Neutral Citation Number: [2023] EWFC 200 (B)

Case No: ZC16D00120

IN THE FAMILY COURT AT WEST LONDON

West London Family Court,
Gloucester House, 4 Dukes Green Avenue
Feltham, TW14 0LR

Date: 9 November 2023

Before :

HIS HONOUR JUDGE WILLANS

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Between :

[A WIFE] **Applicant**

- and –

[A HUSBAND] **Respondent**

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- -

Stuart McGhee (Direct Access Counsel) for the **Applicant**

The Respondent acted as a litigant in person

Hearing dates: 10-12 October 2023

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JUDGMENT

His Honour Judge Willans :

1. In this judgment I refer to the parties as applicant and respondent. I do this bearing in mind the likely publication of this judgment and the need to preserve a level of anonymity. I have heard 3 days of evidence and submissions. I have considered the documents contained within the final hearing bundle together with the additional documents passed between the parties in advance of and during the final hearing. Time did not permit a reasoned judgment leading to this reserved judgment. I have borne in mind all the evidence although I will not refer to every aspect of it. I will focus on that required to explain the reasons for my decision making. I have though kept in mind all the evidence throughout my deliberations. I will use an exchange rate of £1 / €1.15. Bundle references are generally indicated as in [xx].

The issue in the case

2. There is in essence a single issue case: what is the applicant's housing need and how should this be funded? Subject to a limited argument relating to enforcement it is agreed there should be a clean break upon payment of an appropriate lump sum for housing:

    i) The applicant seeks a fund of £1.25m to meet her housing needs [160-179] comprising £1.09m direct from the respondent with the balance £160,000 coming from funds currently held in the Court Funds Office [519]. The applicant contends her housing needs are met in this jurisdiction with needs including cost of housing together with reasonable costs of purchase, a fund to enable furnishings/white goods etc and a contingency fund.

    ii) The respondent argues the applicant will live in Italy and will require around £350k for housing (approximately €400,000) [425-433]. In the alternative the respondent argues appropriate housing could be obtained in this jurisdiction for about £450-500k [412-418]. These figures are referable to the principle cost of housing only. The respondent contends the applicant does not require any lump sum in the light of funds provided to her when the former matrimonial home ("FMH") was sold in about 2020.

3. Given the ambit of this dispute it is a matter of great regret that the parties have between themselves spent close to, if not more than, £1.5m on the litigation and that it has taken some 7 years to reach this point.

The history of litigation

4. It is this history which gives explains the figure cited in §3 above. My summary will not do justice to the full extent of what has taken place but I will discriminate in my overview nonetheless. A fuller summary for the period up to 2019 can be found at §4-47 of the judgment of Baker J. referred to below:

    i) The central theme of the disagreement has been a jurisdictional dispute between Italy and England and Wales. The respondent has been a proponent for all matters to be heard in Italy. The applicant has generally held out for this jurisdiction. Initially both parties issued process in their chosen jurisdiction. However, at the outset under well understood principles the respondent's Italian separation process was accepted

to be first in time and took precedence. This meant that both separation and inevitably financial proceedings would be heard in Italy.

ii) The applicant and child of the family were habitually resident in this jurisdiction. Further the FMH was located here. This led to proceedings under **section 8 of the Children Act 1989**, but it also led to additional applications under both **schedule 1 of the Children Act** and the **Trust of Land and Appointment of Trustees Act 1996** ("TOLATA"). Had the separation/divorce proceedings been in this jurisdiction from outset then both schedule 1 and TOLATA proceedings would have been superfluous given the broad powers of the Court under the **Matrimonial Causes Act 1973** ("MCA"). However, the separation proceedings were not in this jurisdiction and so parallel processes commenced. The respondent sought to challenge the right of the applicant to litigate both the Schedule 1 and TOLATA proceedings in this jurisdiction. On 12 November 2018 [495] Baker J. (as was) held against the respondent in respect of both matters[1]. Ultimately, on 15 October 2019, I determined the outstanding Schedule 1 claim [511], and on 13 January 2021, HHJ Parfitt [516] divided the equity in the former matrimonial home in equal parts to each party (a predictable conclusion given their relationship as joint tenants) subject to some adjustments for additional matters.

iii) The child arrangements included a fact finding process and concluded with an order that the child live with the mother and have indirect contact with the father.

iv) Whilst the above was taking place the parties matrimonial separation was proceeding in Italy. The applicant had petitioned for divorce in this jurisdiction but her petition was not dismissed when the Italian process took precedence (instead being held in abeyance). The respondent's Italian separation proceedings were followed by a divorce application. However, it was argued successfully that in this interim period between the two the only existing proceedings were for divorce in this jurisdiction with the result that this now took precedence. This dispute was resolved in favour of the applicant with the implication that matrimonial matters would now be heard in this jurisdiction. This decision was appealed [ ] and was determined in favour of the applicant [512]. I should say that even after this conclusion there was further litigation as to whether the conditional order of divorce should be made final or not. On 5 July 2023 [37] I made the order final at a contested hearing. There had been a suggestion the respondent was pursuing a further process of appeal to the European Court of Human Rights but this did not materialise. For the avoidance of doubt the Italian authorities have accepted the right of this jurisdiction to proceed exclusively in these matters.

