Neutral Citation Number: [2023] EWFC 279 (B)

Case No: RS19D05402

IN THE FAMILY COURT AT BRISTOL

Date: 21 December 2023

BEFORE

RECORDER DAY

BETWEEN

WX

Applicant

-and-

HX

Respondent

-and-

MX
SX
BX

Intervenors

Zöe Saunders (instructed by Lyons solicitors) for the **Applicant**

Tina Villarosa (instructed by Bradford & Company) for the **Respondent**

MX did not attend and was not represented.

SX and **BX** appeared in person.

Hearing dates: 12, 13 and 14 December 2023

Approved Judgment

This judgment was handed down remotely at 10.30am on 21 December 2023 by circulation to the parties or their representatives by email. This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media,

must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

Introduction

1. This is my judgment in case number RS19D05402, the matter of WX v HX, or perhaps more accurately, WX v HX and others.

2. It is more or less customary for judgments of this kind to refer to the parties as 'the wife' and 'the husband', or simply 'W' and 'H', and in this case it would be accurate to do so, because, nearly six years after their separation, they are still legally married to each other. My experience, however, is that litigants often dislike being described in that way and therefore wherever possible I endeavour to refer to them by simply using their names. Here that risks confusion as the applicant, the respondent and two of the three intervenors share a surname and so, doing the best I can to balance courtesy and clarity, I will call the applicant and the respondent 'the applicant' and 'the respondent' and the intervenors 'the respondent's mother', 'the respondent's sister' and 'the respondent's brother'.

3. The applicant is WX. She is in her fifties. She was represented at the hearing by counsel, Zöe Saunders, instructed by Lyons solicitors.

4. The respondent is HX. He is in his fifties. He was represented at the hearing by counsel, Tina Villarosa. My understanding is that she was instructed by Bradford & Company solicitors, although I do not believe that they were ever formally on record as acting, and no representative of theirs attended the hearing, so it might be that, in fact, Miss Villarosa was formally instructed under the Direct Access scheme; for my purposes, it matters not.

5. The three intervenors are MX, SX and BX, who are the respondent's mother, sister and brother. All three intervenors had notice of the final hearing and all three filed witness statements in anticipation of it. The respondent's mother elected not to attend, having received prior warning that if she did not attend then the hearing was likely to proceed in her absence. The respondent's sister and brother both attended, both gave oral evidence and the respondent's brother made brief closing submissions on behalf of all

three intervenors. They were not legally represented at the hearing itself but received advice and assistance behind the scenes from solicitors, The Family Law Practice.

6. I am concerned with the applicant's application for financial remedies on divorce, effectively issued in December 2019 when she filed her original application in Form A, by which she sought lump sum, property adjustment and pension sharing orders, naming the Y Hotel as the sole subject of her application for a property adjustment order.

7. An amended Form A was later filed, in April 2023, in which the reference to the hotel had been deleted and the family home named, in its place, as the subject of her application for a property adjustment order.

8. The respondent's financial disclosure, such as it was, revealed no private pensions in respect of which a pension sharing order could be made in the applicant's favour and so no such order was ultimately sought.

9. At the final hearing, therefore, the court was essentially concerned only with the applicant's application for (a) a property adjustment order in respect of the family home; and (b) a lump sum order.

10. No further or other applications were made but, insofar as it may be necessary for me to do so in order to give effect to the clean break that both parties agree is now appropriate, I can and will deem all such application to have been made.

Background

11. The applicant and the respondent began living together 1998 and married in 2004. They separated in late 2017 or early 2018. From first cohabitation to final separation, therefore, their relationship lasted approximately 20 years. By today's standards it was, unquestionably, a long marriage.

12. The applicant began divorce proceedings in 2019 and decree nisi was made in 2020. As is common, the divorce proceedings themselves have since been placed on hold,

pending the outcome of these financial proceedings, though doubtless they will be concluded swiftly hereafter.

13. The applicant and the respondent have one child together, who is now an adult. She lives independently, with a partner of her own. There is no suggestion that she is now supported financially by either the applicant or the respondent; rather, in fact, the applicant suggests that she may look to her and her partner to provide her with some assistance in the future, as guarantors of any future mortgage borrowing.

14. In 2005, following the death of their late father, together with his sister and brother, the respondent inherited an interest in a company, Z Limited. The company is the registered legal owner of the hotel referred to in the applicant's original Form A, which it now operates as an H.M.O. (a house in multiple occupation). The respondent's mother currently lives in a bungalow built within its grounds.

Procedural history

15. The case has an extraordinarily long and unhappy procedural history, which I will not attempt to rehearse in full here, since it is neither necessary nor proportionate to do so.

16. These financial proceedings have been before the court for almost exactly four years. The applicant has incurred legal costs totalling £78,654 and the respondent £93,949, meaning that their costs alone total £172,603; as will be clear from all that is to follow, that sum is grossly disproportionate to the value of their disclosed assets. The intervenors appear to have incurred costs of nearly £12,000 in total; that sum is also disproportionate.

17. By the time the case first came before me in April 2023, in nearly three and a half years, there had been nine prior case management hearings, heard by eight different judges, and twelve case management orders, made by eleven different judges. Lamentably, none of those earlier hearings had been an effective financial dispute resolution appointment.

18. The hearing in April 2023 was intended to have been the final hearing in the proceedings, but the case was very obviously not by then trial ready, for a multitude of reasons.

19. One significant problem, at that stage, was the position with regard to the intervenors. They applied to intervene in the proceedings (which had then already been before the court for nearly two years) in November 2021, in response to the applicant's assertion, detailed in correspondence sent in July 2021, which I have seen, that the respondent has effective control over the company, that the company is his alter ego, that he is the true legal and beneficial owner of the hotel and it could and should be sold to meet her claims, and they were duly joined in the same month.

20. The issues between the applicant and the intervenors were ostensibly compromised in March 2022 and the compromise reflected in the terms of an order made later that month, which recited that the applicant accepted that the respondent had only a one third interest in the company and that the respondent's mother had permission from the company to occupy the bungalow owned by the company and situated in the hotel's grounds.

21. The order provided that the intervenors' evidence should be limited to that already filed and that they should not be at liberty to give evidence at the final hearing. It also provided that there should be no order as to costs. Curiously, for reasons which are unclear to me, the intervenors were not duly discharged from the proceedings, which then continued, without reference to them, until the hearing in April 2023, which they did not attend and of which it appeared that they might be unaware.

22. Another significant problem, then as throughout, was the respondent's failure to comply with rules, practice directions and orders, and to provide to the applicant and to the court full, frank and clear disclosure as to his financial and other relevant circumstances.

23. The nature and extent of his failings in that regard was such that, just prior to the hearing, in March 2023, the applicant made a formal written application to the court seeking what was described as a *Hadkinson* order (after *Hadkinson v Hadkinson* [1952] All ER 567), effectively debarring the respondent from all or any participation in the proceedings until his breaches of previous orders had been remedied.

