude as follows:

i) The high bar to conduct claims established in the jurisprudence (cases referred to in this judgment are examples) is undisturbed by the recent focus on domestic abuse in society and the family justice system.

ii) I accept that the statute does not specifically refer to a financial consequence, and it is therefore wise not to rule out completely the theoretical possibility of conduct being taken into account absent such a financial impact. Nevertheless, as the review of authorities above suggests, such cases will be vanishingly rare.

iii) The preponderance of authority clearly militates firmly in favour of financial consequences being a necessary ingredient of a conduct claim. This applies as much to domestic abuse allegations as to other types of personal misconduct.

iv) The alleged conduct (even if it reaches the threshold and has a financial consequence) must be material to the outcome. In the vast majority of cases, a fair outcome is ascertained by reference to the other s25 criteria (including needs and impact on earning capacity) without requiring the court to examine conduct.

v) To inquire into conduct must be proportionate to the case as a whole.

40. In short, the dicta in both **OG v AG (supra)** and **Tsvetkov v Khayrova (supra)** which attempt to distil the learning on both the law and procedure, remain, in my judgment, sound. Courts should continue to case manage conduct allegations robustly at the earliest possible opportunity.

This case: analysis

41. It seems to me to be appropriate to assume N's factual case at its highest for the purposes of considering the issue before me, whilst noting that much is in dispute. That will not always be the case when a court is deciding at an early stage whether to exclude conduct; in some instances, it will be apparent even on a cursory reading that the allegations are exaggerated, fanciful, contrary to clear evidence or in some other way plainly insupportable. Accordingly, the essential alleged facts (which I assume to be correct for these purposes) in this case are that: N had pre-existing mental health problems of which J was well aware; J on multiple occasions paid for sexual encounters with masseurs during the relationship; J lied about those encounters; J knew that N was expressing jealousy; J knew that N's mental health deteriorated from 2016 onwards; J knew what treatment N underwent.

42. I have read a letter from N's treating psychiatrist and considered it for the purposes of this hearing, but the letter shall be excluded from the evidence hereinafter because I

directed, in the case management part of the hearing, that an SJE report be carried out into N's diagnosis, prognosis, and medical needs.

43. In this case, in my judgment N's allegations of conduct should be excluded from the issues for consideration at trial for the following reasons:

i) Even taking the case at its highest, I am not convinced that N's allegations are of such exceptionality as to meet the conduct test. Having extra partnership encounters, and dishonestly concealing them, does not in and of itself constitute conduct for the purposes of financial remedies.

ii) It is very difficult to be satisfied that N's infidelity and deceit caused N's mental health to decline and necessitated the treatment for depression. The medical notes to which I have been referred demonstrate that for decades N has had a variety of experiences which have contributed to his mental state regardless of J's behaviour. These include: a deeply troubled childhood, being diagnosed HIV positive, the death of a former partner, being separated from J for long periods while they were both pursuing their work commitments and the failure of his film projects, all of which contributed to long standing depression. It does not seem to me that the nexus between J's behaviours and N's mental health decline is "obvious" for there may have been many factors at play. The treatment was for depression generally, not for obsessive paranoia specifically, and to separate out the extent to which each factor affected N's health, and J's knowledge of how much of it was referable to his own actions, would be a highly difficult exercise.

iii) Further, although it is a counter factual question, what would the consequence have been if J had told the truth? Would it have exacerbated N's mental health struggles? Might it have led to a breakdown of the relationship, in which case N's financial claims would presumably be more limited because the wealth would have been less than it is now?

iv) J, on the evidence before me, did not know that the treatment was a result of one particular aspect (morbid delusions) rather than in respect of deep-rooted depression generally, caused by a confluence of factors over many years.

v) The conduct alleged does not, in my view, leap off the page as a factor for consideration in the financial remedy proceedings. It may have been wicked and immoral, but that is not the same as saying that it falls with that very rare band of cases where it will be taken into account in the financial distribution.

vi) The only direct financial consequence pleaded is increased medical costs. This constitutes an asserted need. Regardless of conduct, the court is required to take health into account to the extent necessary, not least as one of the relevant statutory criteria. Those needs (if established on the evidence) are there irrespective of origin, and will inevitably form part of the court's evaluative process. I doubt very much whether establishing the genesis of his current mental health presentation, and in particular whether J has contributed to it, will assist or better inform the court in its evaluation of the appropriate division of finances.

vii) The court will weigh all the relevant factors. I suspect that this case will turn largely on the sharing principle and needs (including N's health generated requirements).

viii) On N's case he is entitled to a share of the assets built up during the civil partnership, and his needs should be met. He has not been able to persuade me that the conduct issue in fact adds anything to his case. The "glass" analogy, that all factors should be looked at through the glass of conduct, does not seem to me to assist as N's claimed needs are relevant regardless of cause. If, for example, a wholly innocent event had occurred to N during the relationship, with no fault attributable to J, which had caused the mental health problems now complained of, the needs claim would be identical. Put another way, I cannot see how his conduct case would increase the award he will receive. The conduct claim would therefore not make a material difference to the outcome.

ix) Mr Kingscote KC submits that conduct is relevant to the Partnership Agreement. I struggle to accept that submission since it is N's own case that the misconduct complained of started in mid-2012, about the same time as the signing of the Partnership Agreement. It is hard to see how the alleged misconduct can have impacted on the signing of the Agreement. Far more significant is whether both parties had a full appreciation of the meaning and consequences of the Agreement and the general context within which it was signed, about which N has given detailed written evidence which will be explored at trial.

x) I consider the conduct argument to be disproportionate. It will considerably add to the length of the case and the costs to no purpose. This is a highly contentious case. I reject the suggestion by Mr Kingscote KC that it will only take limited time; the 1500-page length of the bundle for this case management hearing, and the length of the parties' written and oral submissions on this point alone, point firmly the other way. Factors such as the length of the relationship on either party's case, the needs of N, the extent of J's pre-relationship wealth, and the effect of the Partnership Agreement are likely to be far more influential.

44. At the risk of lengthening this already over-long judgment, the magnetic feature of this case and, I suspect, in other cases where personal misconduct is alleged (i.e the first of the categories of conduct identified by Mostyn J in **OG v AG)**, is that, in my view, the financial distribution can be fairly achieved by reference to all the other s25 criteria (and their equivalent under the Civil Partnership Act) without any need to take account of the conduct allegations, and conduct (even if found) would make no material difference to outcome.

45. The conduct claim shall be excluded from consideration at trial.