v) This change in jurisdiction did not prevent further and separate litigation in Italy. So in a manner similar to the schedule 1/TOLATA applications, the respondent raised discrete claims against the applicant as to the use to which jointly held funds had been put and as to the failure to complete a property transaction initiated pre-separation. This litigation was determined in favour of the respondent by the Italian Court with the net effect that the applicant is indebted to the respondent in the sum of about £350,000 [313-360]. Separate to this the applicant has sought to enforce arrears of child maintenance owed under the Schedule 1 proceedings and Italian bank accounts have been frozen. Finally, the respondent has initiated / supported criminal proceedings against the applicant in Italy for alleged breach of the indirect contact order. I am told these have now ended in favour of the applicant. This Italian litigation could well have been incorporated within the litigation before me. This

1 LM v KD [2018] EWHC 3057 (Fam)

Court would have been placed to determine whether or not the funds utilised by the applicant should be subject to an addback in favour of the respondent. This Court could have sought to resolve the implications for the parties of the applicant's failure or inability to complete a property transaction leading to financial loss. The Family Court was of course well placed to determine breach of its own child arrangements.

vi) I addressed these points ((ii) and (v) above) in the course of the hearing. I pointed out that this global litigation could be characterised as the deck of a ship with a line drawn down the middle and an equal number of chairs on each side of the line. Throughout the proceedings both parties had variously sought to redistribute the chairs onto their side of the line. In doing so a large number of the seats had been lost overboard and can no longer be recovered. The parties have engaged in this action notwithstanding they know there is a captain of the ship (me) who is ultimately obliged to come down onto the deck and redistribute the chairs in a fair manner wherever the chairs were found to be distributed at that point. The parties are both mature and intelligent individuals. This point cannot have been lost on them. That they could not see this much earlier has been to their substantial cost. I am told the Italian Judge has implored them to find a route out of this litigation and pointed to the fact that so much has been lost that would otherwise have been available for the child. I entirely agree with that sentiment and urge the parties similarly in respect of their future conduct. Sadly the past is now a fixture for the parties to reflect upon only.

Legal Principles

5. The central focus of any judgment under the MCA is a search for a fair outcome. Fairness will typically require consideration of the strands of sharing and needs. Less frequently reference may also be had to the strand of compensation. That is not alleged to be relevant in this case and I will not refer to it again. In considering these principles the Court is guided by the factors set out in section 25 of the MCA. **The concept of sharing** reflects the view that assets and resources accrued between the parties during the course of their relationship should be shared equally on the basis of equality of effort and contribution. It is therefore important for a Court to first identify and calculate the resource base available for distribution and to establish to what extent assets are a product of the relationship. This process is not typically challenging as in many relationships the assets available are entirely or significantly matrimonial in character. However even assets which did not accrue during the marriage may be deemed to be matrimonial either where they comprise an asset such as the matrimonial home (which is deemed to be central to the relationship) or where the asset has been treated during the marriage as something on which the parties jointly rely and has lost the sense of being a non-matrimonial asset. Thus assets brought into the relationship solely from one party may over time take on a matrimonial character. **The second strand is needs.** In the vast majority of cases this is the decisive factor. It reflects the individual parties needs whether as to capital or income. Built into this one also finds the needs associated with caring for children of the family whilst minors. This will be the Court's first consideration. Needs will dominate sharing in circumstances in which needs can only be met by recourse to all the assets including those which are non-matrimonial. It will be no defence to a needs claim to contend a resource came from outside the matrimonial partnership. Needs will be assessed having regard to all the circumstances of the case, however, in any assessment the Court must keep in mind that it is providing a fair outcome for both parties and a crosscheck needs to be applied ultimately to ensure the outcome is fair.

6. In applying these strands in a search for a fair outcome the Court will always reflect upon the factors found in **section 25 MCA**:

(2) As regards the exercise of the powers of the court under section 23(1)(a), (b) or (c), 24, 24A, 24B and 24E above in relation to a party to the marriage, the court shall in particular have regard to the following matters –

(a) the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future, including in the case of earning capacity any increase in that capacity which it would in the opinion of the court be reasonable to expect a party to the marriage to take steps to acquire;

(b) the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future;

(c) the standard of living enjoyed by the family before the breakdown of the marriage;

(d) the age of each party to the marriage and the duration of the marriage;

(e) any physical or mental disability of either of the parties to the marriage;

(f) the contributions which each of the parties has made or is likely in the foreseeable future to make to the welfare of the family, including any contribution by looking after the home or caring for the family;

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

(h) in the case of proceedings for divorce or nullity of marriage, the value to each of the parties to the marriage of any benefit which, by reason of the dissolution.

The Court must reflect as to whether the financial connections between the parties can be terminated on the making of a final order by way of a clean break. The Court considers whether the receiving party can adjust without undue hardship to the termination of financial dependence on the other party [**section 25A MCA**].

7. Parties to a marriage can enter into agreements intended to bind them on separation whether prior to, during or after a marriage. In general terms such agreements do not oust the power of the Court but they do amount to a powerful feature when considering a fair outcome. In the leading case of ***Radmacher v Granatino [2010] UKSC 42*** the Court advanced the following general proposition:

"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."

There will be circumstances in which it is not appropriate to hold a party to such an agreement. This will typically arise in one of two circumstances. First, where there are **vitiating circumstances** which undermine the agreement, and second, where **fairness** dictates it would not be right to hold the parties to the terms of the agreement. Examples of circumstances in which fairness impacts on an agreement may be where there is a requirement to meet the needs of children of the family or where subsequent and unforeseen events make it unfair to hold the parties to the terms of the agreement. In general terms it will be the strand of needs which provides a foundation for interfering with an otherwise valid agreement. There is authority which suggests departure from an agreement based on needs should be restricted to that necessary to meet needs alone. Viewed in this way one can identify three potential situations in which: (i) the agreement should be given full effect; (ii) unfairness or other vitiating factor causes the Court not to

follow the terms of the agreement, and (iii) fairness demands the terms of the agreement be softened and identified needs met outside of the terms of the agreement.