24. Having reviewed all of the reported *Hadkinson* cases to which counsel had referred me, or which otherwise came to my attention through my own independent legal research, I noted that I could find only one case, *Mubarak v Mubarik* [2006] EWHC 1260 (Fam), in which any *Hadkinson*-type order had been sought and made against a respondent, rather than an applicant or appellant; that *Mubarak* was an exceptional case on its facts; and that even in *Mubarak*, the order made had not been a full-blown *Hadkinson* order, properly-so-called.

25. I determined that there was a highly material distinction between (a) telling an applicant or appellant that their application or appeal will be put on hold until they comply with a previous order, on the one hand, and (b) telling a respondent that an applicant's claim against them will be heard and they will not be permitted to address the court in relation to it unless they comply with a previous order, on the other. I also noted that the precise form of order sought by the applicant at the hearing differed materially from that sought in her written application. I ultimately ruled that it was not safe, appropriate or proportionate to make the order sought against the respondent.

26. I note in parentheses that it was argued in *Mubarak v Mubarik* [2006] EWHC 1260 (Fam) that the difference between a respondent seeking to obtain a *Hadkinson* order to be used 'as a shield' and an applicant seeking one to be used 'as a sword' was a material one, but, in rejecting the argument that the respondent should be debarred from participation but holding that his participation should be conditional, Bodey J did not deal expressly with the merits of that argument, and so, to the best of my knowledge, there is no authority, decided at High Court level or above, dealing directly with the point and therefore either supporting or contradicting my view.

27. I also note what was said by Moor J in *Williams v Williams* [2023] EWHC 3098 (Fam), decided since the hearing in April 2023, about the making of *Hadkinson* orders prior to the final hearing of any application for financial remedies, echoing his earlier comments, to similar effect, in *Young v Young* [2013] EWHC 3637, which strongly support my view that it would have been inappropriate to make the order sought.

28. Concerned to ensure that the court's eventual decision should have the soundest foundations possible, I instead exercised my discretionary powers of case management under Family Procedure Rules 2010, Part 4, including my power under rule 4.1(4)(b) to 'specify the consequences of failure to comply with [my] order', to make a number of case management orders, including 'unless' orders and orders to which penal notices were attached.

29. I observed that aside from the difficulties with the intervenors' recent lack of participation and the respondent's failure to do that which required of him, the case appeared to have suffered from a lack of judicial continuity and a financial dispute resolution appointment.

30. I made the obvious point that, given the restriction in Family Procedure Rules 2010, rule 9.17(2), I sadly could not offer myself as the solution to both of those difficulties. Both the applicant and the respondent argued that, exceptionally, I should dispense with a financial dispute resolution appointment and hear the adjourned final hearing myself. I agreed to do so and listed the case for an adjourned three day final hearing before me in December 2023, with a pre-trial review hearing listed before me in October 2023. I ordered that the costs of the ineffective final hearing be 'costs in the application'.

31. I am acutely conscious that subsequent to the April 2023 hearing, the proceedings have taken up four and a half days of court time and cost the applicant and the respondent £68,395 in total. Naturally, in the circumstances, I have reflected upon my decision and the decision in *S v S (Ancillary Relief: Importance of FDR)* [2007] EWHC 1975 (Fam), and pondered whether an opportunity to resolve the case consensually and comparatively swiftly and inexpensively was missed. I concluded that, regrettably and exceptionally, this case was always destined to require a final, binding judicial

determination, principally because of the respondent's conspicuous failure to provide full and frank financial disclosure and the impediment to settlement that that obviously presented.

32. Despite my dire warnings, given at the hearing in April 2023, the respondent continued failing to satisfy the requirements of orders made. Consequently, the applicant applied, in August 2023, for the respondent's committal to prison on account of his breaches of those parts of my case management order to which a penal notice had been attached.

33. Unfortunately, the application could be not be listed in advance of the pre-trial review. Instead, it was listed alongside or, perhaps more accurately, on top of the pre-trial review. The respondent attended the hearing with counsel, together with his brother and sister, and asked to be allowed some further time to remedy his admitted breaches of my order, and to file evidence in response to the committal application, including medical evidence.

34. In all the circumstances, bearing in mind that the applicant's preferred outcome was a committal suspended on condition that the respondent remedy his breaches of my order, bearing in mind that the application's primary objection had been to secure disclosure, bearing in mind the need to ensure procedural fairness, and bearing in mind that there would sadly have to be an adjournment of the pre-trial review, at least, in any event, I adjourned both the committal hearing and the pre-trial review for just over two weeks, to be heard separately, and in that order, with an aggregate time estimate of one day, permitting but not requiring the respondent to file evidence in the interim.

35. In so doing, I warned the respondent that if he failed to remedy his breaches of my order, the arguments in favour of a suspension of any committal on terms might have less force at the adjourned hearing than they might have had at the initial hearing, and that if the court were to decide that he should pay the applicant's costs of the committal application, they might include the costs of both the initial hearing and the adjourned hearing.

36. The adjourned committal hearing and pre-trial review came before me in late October 2023, six weeks prior to the scheduled commencement of the adjourned three day final hearing.

37. In the meantime, the applicant had filed an additional application for committal by way of judgment summons, relating to the non-payment of costs originally ordered to be paid in February 2021, November 2021 and June 2022, which he had not paid by April 2023, and which I ordered him to pay in three instalments, of which only the first he then paid.

38. In the end, that judgment summons application was not pursued, in light of the facts that:

    a. through no fault of the applicant's or her solicitors', the respondent had not received the fourteen clear days' notice of the application to which he was entitled under Family Procedure Rules 2010, rule 33.11(5);
    b. it was noted, without any argument being heard or any determination made as to whether the requirements of rule 37.4 are applicable to judgment summons applications under Part 33, as they are to applications for committal under Part 37, that the requirement in my April 2023 order to satisfy the previous costs orders by payment of instalments was not one of those provisions in my order to which a penal notice had been attached; and
    c. the respondent agreed to pay, and did pay, the outstanding sum, whilst at court, with funds provided by the company.

39. Similarly, the original August 2023 application for the respondent's committal to prison was not ultimately pursued because, on the last working day prior to the hearing and then again on the day of the hearing itself, the respondent produced additional disclosure, which amounted in total to several hundred pages of documentation.

40. I determined that notwithstanding that I eventually made no order on the application, the applicant's original application for committal had been necessary and appropriate, and that the respondent should pay the costs of and incidental to that application. Taking care to strip out the costs of the separate pre-trial review, which I ordered to be 'costs in the application', I summarily assessed the costs payable in the sum of £8,683, and ordered that they should be paid within 14 days, which I understand they were.

41. In addition, I gave a number of directions intended to keep the case, or put the case back, on track for the scheduled final hearing.

42. As a result of his non-compliance with certain disclosure provisions in my April 2023 order to which an 'unless' order had been attached, by operation of Family Procedure Rules 2010, rule 4.5(1), at the time of the pre-trial review, the respondent stood debarred from giving oral evidence at the final hearing 'save for the purposes of answering questions put on behalf of another party in cross-examination or by the court'.

43. In light of certain representations made on his behalf at the pre-trial review, I deemed him to have made an application for relief from sanctions, and effectively waived the procedural requirement in rule 4.6(2) for that application to be supported by evidence. I adjourned the application to be dealt with as a preliminary issue at the commencement of the final hearing, making plain that that was so as to enable the court to assess and consider the state of the respondent's compliance with rules, practice directions and orders as at the date of the hearing.

44. Although the respondent's litigation conduct clearly hampered proper preparations for the adjourned final hearing between April and October 2023, there was fortunately just enough time remaining during November and December 2023 to make the case capable of being heard. In reality, as I shall explain, the state of the evidence in the case remained unsatisfactory, but all parties agreed that the adjourned final hearing must proceed and that, frankly, further adjournment of the proceedings would be unconscionable.

The final hearing

45. As noted above, the adjourned final hearing was listed before me, with a time estimate of three days, in December 2023.

46. Prior to the hearing, I was supplied with a core bundle of 768 pages, which I was able to read in advance of the first day of the hearing, and a supplementary bundle of 390 pages, which I made clear I would consider only if, when and insofar as I was referred to it. As it turned out, some of the documents that it contained were properly and helpfully referred to in the course of the hearing, so it was as well that it was available to me, notwithstanding that the preparation of supplementary bundles, or indeed any bundles which do not accord with the requirements of Family Procedure Rules 2010, PD27A, is generally discouraged very strongly and with good reason. The bundles in this case, it should perhaps be added, did not comply with the requirements of the rules but did, for the most part, at least, comply with the directions I gave in April and October 2023.

47. The bundle contained a composite schedule of assets, or ES2, but it had not been fully and properly completed by both parties, as required pursuant to the 'Statement on the Efficient Conduct of Financial Remedy Hearings Proceeding in the Financial Remedies Court Below High Court Judge Level', issued on 11 January 2022, or in accordance with the 'Note on the Correct Use of the ES2' issued by the Family Law Bar Association's money and property sub-committee shortly thereafter.

48. Imperfect as it may be, the ES2 is an invaluable tool for judges and lawyers dealing with cases of this kind. Its entire purpose is to facilitate the presentation of two parties' competing cases, side by side, in a single document. To put it another way, it is designed to enable parties to present the court with a single, agreed schedule, even in cases where they must agree to disagree about the figures. It is not clear to me that there was any good reason why the bundle could not have included a fully and properly completed ES2.

49. I was eventually provided with a revised ES2, completed by counsel for the applicant and the respondent which, though much improved, sadly remained somewhat defective.

Nevertheless, the parties' positions were clear from the evidence and submissions and so I was not ultimately placed at any material disadvantage.

50. At the start of the final hearing, it was necessary for me to rule on two preliminary issues. First, there was the question of the respondent's application for relief from sanctions. Second, there was an application made by the intervenors for permission to rely upon witness statements prepared in anticipation of the final hearing but not filed and served in accordance with the order made at the pre-trial review six weeks previously.

51. The submissions made in support of the respondent's application were very brief and made scant reference to the relevant criteria in Family Procedure Rules 2010, rule 4.6(1). In short, it was urged upon me that the respondent's failures had not been 'intentional'.

52. Miss Saunders argued forcefully against the grant of relief from sanctions, noting that the respondent remained in breach of numerous rules, practice directions and orders including notably the provision of my April 2023 order, with an 'unless' order attached, his breaches of which had led to the imposition of the relevant sanction in the first place.

53. I noted that in *Tarn Insurance Services Limited (in Administration) v Kirby* [2009] EWCA Civ 19, the Court of Appeal explained that, when considering an application for relief from sanctions made under similar provisions in the Civil Procedure Rules 1998, the true test to be applied was whether, notwithstanding that the unless order was a proper order to make for the purpose of furthering the overriding objective in the circumstances known at the time it was made, it remained appropriate at the time of hearing the application for relief to allow the sanction to take effect.

54. I also noted comments made in *Williams v Williams* [2023] EWHC 3098 (Fam), to which I have already referred, which highlight the importance of taking care to ensure that sanctions imposed upon a litigant do not have the unintended consequence of leaving the court without the evidence that it requires properly to discharge its quasi-inquisitorial function and arrive at a decision which is as fair as possible in all the circumstances.

55. I carefully considered all of the relevant circumstances, including those identified in rule 4.6(1) as being potentially pertinent to my decision, noting in particular that, while I would defer judgment as to whether the respondent's failure had been intentional until after I had had the benefit of hearing him give evidence and being cross-examined, nothing I had yet heard persuaded me that there was any satisfactory explanation for it.

56. I determined that the sanction imposed remained a proper and proportionate one and accordingly dismissed the respondent's application for relief from sanctions, ruling that his oral evidence in chief should therefore be limited to the identification and verification of evidentiary documents within the bundle, and that there should be no re-examination, save with my express permission, sought and obtained at the appropriate juncture.

57. In considering the intervenors' application for permission to rely upon witness statements filed and served out of time, I noted the apparent tension between the decision of the Supreme Court in *Barton v Wright Hassall LLP* [2018] 1 WLR 1119 and subsequent guidance published by the Civil Justice Council in November 2021 as to the 'leeway' properly to be afforded to litigants-in-person.

58. I reviewed the contents of the three statements, noting the issues which they addressed, namely (a) whether the company owes the respondent's mother a debt that is not properly reflected in its financial statements; and (b) whether the respondent owes the company circa £100,000 on account of legal fees incurred in the financial remedy proceedings.

59. The former issue, it transpired, was in fact a non-issue in the proceedings, by reason of the respondent's open concession that the court could proceed to determine the merits of the applicant's application for financial relief on the basis of a single joint expert's valuation of his shareholding, which took no account of any alleged additional liabilities.

60. Having sought and received confirmation that Miss Saunders was ready to cross-examine on the latter issue in the event that the statements were admitted into evidence and their makers tendered for such questioning, I ruled that the statements should form part of the evidence to be considered, and the respondent's brother and sister gave oral evidence, largely but not entirely limited to the issue of the alleged £100,000 loan liability.

61. With the benefit of the above-mentioned pre-reading, and as a result of my having slightly extended the normal sitting day at both ends, with the agreement of all parties, it proved possible to complete the evidence and submissions in the case within two days. Nevertheless, by the end of day two, it was apparent to me that I was most unlikely to be in a position to deliver a satisfactory oral judgment, which dealt properly with all of the issues raised in the case, the following day and so I very reluctantly reserved judgment.

The open proposals

62. The applicant's final open proposal was made on 21 November 2023 and provided for:

    a. the transfer of the family home into her sole name, on the basis that if the respondent's release from all liability under the mortgage was not procured within 18 months then the property would be sold and the net proceeds of sale paid to her;
    b. the payment to her, by the respondent, of a sum of £70,000, by 31 January 2024;
    c. a clean break; and
    d. no order as to costs.

63. That proposal differed only slightly from an earlier open offer, made on 24 March 2023, which had provided for:

    a. the transfer of the family home into her sole name, on the basis that if the respondent's release from all liability under the mortgage was not procured within 12 months then the property would be sold and the net proceeds of sale paid to her;

b. the payment to her, by the respondent, of a sum of £80,000, by 31 December 2023;
c. a clean break; and
d. no order as to costs.