Relevant Background

8. Within this section I will provide a relatively brief overview. I rely upon the chronology found within the hearing bundle and the contents of the statements filed by both party's. The applicant is aged 46 and the respondent is aged 48. They met in 2004 and married in 2006. They brought no assets into the marriage and under the Italian system were taken (in the absence of a contrary agreement) to have elected community of property. At some point around this time the applicant relocated to this jurisdiction for employment purposes.

9. In 2008 the respondent inherited an estate on the death of his uncle. This comprised a property portfolio in Italy and liquid funds (c€1.85m). Following the receipt of the same the parties entered into a notarised agreement [154] under which existing property would be held as tenants in common but any future property including that inherited would remain the sole property of the party who had obtained it. It is agreed the liquid funds were subsequently paid into an account in joint names. The respondent contends this was done to protect the funds from groundless claims being made against the estate at that point in time. It is from these funds that the respondent claims monies were wrongly withdrawn by the applicant and this comprises €177,000 of the sums found against the applicant by the Italian court. It seems agreed there was about €1.5m left at the time of the separation and that the respondent withdrew the remaining sums on separation. It is also agreed that whilst the applicant was subsequently employed in this country, the respondent effectively acted as a manager for the property portfolio drawing his income from the sums received by renting out the said properties. The parties agree the sums received as income from the portfolio were used to support the family in the course of the marriage.

10. In 2009 the FMH was purchased. It was funded by borrowing secured against the inheritance which was subsequently repaid. In 2010 the child of the family was born. The parties separated in early 2016 and the applicant left the home with the child of the family. She has subsequently rented a replacement property in which she has remained throughout. Some time ago her parents travelled to this country and have lived with her providing support and assisting with child care. The respondent has remained in Italy. In 2018/19 the respondent's parents died and he inherited further property which was added to the property portfolio held by him [145]. This is caught by the agreement.

11. I refer to the history of litigation outlined above. I note the following:

- In December 2018 the respondent obtained an order of the Italian Court [391] that he was solely entitled to the funds comprised in the joint account holding the inherited liquid funds;

- In 2019 I determined the schedule 1 proceedings [498]

- In around 2020 the FMH was sold. In December 2020 HHJ Parfitt determined the TOLATA proceedings [516]. The net proceeds were approximately £868,000 of which £472,728 was paid to the applicant, £254,666 to the respondent and £160,000 retained in Court funds. The differential division reflected sums otherwise payable by the respondent to the applicant (school fees, costs etc). The £160,000 reflects the €177,000 referred to above.

- In 2022 the Italian Court determined the applicant was liable to the respondent in the sums identified above which included the €177,000 [313]. This decision is currently under appeal.

- The case management decisions in this case are found at [18-31]. At [436] I have an expert valuation of the property portfolio. The respondent applied for a second valuation to be undertaken. I refused this application.

Evidence material to final outcome

13. I will not summarise all the evidence. I will identify that evidence which is material to my ultimate determination. I will where appropriate summarise my conclusions on an aspect of evidence. Otherwise I will resolve the point in my analysis.

The Italian Debt

14. The respondent was asked to consider the possible implications for any outcome of the Italian debt. As noted above there is a sum of close to £350,000 owed by the applicant pursuant to the Italian litigation. If I found the applicant has a housing need of £350,000 and by order provide the same, then this would be vulnerable to extinction via enforcement of the Italian debt. The question arose as to whether I should adjust for this and if so how? Fortunately this issue was readily compromised with the respondent sensibly agreeing that it would be wrong to seek to enforce the judgment given the implications it would have for his child's housing. He agreed to a route forward under which this would not be enforced.

15. The debate turned as to the best way to achieve the same. For the applicant it was suggested the better route was to supplement any award by the sum owing, but make this only payable in the event the respondent does not co-operate to discharge the Italian debt. Should the respondent co-operate (as he said he would) then the sum would not be paid. If he did not then the debt would be cancelled by the cross payment. For his part the respondent suggested the appropriate route was to order no sum but for the parties to commit to the filing of a consent order in Italy discharging the debt. It was also agreed that as part of this the applicant would also have to withdraw her appeal. I am very grateful for the common sense shown by both parties in this regard. In my judgment the better approach is for me to order a lump sum equal to the Italian debt but which will not be payable (and will be self discharging) on the settlement and conclusion of the Italian proceedings on the basis of no liability either way. I judge this to be the better approach as it will leave this Court with jurisdiction with regard to enforcement of the supplementary sum in the event the parties fall into future dispute. This does still require the parties to actively co-operate in Italy but I consider it would be an inappropriate risk to pass all responsibility to that jurisdiction.

16. To the extent this sum includes the costs owed by the applicant to the respondent in Italy then there should be an equal set-off of the debts owed by the respondent to the applicant in this jurisdiction. By reference to the ES2 these sums broadly equate and set-off. It would be wrong if as part of the above the respondent was to lose the right to enforce his costs whilst the applicant preserved her claim for costs. If the costs are not included within the sum then the amounts in any event set-off.

Where is the applicant planning to live?