64. The respondent's final open proposal was made on 7 December 2023 and provided for:

a. the transfer of the family home into the applicant's sole name, on the basis that if his release from all liability under the mortgage was not procured within 56 days then the property would be sold and the net proceeds of sale paid to her;
b. a clean break; and
c. no order as to costs.

65. That proposal differed substantially from an earlier open offer, made on 31 March 2023, which had provided for:

a. the transfer of the family home into the applicant's sole name, on the basis that if his release from all liability under the mortgage was not procured within 56 days then the property would be sold and the net proceeds of sale paid to her;
b. the payment to him, by the applicant, of a sum of £100,000;
c. a clean break; and
d. no order as to costs.

66. It might be observed that with the applicant and the respondent having spent £172,603 to bring to trial proceedings in which they ultimately found themselves £70,000 apart, rather than £180,000, this case represents an unhappy exception to what was described by Mostyn J in *N v F (Financial Orders: Pre-acquired Wealth)* [2011] EWHC 586 (Fam) as "*an iron law of ancillary relief proceedings that the final difference between the parties is approximately equal to the costs that they have spent*."

67. The intervenors had no final open position, as such, in as much that they made no offers and sought no orders. It might be said, in the circumstances, that they could and perhaps should all have been discharged from the proceedings around 18 months previously, in March 2022, and simply called as witnesses by the respondent, if

necessary, thus saving themselves several thousands of pounds in legal costs and, no doubt, a good deal of stress.

The relevant law

68. Before turning to the evidence that I read and heard, my assessment of that evidence, my decision and the reasons for it, I ought properly to address the relevant law.

69. I am conscious that judges are nowadays discouraged from producing unduly lengthy and unnecessarily discursive judgments. As Sir James Munby P noted in *Re F (Children)* [2016] EWCA Civ 546:

> *The task facing a judge is not to pass an examination, or to prepare a detailed legal or factual analysis of all the evidence and submissions he has heard. Essentially, the judicial task is twofold: to enable the parties to understand why they have won or lost; and to provide sufficient detail and analysis to enable an appellate court to decide whether or not the judgment is sustainable. The judge need not slavishly restate either the facts, the arguments or the law. To adopt the striking metaphor of Mostyn J in SP v EB and KP [2014] EWHC 3964 (Fam), [2016] 1 FLR 228 para 29, there is no need for the judge to "incant mechanically" passages from the authorities, the evidence or the submissions, as if he were "a pilot going through the pre-flight checklist".*

70. In this particular case, however, I do consider it necessary and appropriate to say a certain amount the legal principles that have guided me in my decision making, notwithstanding that they are, in and of themselves, largely uncontentious as between the parties.

General principles

71. The general legal principles which govern the courts' approach to all claims for financial remedies on divorce were summarised clearly and concisely by Peel J in paragraph [21] of his judgment in *WC v HC* [2022] EWFC 22 as follows:

i. *As a matter of practice, the court will usually embark on a two-stage exercise, (i) computation and (ii) distribution; Charman v Charman [2007] EWCA Civ 503.*

ii. *The objective of the court is to achieve an outcome which ought to be "as fair as possible in all the circumstances"; per Lord Nicholls at 983H in White v White [2000] 2 FLR 981.*

iii. *There is no place for discrimination between husband and wife and their respective roles; White v White at 989C.*

iv. *In an evaluation of fairness, the court is required to have regard to the [criteria in Matrimonial Causes Act 1973, section 25], first consideration being given to any [minor] child of the family.*

v. *[Section 25A of the Matrimonial Causes Act 1973] is a powerful encouragement towards a clean break, as explained by Baroness Hale at [133] of Miller v Miller; McFarlane v McFarlane [2006] 1 FLR 1186.*

vi. *The three essential principles at play are needs, compensation and sharing; Miller; McFarlane.*

vii. *In practice, compensation is a very rare creature indeed. Since Miller; McFarlane it has only been applied in one first instance reported case at a final hearing of financial remedies, a decision of Moor J in RC v JC [2020] EWHC 466 (although there are one or two examples of its use on variation applications).*

viii. *Where the result suggested by the needs principle is an award greater than the result suggested by the sharing principle, the former shall in principle prevail; Charman v Charman.*

ix. *In the vast majority of cases the enquiry will begin and end with the parties' needs. It is only in those cases where there is a surplus of assets over needs that the sharing principle is engaged.*

x. *Pursuant to the sharing principle, (i) the parties ordinarily are entitled to an equal division of the marital assets and (ii) non-marital assets are ordinarily to be retained by the party to whom they belong absent good reason to the contrary; Scatliffe v Scatliffe [2017] 2 FLR 933 at [25]. In practice, needs will generally be the only justification for a spouse pursuing a claim against non-marital assets. As was famously pointed out by Wilson LJ in K v L [2011] 2 FLR 980 at [22] there was at that time no reported case in which the applicant had secured an award against non-matrimonial assets in excess of her needs. As far as I am aware, that holds true to this day.*

xi. *The evaluation by the court of the demarcation between marital and non-marital assets is not always easy. It must be carried out with the degree of particularity or generality appropriate in each case; Hart v Hart [2018] 1 FLR 1283. Usually, non-marital wealth has one or more of 3 origins, namely (i) property brought into the marriage by one or other party, (ii) property generated by one or other party after separation (for example by significant earnings) and/or (iii) inheritances or gifts received by one or other party. Difficult questions can arise as to whether and to what extent property which starts out as non-marital acquires a marital character requiring it to be divided under the sharing principle. It will all depend on the circumstances, and the court will look at when the property was acquired, how it has been used, whether it has been mingled with the family finances and what the parties intended.*

xii. *Needs are an elastic concept. They cannot be looked at in isolation. In Charman (supra) at [70] the court said:*

"The principle of need requires consideration of the financial needs, obligations and responsibilities of the parties (s.25(2)(b)); of the standard of living enjoyed by the family before the breakdown of the marriage (s.25(2)(c)); of the age of each party (half of s.25(2)(d); and of any physical or mental disability of either of them (s.25(2)(e))".

xiii. *The Family Justice Council in its Guidance on Financial Needs has stated that:*

"In an appropriate case, typically a long marriage, and subject to sufficient financial resources being available, courts have taken the view that the lifestyle (i.e. "standard of living") the couple had together should be reflected, as far as possible, in the sort of level of income and housing each should have as a single person afterwards. So too it is generally accepted that it is not appropriate for the divorce to entail a sudden and dramatic disparity in the parties' lifestyle."

xiv. *In Miller/McFarlane Baroness Hale referred to setting needs "at a level as close as possible to the standard of living which they enjoyed during the marriage". A number of other cases have endorsed the utility of setting the standard of living as a benchmark which is relevant to the assessment of needs: for example, G v G [2012] 2 FLR 48 and BD v FD [2017] 1 FLR 1420.*

xv. *That said, standard of living is not an immutable guide. Each case is fact specific. As Mostyn J said in FF v KF [2017] EWHC 1093 at [18]:*

"The main drivers in the discretionary exercise are the scale of the payer's wealth, the length of the marriage, the applicant's age and health, and the standard of living, although the latter factor cannot be allowed to dominate the exercise".

xvi. *I would add that the source of the wealth is also relevant to needs. If it is substantially non-marital, then in my judgment it would be unfair not to weigh that factor in the balance. Mostyn J made a similar observation in N v F [2011] 2 FLR 533 at [17-19].*

72. In *Clarke v Clarke* [2022] EWHC 2698 (Fam), at paragraph [36], Mostyn J proposed the addition of a seventeenth sub-paragraph which noted, insofar as is relevant here, that the court's goal "*should be to achieve, if not immediately, then at a defined date in the future, a complete economic separation between the parties*."