17. The applicant contends her future is in London (England and Wales). On her case she has lived here now for more than 15 years and the child is settled here in school and socially. She has no plans to live in Italy and housing should be approached from that position. On what

basis is this in dispute? The dispute arises because the respondent discovered the applicant had in fact been living in Italy in recent months and was employed within a school local to the area in which her parents continue to retain a property. He has reached the conclusion that the applicant is seeking a housing fund for expensive accommodation in London but will then move to Italy to pursue a career as a likely teacher.

18. The applicant accepts the evidence presented by the respondent but disputes the conclusions drawn. She accepts she has been working in Italy since about September 2022 when she obtained a support teaching post in the school identified by the respondent. She told me she will be continuing in employment there until June 2024 when she will have completed a teaching qualification which will enable her to return to this jurisdiction to work. She argued that this route was taken as it was cost effective training in comparison to within the UK. Her parents have continued to care for the child whilst she effectively commutes to work in Italy - returning every fortnight weekend or so. The respondent doubts this account. He notes the applicant previously accepted becoming unemployed rather than taken a post in Kent given the disruption it would cause to her care for the child. He considers it is therefore odd to say the least that she would relocate to Italy leaving the child behind. He notes the job obtained is coincidentally very local to where the grandparents own property and sees this as a plan towards relocation full-time. He argues the applicant could have availed herself of training support within this jurisdiction were this her ultimate planned place of employment. Finally he points to the manner in which this was kept secret only being confirmed when he filed a late statement setting out the evidence for the same. The applicant stands by her case that this was a cost effective training route. She explained the circumstances in which re-employment in this country was difficult due to the research nature of her employment and her inability to find a required funding stream to support such a role. She therefore decided to make a career change which would provide a long term option. The location of her post indicates little about her future planning. Finally she kept this secret (although she would have revealed this at final hearing) due to her fears of being stalked by the respondent and points to historic spending which appears to show the respondent having hired a private investigator.

19. A side issue relates to the non-disclosure of the account into which the salary is paid in Italy. The applicant explains this by reference to her concern that had this been disclosed then the respondent would have likely applied to freeze it in the manner other accounts have been frozen. She wished to avoid this as she needed access to the funds for day to day living.

20. I consider the applicant's position has not been helped by the manner in which she disclosed her actions. I am somewhat doubtful she would have volunteered this at final hearing. However, I note that it was no part of her claim to seek maintenance from the respondent and as such the fact of her employment did not directly touch on an issue in dispute. I also have some sympathy for her argument as to why she did not want to disclose her account lest it be frozen. I make this observation having regard to a similar point made by the respondent as to how he has diverted monies from tenants to avoid the same outcome.I consider very little turns on the location of the school. In many ways it is hardly surprising the applicant would have sought a post local to the place at which she had free and available accommodation open to her. Further this is of course the area of Italy in which she grew up and it is therefore natural to seek a post in this area. I did not find the respondent's evidence as to the detail of the posts undertaken as shedding very much light on this issue. On balance I accept the evidence of the applicant as to the financial benefits of training in Italy. It may be that alternatives are available in this jurisdiction but her account of her planning appeared logical and thought through. I accept she views this as a sensible launchpad to returning to teach in this country. On balance I find she has not modified her plans to live here in favour of Italy. In support of this I note that no changes have been made with respect

to the schooling of the child and I also note the continued residence of her parents here. Together these are significant matters which would likely have been altered in favour of Italy were this the planning. Sadly, I also consider the nature of the adult relationship its such that the applicant has no wish to live proximate to the respondent in Italy. Finally, whilst I observed at the hearing that an untruthful account in this regard might later cause an order to be set aside (where the same had been based on London living) it is noteworthy that the range of costs of housing identified by the respondent are not significantly different between London and Italy.

The nuptial agreement

21. There is no principled challenge to the nuptial agreement. There are not said to be any vitiating circumstances. There are though a range of points taken.

22. First it is noted and agreed that the FMH was purchased from funds deriving from the 2008 inheritance. Whilst I understand the respondent to have argued in Italy that this should be seen as his property entirely (based on the source of the funds) this has been determined to the contrary by HHJ Parfitt in this jurisdiction. It is clear to me that the authorities plainly characterise this asset as matrimonial whatever the source of the funds used to purchase it. Unfortunately, the resultant funds have been all but spent on litigation on the account given by each party. What appears to be left is a sum of about £100,000 held by the applicant's mother (although said to reflect funds owing to the mother) and the balance £160,000 which remains in Court Funds. I understood the respondent to have effectively spent his share on litigation costs.

23. It is also right to note that the €1.85m which was the liquid inheritance is also said to have been entirely dissipated on litigation and other costs. I understand the respondent to accept at least €1m was spent on legal fees. Whilst I have a supplementary bundle of bank statements (1830 pages) little time was spent on forensic examination of the same. I do have an analysis undertaken by the applicant in which she seeks to audit this spending. Of this the majority is agreed and identified as being legal costs. There is a residual sum of about €500,000 but on examination aspects of this could be seen to be explicable. Some of the expenditures relate to interbank transfers. I am not assisted by a detailed audit. The simple point is that about €500,000 has been spent since receipt in 2008 (excluding the legal fees). Viewed in a global sense this is less than €35,000 a year. Within this spending is undoubtedly further legal fees, school fees and other items which do not raise concern. One is likely left with a far from significant annual spending level. I have regard to the agreement between the parties as to €177,000 taken/spent by the applicant between around 2008 to 2016 (when "discovered") as found within the Italian debt. When viewed in this way it does not strike me as particularly relevant that this sum has now been spent. I certainly did not receive an argument for a suggested add-back of these funds or any part of the same. The audit provided was largely general in nature and did not permit firm conclusions to be drawn contrary to the respondent. I recognise this spending has occurred and it is of course a matter of regret that these funds have not been preserved given the assistance they would provide the parties in offering a largely pain-free solution. But I accept they have been spent and I find no basis for penalising either party for the same by an addback.