73. Section 25 of the Matrimonial Causes Act 1973 reads as follows:

> 1. It shall be the duty of the court … to have regard to all the circumstances of the case, first consideration being given to the welfare while a minor of any child of the family who has not attained the age of eighteen.
>
> 2. As regards the exercise of the powers of the court … 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 or annulment of the marriage, that party will lose the chance of acquiring.

74. Section 25A of the Matrimonial Causes Act 1973 reads as follows:

> 1. Where on or after the grant of a decree of divorce or nullity of marriage the court decides to exercise its powers … in favour of a party to the marriage, it shall be the duty of the court to consider whether it would be appropriate so to exercise those powers that the financial obligations of each party towards the other will be terminated as soon after the grant of the decree as the court considers just and reasonable.
>
> 2. Where the court decides in such a case to make a periodical payments or secured periodical payments order in favour of a party to the marriage, the court shall in particular consider whether it would be appropriate to require those payments to be made or secured only for such term as would in the opinion of the court be sufficient to enable the party in whose favour the order is made to adjust without undue hardship to the termination of his or her financial dependence on the other party.

The duty of full and frank disclosure

75. It is axiomatic that in order to facilitate the court's consideration of all the circumstances of a given case, the parties must provide it, and each other, with full and frank disclosure.

76. In *NG v SG* [2011] EWHC 3270 (Fam), at paragraph [1], Mostyn J said as follows:

> *The law of financial remedies following divorce has many commandments but the greatest of these is the absolute bounden duty imposed on the parties to give, not merely to each other, but, first and foremost <u>to the court</u>, full frank and clear disclosure of their present and likely future financial resources. Non-disclosure is a bane which strikes at the very integrity of the adjudicative process. Without full disclosure the court cannot render a true certain and just verdict. Indeed, Lord Brandon has stated that without it the Court cannot <u>lawfully</u> exercise its powers (see*

Livesey (formerly Jenkins) v Jenkins [1985] FLR 813, HL). It is thrown back on inference and guess-work within an exercise which inevitably costs a fortune and which may well result in an unjust result to one or other party.

77. Lady Hale made much the same point in *Sharland v Sharland* [2015] UKSC 60, at paragraph [22]:

Lord Brandon of Oakbrook emphasised that "unless a court is provided with correct, complete and up to date information on the matters to which … it is required to have regard, it cannot lawfully or properly exercise its discretion in the manner ordained by that subsection". Hence each party "owes a duty to the court to make full and frank disclosure of all material facts to the other party and the court".

78. The duty is far older than either of those cases, or even the 1985 case to which they refer. In a case decided before the applicant or the respondent were born, *J v J* [1955] P 215, Sachs J said as follows:

In cases of this kind, where the duty of disclosure comes to lie on a husband; where a husband has - and his wife has not - detailed knowledge of his complex affairs; where a husband is fully capable of explaining, and has had opportunity to explain, those affairs, and where he seeks to minimize the wife's claim, that husband can hardly complain if, when he leaves gaps in the court's knowledge, the court does not draw inferences in his favour. On the contrary, when he leaves a gap in such a state that two alternative inferences may be drawn, the court will normally draw the less favourable inference - especially where it seems likely that his able legal advisers would have hastened to put forward affirmatively any facts, had they existed, establishing the more favourable alternative.

[I]t is as well to state expressly something which underlies the procedure by which husbands are required in such proceedings to disclose their means to the court … [T]he obligation of the husband is to be full, frank and clear in that disclosure. Any shortcomings of the husband from the requisite standard can and normally should be visited at least by the court drawing inferences against the husband on matters the subject of the shortcomings - in so far as such inferences can properly be drawn.

For a husband in maintenance proceedings simply to wait and hope that certain questions may not be asked in cross-examination is wholly wrong.

79. Perhaps the pithiest and most evocative summation of the relevant principle is to be found in Moor J's judgment in *Young v Young* [2013] EWHC 3637 (Fam), at paragraph [20]:

[I]t is up to the Respondent to open the cupboard door and show that the cupboard is bare. If he does not do so, the court can draw the inference that the cupboard is not bare.

80. Again, a similar point was made by a higher court in *Baker v Baker* [1995] 2 FLR 829, when Butler-Sloss LJ said this:

[I]f a court finds that the husband has lied about his means, lied about other material issues, withheld documents, and failed to give full and frank disclosure, it is open to the court to find that beneath the false presentation, and the reasons for it, are undisclosed assets.

81. The leading authority on the drawing of adverse inferences from a failure to provide full and frank disclosure is now the decision of the Court of Appeal in *Moher v Moher* [2019] EWCA Civ 1482, in which case Moylan LJ said, in paragraphs [87] to [91]:

i. *It is clearly appropriate that generally, as required by section 25, the court should seek to determine the extent of the financial resources of the non-disclosing party.*

ii. *When undertaking this task the court will, obviously, be entitled to draw such adverse inferences as are justified having regard to the nature and extent of the party's failure to engage properly with the proceedings. However, this does not require the court to engage in a disproportionate enquiry. Nor … should the court "engage in pure speculation". As Otton LJ said in Baker v Baker, inferences must be "properly drawn and reasonable". This was reiterated by Lady Hale in Prest v Petrodel, at [85]:*

"… the court is entitled to draw such inferences as can properly be drawn from all the available material, including what has been disclosed, judicial experience of what is likely to be being concealed and the inherent probabilities, in deciding what the facts are."

iii. *This does not mean … that the court is required to make a specific determination either as to a figure or a bracket. There will be cases where this exercise will not be possible because, the manner in which a party has failed to comply with their disclosure obligations, means that the court is "unable to quantify the extent of his undisclosed resources", to repeat what Wilson LJ said in Behzadi v Behzadi.*

iv. *How does this fit within the application of the principles of need and sharing? The answer, in my view, is that, when faced with uncertainty consequent on one party's non-disclosure and when considering ... "the inherent probabilities" the court is entitled, in appropriate cases, to infer that the resources are sufficient or are such that the proposed award does represent a fair outcome. This is, effectively, what Munby J did in both Al-Khatib v Masry and Ben Hashem v Al Shayif and, in my view, it is a legitimate approach …*

This approach is both necessary and justified to limit the scope for what … could otherwise be, a "cheat's charter". As Thorpe J said in F v F, although not the court's intention, better an order which may be unfair to the non-disclosing party than an order which is unfair to the other party. This does not mean, as Mostyn J said in in NG v SG, at [7], that the court should jump to conclusions as to the extent of the undisclosed wealth simply because of some non-disclosure. It reflects, as he said at [16(viii)], that the court must be astute to ensure that the non-discloser does not obtain a better outcome than that which would have been ordered if they had complied with their disclosure obligations.