24. I have not been addressed in any detail on the €177,000. For my part I find it very difficult to conceive of circumstances in which this Court, approaching the spending through the prism of the MCA, would have penalised the applicant. I note that whilst this point was concluded against the applicant in the Italian proceedings she was not able to press her case for explaining the spending on the basis that her explanation appears to have come to late within those proceedings. It is not right to suggest, as I understood the respondent to

suggest, that her explanation was rejected by the Italian Judge. Rather it was not entertained. Had I been asked to determine the point then I would have likely placed significant weight on the fact that the respondent failed to notice this spending for a number of years despite it coming from an account which he claimed to be effectively his own and despite the fact this amounted to close to 10% of the liquid inheritance. I found this account challenging. The absence of curiosity on his part might be thought to support the applicant's position. But I do not need to resolve the point given the concession as to the Italian litigation.

25. A separate point (also considered within the Italian litigation) was as to the fact that the liquid funds were put into an account in the joint names of the parties. As above it was from this that the applicant came to spend the sums noted above. Before me it was argued that this was telling evidence that these funds had been mingled or relied on in such a way to lose their status as non-matrimonial with the implication that they became joint funds. For the respondent it was said that this was only done due to there being in play some fraudulent claims which were seeking to set aside the inheritance. As a result he sought to protect the funds by placing them into joint names. He made a similar argument as to the funding of the FMH. I note within the Italian litigation the Court appears to have applied a strict legal rights approach in concluding these funds remained the absolute possession of the respondent alone. It is unclear what relevance this now has for me given these funds have in fact been completely exhausted. Whether or not they came to be reclassified they are now spent and no longer available for distribution in any event.

Other matrimonial property

26. I received evidence as to two properties in Italy which are said to have a matrimonial quality. One is a holiday property which the respondent claims to have recently sold for the sum of €43,000. The tracing of these funds is not possible as the respondent did not pay this through an account to avoid the funds being frozen (see above). The second is a property in which the parties lived when in Italy and which is now comprised in the property portfolio (valued at €137,500 - see [448]). The applicant contends the sharing principle applies to these assets as being matrimonial in character. The respondent disagrees but his reasons for doing so are somewhat obscure. One can see the matrimonial elements would thus total approximately €180,500 (€43,000 + €137,500) [or £157,000] plus the proceeds of the FMH [£887,000] totalling £1.044m. Aside from this there are no other matrimonial assets of note.

Risk of bankruptcy

27. In the course of his evidence the respondent raised the risk of bankruptcy were he ordered to facilitate a lump sum beyond a certain level. The exact point at which this was said to likely materialise was somewhat unclear despite the fact I pressed the respondent. It seemed to me he was claiming it might arise were he ordered to pay more than about £200,000 (the maximum sum he claimed affordable). I struggled to understand the logic of this argument. It was not helped by the fact that evidence of such a risk (in the form of debts) was entirely absent from the evidence filed by the respondent. He had naturally outlined his debts within his Form E and had provided a section 25 statement. But neither provided the evidential foundation for this suggestion. When questioned it was difficult to understand what he meant by bankrupt. He was certainly not saying his debt came anywhere near the value of the property portfolio. I was left with the impression that he would be able to fund all his liabilities but that this would likely come with some 'tough' choices and implications for income (which is a function of the portfolio). I do not consider my decision making should be shaped by this issue. I will return to debts when I consider the MCA factors below.

Applicant's indebtedness to her parents

28. The applicant claims to have borrowed significant amounts from her parents to fund litigation. In evidence she told me she had borrowed £234,000. On receipt of the proceeds from the FMH (£472,000) she had paid about £280,000 of this into her mother's account with the balance being used to settle debts. There was now only £105,000 left and she remained indebted to her parents for about £180,000. I was provided with a recent statement from this account showing the remaining balance. As such the applicant claimed to have no remaining proceeds form the FMH. The respondent challenged this account noting the complete absence of documentary evidence with relation to either the borrowing from the parents or the use to which the FMH funds were put. There is some weight in these criticisms but this must be tempered by the reality that the respondent has spent what he has on litigation and the applicant will have undoubtedly also spent a significant sum. She puts her own expenditure at around £500,000. This appears reasonable on the basis of what I know. She has of course recovered some of this (or perhaps remains owed sum of this). Sadly, even without an account it is easy to see how the majority of the FMH proceeds may have come to be spent. Absent reliance on the same it is difficult to understand on what basis the applicant will have funded the costs. I am therefore satisfied in broad terms that the applicant has largely spent this money (as has the respondent with regard to his share).

29. I am though less confident as to whether the £105,000 should now be viewed as dissipated or whether it is a resource available to the applicant. It is clear from my conclusion above that little turns on the fact of borrowing from the parents. It matters little whether the applicant borrowed X from her parents and then settled this or part of it from the proceeds of sale. In reality this is just a discussion as to whether the funds were spent directly or indirectly on costs. I am in no doubt they have come to be dissipated as claimed by the applicant save for the remaining £105,000. I struggle to understand the evidential foundation that would have permitted the applicant to have both funded her costs and preserved the funds at the same time. This does not provide an answer to the status of the remaining funds. I have no evidential audit of borrowing nor documentary evidence to support the claim of an extant loan. In such circumstances I find it very difficult to reach a conclusion of an outstanding level of debt to her parents. I reach this conclusion in circumstances in the parents have plainly devoted the last 7 years to their daughter and grandchild; to the fact that the applicant is the only child of the parents, and; the absence of positive evidence for a loan.

Housing Requirements in London

30. No part of the hearing directly concerned the respondent's housing. He is currently housed and a property is being refurbished for him to remove in. It is clear he can be housed either from within the property portfolio or using that resource. On the evidence appropriate accommodation in that part of Italy would not exceed €500,000. There are sufficient funds on any case to meet this need. I understand him to put his housing needs lower than this.

31. The applicant and respondent fundamentally disagree as to the applicant's appropriate accommodation if in London. The applicant makes a case for a 3-bedroom terraced house which would cost around £1m. Such a property would be situated in the Chiswick area of London. Her claim for 3-bedrooms is on the basis that her parents will visit on an occasional basis. Her evidence was that they would return to Italy once these matters are resolved and she has returned with a teaching qualification from Italy. I am satisfied a 3-bedroom property in Chiswick would cost in the region stated. The respondent put forward no alternative properties in that area. The respondent argues the applicant could be housed in accommodation similar to that in which she is currently housed on a rented basis. He was

able to identify similar 2-bedroom flats within the complex in which the applicant lives for around £450-500,000 and argued there was no need for a 3-bedroom property to provide occasional housing for the grandparents, As to location he disagreed there was a need to house other than in Brentford where the applicant and child are currently living, and have been living since separation about 7 years ago. Whilst the applicant pointed out the child was schooled in Chiswick the respondent noted this had been a choice made by the applicant when she was living in Brentford. In any event the distance between Brentford and Chiswick is short. The applicant opposed a flat due to the annual charges that would be levied on the same (service charges and to a degree ground rent). The applicant put forward no alternative properties in Brentford. I am satisfied a 2-bedroom flat can be obtained for around £450,000 in that area. It can be seen I have no figures for alternative 2-bedroom properties (flat or otherwise) in Chiswick or for 3-bedroom properties (flat or otherwise) in Brentford. Plainly such properties do exist but the parties have chosen not to inform me in such regard. This is not an unusual state of affairs to face a Court but it means the parties have to accept the Court will have to form a view if it reaches a conclusion contrary to both cases given the search is for a fair outcome not a coin toss between the options identified by the parties.

32. Within the schedule 1 proceedings I was faced with a very similar situation as can be seen from the judgment contained within the hearing bundle. By the end of that hearing both parties provided particulars in Brentford within the complex in which the applicant lives. The respondent's cost about £425,000 whereas the applicant had accommodation within the same complex for about £600,000 [503 at §§25-30]. I reached the conclusion that an appropriate housing need would be met by a property at £450-500,000. At that time the evidence suggested the proceeds from sale of the FMH would permit the applicant to rehouse within this band.

Section 25

First consideration being the chid of the family whist a minor

33. This places an onus on my assessment of the applicant's housing needs given this is where the child will live. For the avoidance of doubt it seems clear the respondent will retain appropriate housing for contact, if and when this develops to direct contact. Aside from this the need relates to income needs and is again a function of the applicant's budget. At this time the schedule 1 order is for maintenance at £850 and I received no evidence to gainsay this figure. The applicant is not seeking spousal maintenance and her case is founded on the basis that a combination of mortgage free living together with earned income will meet the child's needs.

Resources and liabilities

34. I have regard to the ES2 to calculate the available resources in this case subject to any comments below. As already noted the FMH has sold and the proceeds spent save for the sum of £105,000 held by the applicant's mother. Aside from this there is the funds in Court Funds Office at £160,000. The ES2 also identifies a frozen sum held in the joint account of the parties in Italy with a balance of approximately £138,500 (€160,375). I am a little troubled by this asset as I cannot recall any mention of it whether in evidence, submissions or when considering the net effect of the order. However, I note [247] which is an undated document relating to this account.

35. The key asset in this case is the respondent's property portfolio as noted above. This was subject to a joint valuation which has provided a global value [451] of €3,006,470 [£2.614m].

Of this approximately €0.4m relates to the post-separation inheritance and €2.6m [£2.26m] to the 2008 inheritance. Selling costs are put at 3% reducing the global value to £2.536m (or £2.192m re the 2008 element). Provision was made for the parties to obtain CGT equivalent figures. Nothing has been provided. Aside from this the parties have modest bank accounts. I believe the respondent's overall balance which is frozen is close to the sum charged against it with respect to child maintenance arrears.

36. I take the resources as being: £2.536m (portfolio) + £0.105 (held by mother) + £0.160 (Court Funds) + £0.138 (Italy frozen) = £2.939m.

37. I rule out any suggestion that the applicant's family is a resource or that the family are holding funds for the applicant. I accept the evidence that funds paid have settled debts linked to litigation lending. I accept the applicant will likely have some mortgage capacity on return to working in this jurisdiction. It seems a likely gross income for her might be close to £30,000 at such point giving her a mortgage of no more than £100,000. She has a working life to normal retirement of about 20 years. With child benefit and child maintenance her likely net income would approximate £30-36,000. The respondent has worked in recent years managing the portfolio. He declares an income of about £40,000 net from this. At first blush this appears a relatively modest return on a portfolio of close to £2.5m being an annual return of about 1.6%. However the evidence suggested that the gross return is about twice this before tax. In any event there was little examination as to this point save to draw attention to the mismatch between the claimed global income and sums deposited over a period of time. The respondent explained this discrepancy on the basis that the sums received from tenants also included amounts relating to services (gas/electricity) which then have to be met by the respondent. I recall within the schedule 1 proceedings I identified an income of about €58,000 (based on conclusions drawn within the Italian litigation). Were this correct then this would produce a net income of about £50,000 which is not very far from the declared income. I am conscious of the fact that this is overlaid by a different tax system on which I have little if any information. Within this in mind I find a likely income of between €42,000-50,000 per annum.