Business valuations

82. A number of cases have considered the question of how the court ought to approach cases involving business assets. In the very recent case of *HO v TL* [2023] EWFC 215,

at paragraphs [20] to [27], Peel J helpfully summarised the key decisions and the principles to be drawn from them:

The relevant legal principles seem to me to be as follows.

First, it is for the court to determine the value, not the expert.

Second, valuations of private companies can be fragile and uncertain. In Versteegh v Versteegh [2018] EWCA Civ 1050 Lewison LJ said at para 185:

"The valuation of private companies is a matter of no little difficulty. In H v H [2008] EWHC 935 (Fam), [2008] 2 FLR 2092, Moylan J said at [5] that "valuations of shares in private companies are among the most fragile valuations which can be obtained." The reasons for this are many. In the first place there is likely to be no obvious market for a private company. Second, even where valuers use the same method of valuation they are likely to produce widely differing results. Third, the profitability of private companies may be volatile, such that a snap-shot valuation at a particular date may give an unfair picture. Fourth, the difference in quality between a value attributed to a private company on the basis of opinion evidence and a sum in hard cash is obvious. Fifth, the acid test of any valuation is exposure to the real market, which is simply not possible in the case of a private company where no one suggests that it should be sold. Moylan J is not a lone voice in this respect: see A v A [2004] EWHC 2818 (Fam), [2006] 2 FLR 115 at [61] – [62]; D v D [2007] EWHC 278 (Fam) (both decisions of Charles J)."

Third, I suggest that the reliability of a valuation will depend on a number of factors such as: (i) whether there are applicable comparables, (ii) how "niche" the business is, (iii) whether the business is to be valued on a net asset basis (for example a property company) or one of the recognised income approaches (such as EBITDA or DCF), (iv) the extent of the parties' interests, and accordingly their level of control, (v) the extent of third party interests, (vi) the relevance of any shareholders' agreements, (vii) whether there is a realistic market for sale, (viii) the volatility or otherwise of the figures, (ix) the reliability of forecasts, and (x) whether the assumptions underpinning the valuation are seriously in dispute.

Fourth, in practice the choices for the court will be, per Moylan LJ in Martin v Martin [2018] EWCA Civ 2866 at para 93: (i) "fix" a value; (ii) order the asset to be sold; and iii) divide the asset in specie. The latter option (divide the aspect in specie) is commonly referred to as Wells sharing (Wells v Wells [2002] EWCA Civ 476).

Fifth, whether a business should be retained by one party, or sold, or divided in specie will depend on the facts of each case. Relevant features will include whether the business was founded during the marriage or pre-owned, whether it has its origins in one party's nonmarital wealth, whether the parties were both involved in its strategy and operation, the ownership structure of the business, whether Wells sharing is practical or realistic given that it will usually continue to tie the parties together to some extent, and how to ensure a fair allocation of all the resources in any given case.

Sixth, as was pointed out in Wells (supra), Versteegh (supra) and Martin (supra), there is a difference in quality between copper-bottomed assets and illiquid/risk-laden assets. As Moylan said LJ at para 93 of Martin (supra):

"The court has to assess the weight which can be placed on the value even when using a fixed value for the purpose of determining the award to make. This applies both to the amount and to the structure of the award, issues which are interconnected, so that the overall allocation of the parties' assets by application of the sharing principle also effects a fair balance of risk and illiquidity between the parties. Again, I emphasise, this is not to mandate a particular structure but to draw attention to the need to address this issue when the court is deciding how to exercise its discretionary powers so as to achieve an outcome that is fair to both parties. I would also add that the assessment of the weight which can be placed on a valuation is not a mathematical exercise but a broad evaluative exercise to be undertaken by the judge".

Seventh, when deciding how to reflect the illiquidity or risk in a private company, the court has three choices:

i. *The business valuation may incorporate a discount for factors such as lack of control, lack of marketability, and lack of risk. This is particularly common where a party has a minority holding, or otherwise does not have overall control, and there are relevant third-party interests. In such circumstances, the court may simply adopt the business valuation as reflecting these matters. This I term an "accountancy discount".*

ii. *To step back when conducting the s25 exercise and, in the exercise of its discretion, to allocate the resources in such a way as to reflect illiquidity and risk. Conventionally, that would be to allocate to the party retaining the business a greater share of the overall assets to provide a fair balance. As Bodey J said in Chai v Peng and Others [2017] EWHC 792 (Fam) at para 140:*

"It is a familiar approach to depart from equality of outcome where one party (usually the wife) is to receive cash, while the other party (usually the husband) is to retain the illiquid business assets with all the risks (and possible advantages) involved".

It will be for the court to determine whether, and to what extent, to reflect this aspect in what might be a termed a "court discount". Of particular relevance, it seems to me, is whether the illiquid (or less liquid) business represents the principal asset in the case, in which event the distinction between liquid/illiquid assets may be sharper and require particular attention, or whether it is a relatively modest part of the overall assets.

iii. *The court might, in the right case, take both the valuation, which includes an accountancy discount, and apply a further court discount i.e. an amalgam of (i) and (ii). Moylan LJ in Martin (supra) at para 94 considered that this would not be double counting: "…this is not…to take realisation difficulties into account twice". It will all depend on the case. If, for example, the accountancy valuation includes a discount for a minority holding, but it is clear that there is no possibility of realisation of interest in the future by sale or otherwise, it seems to me that it would not be unfair to further take that factor into account when allocating assets.*

83. With due diffidence, I propose to supplement Peel J's summary by quoting at slightly greater length from two of the earlier decisions to which that summary refers.

84. The first of the two is *H v H* [2008] EWHC 935 (Fam), in which, at paragraph [5], Moylan J (as he then was) said this:

As Lord Nicholls said in Miller v Miller; McFarlane v McFarlane [2006] 2 AC 618 [26]: "valuations are often a matter of opinion on which experts differ. A thorough investigation into these differences can be extremely expensive and of doubtful utility". I understand, of course, that the application of the sharing principle can be said to raise powerful forces in support of detailed accounting. Why, a party might ask, should my "share" be fixed by reference other than to the real values of the assets? However, this is to misinterpret the exercise in which the court is engaged. The court is engaged in a broad analysis in the application of its jurisdiction under the Matrimonial Causes Act, not a detailed accounting exercise. As Lord Nicholls said, detailed accounting is expensive, often of doubtful utility and, certainly in respect of business valuations, will often result in divergent opinions each of which may be based on sound reasoning. The purpose of valuations, when required, is to assist the court in testing the fairness of the proposed outcome. It is not to ensure mathematical/accounting accuracy, which is invariably no more than a chimera. Further, to seek to construct the whole edifice of an award on a business valuation which is no more than a broad, or even very broad, guide is to risk creating an edifice which is unsound and hence likely to be unfair. In my experience, valuations of shares in private companies are among the most fragile valuations which can be obtained.