38. This income is directly referable to the return on the portfolio. I heard nothing to suggest other than that a direct line approach could be taken. By this I mean if the portfolio was reduced by 25% then the income would reduce accordingly. There are no relevant pensions and no pension claim is made (the wife has a modest pension which has played no part in the proceedings and is immaterial for the purposes of any award). I have addressed the consequences of the Italian debt earlier in this judgment. I have also noted the balancing nature of the cost awards owed by each party to the other. Aside from cross-party indebtedness the applicant claims commercial liabilities of £19,000 whereas the respondent claims £61,500. There is a car loan balanced by the value of the car. The applicant also claims the debt to her parents of £234,000 although this does not allow for the payment noted in evidence which is said to have reduced it to £180,000.

Needs and obligations

39. The question of housing need is central to this judgment and I will turn to it in my analysis below. There is also an income need on both sides although there is no claim for maintenance and there has been no spousal support since separation other than relating to child maintenance. Within their Form E's each party identifies income needs which can be met from their prospective incomes.

Standard of living

40. The parties had a comfortable standard of living in that they were not required to take employment and were supported by income from the inheritance. In due course the applicant did work and the sense is of a good disposable income which initially permitted private school fees. They were able to purchase a decent London property funded by the inheritance.

Disability & Conduct

41. Not relevant.

Length of marriage and age of parties

42. Noted above.

Contributions

43. In my assessment the typical assessment of equal but different contributions applies during the course of the marriage. I have regard to the additional contributions in the form of the inherited assets. I also have regard to the continuing obligation on the applicant with respect to the child of the family and note the applicant has largely borne this separation. I am in little doubt the retained inheritance will come to benefit the child in due course (to the extent it remains preserved).

Analysis

44. In my assessment this is a case in which the nuptial agreement deserves appropriate respect but there must still be some recourse to the otherwise protected resources. This is due to the harsh consequences which would be in play were a strict approach to be taken. It would also in my assessment be unfair not to have regard to the circumstances arising after the date of the agreement which now make it unfair to hold the parties exactingly to its terms. There is no question the parties consciously entered into a separation agreement under which the 2008 inherited resources would be sheltered from future claim. They did so with a clear understanding of the nature and value of the protected resource. It seems appropriate to infer a joint understanding on their part that such an approach was fair.

45. In my assessment it matters little that these resources were subsequently relied upon to support the family. This of itself does not cause the protected resources to lose their protection. A clear distinction has to be drawn between the process of mingling insofar as it acts upon non-matrimonial resources when compared to its impact on resources subject to a nuptial agreement of this sort. It will very often be the case that protected assets come to be utilised to support the family. Many of the leading cases on such agreements include such a feature under which an inherited resource has permitted the family a high level of luxury during their married life. However, support from such resources does not lose the resource the shield of the agreement. In my judgment this is different from when one considers non-matrimonial assets which have come to be relied upon. In that case the passage of time blurs the distinction between matrimonial and non-matrimonial character. This is not the same with those assets protected by an agreement. The agreement remains a clear and operative feature in place whilst the resources are utilised. In this case the assets are not only non-matrimonial but protected. I do not consider the passage of time has changed the principled application of the agreement.

46. Further, I consider the principle applies even more firmly with respect to those assets inherited after separation on the death of the respondent's parents. In my assessment these can only form part of the distribution where hard needs demand the same. It will be seen I

do not find this to be the case. As such it will be seen I have left these assets untouched in the hands of the respondent. In fairness to the applicant I did not understand her to seek a share of the same.

47. There are factors in play that soften the application of the nuptial agreement. The points I make arise in the context of fairness as referenced in §7 above. First, it must be recognised that at the time of the agreement the child was not born and thus any agreement must be read subject to this supervening event. Second, I consider it impossible to ignore the impact that the litigation has had on the parties and its relevance to this question. But for the litigation the parties would retain the benefit of the FMH. As I have made clear this was plainly matrimonial in character whatever the source of the funds used to purchase the same. It can be seen that but for the litigation this would provide a fund in excess of £800,000 to assist in meeting the applicant's housing needs without reference to the protected resources. Allowing for the Italian matrimonial property (§26) one would be in the territory of £1m available. In my assessment it would be unfair to lose sight of the fact that whilst the portfolio assets have been preserved the parties have essentially litigated at the expense of the matrimonial assets. The impact of this if left unmodified would be deeply unfair and would objectively fall outside of the contemplation of reasonable parties when settling the nuptial agreement. I consider the Court is required to make adjustments to balance the unfairness that would otherwise be occasioned by these circumstances.

48. With these points in mind I then turn to the central question of the applicants housing needs. In the course of the hearing I was naturally taken to my earlier conclusions within the schedule 1 proceedings. A question arises as to why and if so the extent to which I should depart from the conclusions reached at that time? For the applicant attention is drawn to the differential assessment undertaken when considering the schedule 1 assessment as compared to any assessment under the MCA. In my judgment the distinction exists but is not so sharp in a case in which one is invading protected assets to meet needs under the MCA. There are points which are equally relevant whichever approach is taken. I struggle for my part to see why the appropriate location and form of accommodation needed should be materially different under each provision. In my assessment the differences are likely to be found in the detail rather than the general.