85. The second is the decision of Moylan LJ in *Martin v Martin* [2018] EWCA Civ 2866, where, at paragraphs [80] and [82], the following was said:

I would not have thought that the concept of assets having variable degrees of risk, based on their volatility, would be controversial …

The first Court of Appeal decision in the field of financial remedy which is generally recognised as drawing direct attention to this issue is Wells v Wells [2002] EWCA Civ 476 … As the headnote states, the Court of Appeal decided that: "The judge … had erred in awarding the wife the bulk of those assets which were readily saleable at stable prices, leaving the husband with all those assets which were substantially more illiquid and risk laden".

Liabilities

86. Helpful guidance on the proper treatment of liabilities, which although not strictly binding upon me is nevertheless powerfully persuasive, is to be found in the decision of His Honour Judge Hess in *P v Q (Financial Remedies)* [2022] EWFC B9, at paragraph [19(x)]:

I have looked at a number of authorities which deal wholly or partly with this point and I include the following in that category: M v B [1998] 1 FLR 53; W v W [2012] EWHC 2469; Hamilton v Hamilton [2013] EWCA Civ 13; B v B [2012] 2 FLR 22; Baines v Hedger [2008] EWHC 1587; and NR v AB [2016] EWHC 277. I have also looked at an article by Alexander Chandler … on the subject: Family loans an intervener claims - taking the bank of mum and dad to court [2015] Fam Law 1505. I derive the following summary of principles from this reading:

a. Once a judge has decided that a contractually binding obligation by a party to the marriage towards a third party exists, the court may properly wish to go on to consider whether the obligation is in the category of a hard obligation or loan, in which case it should appear on the judges' computation table, or it is in the category of a soft obligation or loan, in which case the judge may decide as an exercise of discretion to leave it out of the computation table.

b. There is not in the authorities any hard or fast test as to when an obligation or loan will fall into one category or another, and the cases reveal a wide variety of circumstances which cause a particular obligation or loan to fall on one side or other of the line.

c. A common feature of these cases is that the analysis targets whether or not it is likely in reality that the obligation will be enforced.

d. Features which have fallen for consideration to take the case on one side of the line or another include the following and I make it clear that this is not intended to be an exhaustive list.

e. Factors which on their own or in combination point the judge towards the conclusion that an obligation is in the category of a hard obligation include (1) the fact that it is an obligation to a finance company; (2) that the terms of the obligation have the feel of a normal commercial arrangement; (3) that the obligation arises out of a written agreement; (4) that there is a written demand for payment, a threat of litigation or actual litigation or actual or consequent intervention in the financial remedies proceedings; (5) that there has not been a delay in enforcing the obligation; and (6) that the amount of money is such that it would be less likely for a creditor to be likely to waive the obligation either wholly or partly.

f. Factors which may on their own or in combination point the judge towards the conclusion that an obligation is in the category of soft include: (1) it is an obligation to a friend or family member with whom the debtor remains on good terms and who is unlikely to want the debtor to suffer hardship; (2) the obligation arose informally and the terms of the obligation do not have the feel of a normal commercial arrangement; (3) there has been no written demand for payment despite the due date having passed; (4) there has been a delay in enforcing the obligation; or (5) the amount of money is such that it would be more likely for the creditor to be likely to waive the obligation either wholly or partly, albeit that the amount of money involved is not necessarily decisive, and there are examples in the authorities of large amounts of money being treated as being soft obligations.

g. It may be that there are some factors in a particular case which fall on one side of the line and other factors which fall on the other side of the line, and it is for the judge to determine, looking at all of these factors, and maybe other matters,

what the appropriate determinations to make in a particular case in the promotion of a fair outcome.

Litigation conduct and costs

87. Plainly, given all that I have said already in relation to the difficulties presented by the respondent's failure to provide disclosure that was full, frank, clear, accurate and timely, litigation conduct is something which I am bound to consider in this case.
88. The current law concerning conduct, including litigation conduct, is clearly summarised in Mostyn J's decision in *OG v AG* [2020] EWFC 52, at paragraphs [30] to [39] and [71] to [72]:

Time was that when the court exercised a discretion in relation to ancillary relief it formed first and foremost a moral judgment. Therefore, in Constantinidi v Constantinidi and Lance [1905] P 253 Stirling LJ held that "in the exercise of every discretion which is vested in the [Divorce] Court, the Court should endeavour to promote virtue and morality and to discourage vice and immorality". The moral judgment that was formed in those days was almost always about sex. I have not located any judgment in the old era where financial dishonesty was independently penalised.

But times have changed. The financial remedy court is no longer a court of morals. Conduct should be taken into account not only where it is inequitable to disregard [it] but only where its impact is financially measurable. It is unprincipled for the court to stick a finger in the air and arbitrarily to fine a party for what it regards as immoral conduct.

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.

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.

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.
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.

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.

The revised para 4.4 of FPR PD28A is extremely important. It requires the parties to negotiate openly in a reasonable way.

It is important that I enunciate this principle loud and clear: if, once the financial landscape is clear, you do not openly negotiate reasonably, then you will likely suffer a

penalty in costs. This applies whether the case is big or small, or whether it is being decided by reference to needs or sharing.

89. In at least broad, if not absolute, agreement with Mostyn J, in *TT v CDS* [2020] EWCA Civ 1215 (also reported as *Rothschild v De Souza*), Moylan LJ said, at paragraph [65], that:

[the] general approach is that litigation conduct within the financial remedy proceedings will be reflected, if appropriate, in a costs order. However, there are cases in which the court has determined that one party's litigation conduct has been such that it should be taken into account when the court is determining its award.

90. A similar view was expressed in *Goddard-Watts v Goddard-Watts* [2023] EWCA Civ 115, where Macur LJ stated, at paragraph [71], that "*the 'orthodox approach' to litigation misconduct is to be met by an award of costs.*"

91. Further, as Francis J noted in *WG v HG* [2018] EWFC 84, at paragraph [91], "*people cannot litigate on the basis that they are bound to be reimbursed their costs … no one enters litigation simply expecting a blank cheque.*"

92. The rules relating to questions of costs, as between the applicant and the respondent, appear in Family Procedure Rules 2010, rule 28.3, most notably at paragraphs (5) to (7):

(5) Subject to paragraph (6), the general rule in financial remedy proceedings is that the court will not make an order requiring one party to pay the costs of another party.

(6) The court may make an order requiring one party to pay the costs of another party at any stage of the proceedings where it considers it appropriate to do so because of the conduct of a party in relation to the proceedings (whether before or during them).

(7) In deciding what order (if any) to make under paragraph (6), the court must have regard to –

(a) any failure by a party to comply with these rules, any order of the court or any practice direction which the court considers relevant;
(b) any open offer to settle made by a party;
(c) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;
(d) the manner in which a party has pursued or responded to the application or a particular allegation or issue;
(e) any other aspect of a party's conduct in relation to proceedings which the court considers relevant; and
(f) the financial effect on the parties of any costs order.