49. In this case I consider my schedule 1 analysis to retain relevance. I consider housing in Brentford would appropriately meet the housing needs of the applicant and child. After all this is the very location in which they have now lived for the last 7 years. During the schedule 1 hearing it was the area identified as being appropriate by both parties. I can see no sound basis for now moving the need to Chiswick. The implication of doing so is to significantly impact on the housing need without real justification. In my assessment the location of the child's schooling does not displace my assessment. This school has been selected whilst living in Brentford, its maintenance has been entirely possible from Brentford and the distance travelled is short.

50. I also do not see the logic or sense of the argument seeking a house over a flat. Again the applicant and child have now lived in a flat for 7 years. If anything the situation will be substantially improved as and when the wider family leave to return to Italy. At that point a flat will be plainly more bearable for all. But to suggest a house is needed due to the cost of a flat misses the point that a property such as the Victorian terraced houses favoured by the applicant would also have significant maintenance costs. In reality the solution I favour leaves the applicant free of mortgage and as such well placed to meet charges associated with such accommodation. In my assessment the applicant's needs are for a 2-bedroom property in Brentford. I do not consider it can be appropriate to invade protected resources

to enable a larger property for the key purpose of housing family members on occasional visits.

51. Turning to the cost of such property I have reached a somewhat modified position when compared to my earlier analysis. This reflects the somewhat different nature of this assessment and adds a slightly more generous approach when compared to my earlier conclusions. I also note the respondent's position demonstrates some house price inflation over the period in question. I have reached the viewed that a property closer to that advocated for by the applicant in the schedule 1 proceedings would fairly meet her needs. This would still be a 2-bedroom property but it would be somewhat more spacious and comfortable to reflect all the circumstances of the case. Although neither party has touched this territory I consider myself to be assisted by the earlier details particularly having regard to the balance between the respondent's property details both then and now. I have reached the conclusion that a fair housing budget would be £650,000 to which should be added £50,000 to cover the costs of purchase and furnishings. I do not find a basis for a contingency fund. I therefore find a budget of £700,000 is appropriate. I appreciate there will be charges associated with the same. For the purposes of my calculation I am not requiring the applicant to have a mortgage. The absence of a mortgage element will free funds to meet monthly charges and contingencies.

52. I pause to reflect that but for the litigation this could have been funded entirely out of matrimonial assets and would have left the protected assets entirely untouched. Even then it would not have required all of the matrimonial pot but would have amounted to approximately 67% of the same on a clean break basis (see §26).

53. In the current circumstances such a sum equates to a little under 25% of the resources identified at §36 above (£0.7m of £2.9m). Removing the post separation inheritance would increase this share to approximately 27% of the available resources (£0.7m of £2.6). In my assessment this is a fair and balanced settlement which invades the protected resources in a manner which is required to provide fairness to the parties but does not go beyond that required. In contrast in my judgment a payment set at £1.25m would amount to an unjustified and excessive invasion of the protected elements. I do not lose sight of the fact that the ongoing child maintenance is founded on income from the portfolio. Utilising the straight line approach noted above £850 per month (of an annual income of £45,000) equates to support from 22% of the portfolio income.

54. Bringing together the remaining issues I consider the sum can be financed as follows. First by reference to the sums of £105,000 and £160,000 held in this jurisdiction (total £265,000). This leaves a further sum of £435,000 to be paid by the respondent. If the frozen account is available then this could be utilised reducing the balance sum to a little under £300,000. But my caution as to the frozen account may be justified and the full sum may be payable on the basis the frozen account is not available. I should make clear that if this is the case then it does not affect the logic of this decision. The removal of £138,000 would have only the most modest impact on the % division referenced above and would not make the ordered sum an unfair one.

55. In my judgment the respondent needs a reasonable timeframe in which to pay this sum. I consider a period of 6 months is appropriate. I consider a period of 1 year is excessive and unjustified. After 6 months interest will run on the award (the sum of £435,000) until paid. I consider an appropriate interest rate at this time is 4% on a simple basis. This will not run until the 6 month point but will then accrue at a daily rate of £47.67 (based on £435,000). I will make this order on a clean break basis. I do not consider it appropriate to maintain a spousal award equivalent to the interest sum pending payment. In any event the applicant

makes no claim for a spousal award. This lump sum amounts to 14.5% of the gross value of the portfolio (see §53). On a straight line basis I infer the reduction in income to the respondent will be such as to reduce his income to no less than £36,000 (85.5% of £42,000). I consider this will preserve an income stream sufficient for both parties.

56. In summary I order a lump sum of £700,000 on a clean break basis.

57. I will send this judgment out to the parties. It will be handed down at 9.30am on 9 November 2023. This will be a remote hearing by Teams and the parties are excused attendance should they wish not to attend. Counsel is excused attendance in such circumstances. Notification of their intention re attendance should be clarified to my clerk in advance of that date. I will accept any proposed corrections or requests for clarification received by 4pm on 6 November 2023. I would like a draft order by 4pm on 8 November 2023.

58. This judgment will be publicised in the normal way. I intend to anonymise the judgment by removing the party names on the front page and by removing the Court of Appeal reference at §4(iv). Any further proposed modification should be raised with the corrections as above.

His Honour Judge Willans