93. Family Procedure Rules 2010, PD28A, paragraph 4.4, provides as follows:

> In considering the conduct of the parties for the purposes of rule 28.3(6) and (7) (including any open offers to settle), the court will have regard to the obligation of the parties to help the court to further the overriding objective (see rules 1.1 and 1.3) and will take into account the nature, importance and complexity of the issues in the case. This may be of particular significance in applications for variation orders and interim variation orders or other cases where there is a risk of the costs becoming disproportionate to the amounts in dispute. The court will take a broad view of conduct for the purposes of this rule and will generally conclude that to refuse openly to negotiate reasonably and responsibly will amount to conduct in respect of which the court will consider making an order for costs. This includes in a 'needs' case where the applicant litigates unreasonably resulting in the costs incurred by each party becoming disproportionate to the award made by the court. Where an order for costs is made at an interim stage the court will not usually allow any resulting liability to be reckoned as a debt in the computation of the assets.

94. A rather different legal regime applies to questions of costs as between the intervenors, on the one hand, and the applicant and the respondent, on the other hand. In that case, the treatment of costs is governed by rule 28.2, which means that the court begins with a 'clean sheet', as explained in *Baker v Rowe* [2010] 1 FLR 761.

The evidence

95. As I have already observed, prior to the final hearing, I was supplied with a core bundle of 768 pages, which I was able to read in advance of the first day of the hearing, and a supplementary bundle of 390 pages, which I considered as and when I was referred to it. I admitted additional documents into evidence, including the intervenors' statements, already referred to, in the course of the hearing. I heard oral evidence from the applicant, the respondent, the respondent's brother and the respondent's sister. I make it quite clear, for the avoidance of doubt, that I have borne carefully in mind all that I read and heard, irrespective of whether or not I refer to it directly in this judgment.

96. I will turn to consider the evidence, written and oral, of those witness who gave evidence before me shortly, but before doing so I should say just a little about the written evidence of some of those who did not give evidence before me, namely those expert witnesses whose reports were place before me with the court's express prior permission, granted in accordance with the requirements of Family Procedure Rules 2010, Part 25, and whose evidence was 'uncontroverted' (within the meaning of the Supreme Court's very recent decision in *TUI v Griffiths* [2023] UKSC 48).

97. The totality of the evidence, and the agreed contents of the parties' final amended ES2, make clear that by far the most significant of the parties' known assets are the family home and the respondent's shareholding in the company.

Valuation of the family home

98. The family home has recently been valued by a single joint expert surveyor at £550,000. It is not in dispute that the property is legally and beneficially owned by the applicant and the respondent, in whose joint names the legal title is registered at the Land Registry.

99. Nor is it in dispute that there is a joint mortgage loan secured against the property with an outstanding balance of -£335,831. The parties have agreed that the allowance

properly to be made in respect of notional costs of sale is 1.5% of the property's value, so -£9,900. There is no evidence to suggest that either party would be liable to pay capital gains tax on any disposal of their interest in the property. Ultimately, therefore, it is agreed that the total equity in the property currently stands at £204,269.

Valuation of the respondent's shareholding

100. An enormous amount of expert evidence has been commissioned and filed with a view to elucidating the value of the respondent's shareholding in the company. First, the hotel was valued by a single joint expert surveyor in June 2021. In July 2021, the applicant obtained a report from a planning consultant addressing the hotel's development potential and it was valued again, by a second surveyor instructed by the applicant, in June 2022. Finally, two reports were produced by the single joint expert forensic accountant in October 2022 and November 2023.

101. The last of those reports suggested that the value of the respondent's shareholding was £238,667 gross. Unhelpfully, the expert had not been instructed to report as to the value of that interest net of tax and any other costs likely to be incurred on any disposal, and nor had he been instructed to report as to levels of liquidity within the company or the range of realistic options available when it came to realising the respondent's interest. Those are basic considerations that I would expect to see addressed in any expert's report dealing with business assets in a case of this kind and it is manifestly unhelpful that this expert apparently was not instructed accordingly. My ability to take judicial notice of certain matters simply does not enable me to fill the resultant gaps in the expert evidence.

102. Somewhat counter-intuitively, the expert valued the whole company on a net asset basis, relying upon various figures taken from the company's financial statements, notwithstanding that in his view, having regard to the information and documentation supplied to him, such as it was, those financial statements "*cannot be relied upon*".

103. On the applicant's behalf, Miss Saunders suggested that coming from an accountant, that measured observation has, in reality, to regarded as a damning indictment and, having regard to the totality of the evidence, I am bound to say that I agree.

104. In the end, neither party contended for the inclusion of any figure other than the expert's in the ES2, but Miss Saunders properly stressed the fragility of the expert's valuation, against a backdrop of only limited engagement with the expert on the respondent's part.

105. Considering the evidence in the round, in light of the authorities to which I have referred, it seems to me that I am bound to regard the expert's valuation as extraordinarily fragile.

106. Miss Saunders understandably stresses the risk of under-valuation on the basis that the expert has, not ungenerously, taken at face value figures presented to him by the company and/or the respondent, notwithstanding that he was provided with no relevant documents to substantiate them, even when such documents were asked for, such that, for example, the balance outstanding in respect of its secured debt to the bank had to be taken on trust.

107. Equally, however, I am mindful that the expert valued the company's one major asset, the hotel, at £1,200,000, on the basis of marketing appraisals obtained in September 2021 and his own calculation as to the property's value to the company as a development site, notwithstanding that the expert evidence, properly-so-called, as to the property's value – the surveyors' valuations obtained in June 2021 and June 2022 – put it at no higher than £715,000, and the single joint expert, reporting in June 2021, at £450,000 to £625,000.

108. Had it not been for the respondent's concession that the court could properly and safely adopt it, I might have wondered whether I was really able to proceed on the basis of so fragile a figure, but in light of his concession, I am just persuaded that I can and should, while keeping in mind, at all times, the facts that:

    a. the figure of £238,667 is gross and not net;
    b. that valuation is, in my judgment, exceptionally fragile; and

c. the shareholding has a different risk- and liquidity-profile to other assets.

109. In the latter connection, it seems to me to be pertinent to note that the expert's conclusion regarding the unreliability of the company's accounts has a potentially significant bearing upon the prospects of the respondent realising the value of his interest relatively swiftly and inexpensively, since it appears doubtful that a reasonably prudent purchaser would, after completing conventional 'due diligence' work, be keen to purchase the company.

The oral evidence

110. I turn now to deal with the evidence of the four witnesses who gave evidence before me. With due respect to each of them, I am bound to say that none of them could properly be described as having been impressive.

The applicant

111. The applicant gave the distinct impression of having given relatively little consideration to any feature of the case other than the shortcomings in the respondent's disclosure.

112. Certainly, she appeared to have thought remarkably little about her own future plans, how she is proposing to secure the respondent's release from liability for the mortgage, or where she will live and how she will earn a living if the family home has to be sold, either because she is given time to procure the respondent's release but cannot do so or because the court is not satisfied that it is a realistic prospect and so determines that the nettle must be grasped sooner rather than later.

113. Her evidence that she might be able to increase her own independent mortgage borrowing capacity almost threefold from its current level of c.£120,000 (with a sub-prime lender) to the level required to refinance the existing debt, simply by increasing the number of rooms she lets from three to four, was so unconvincing that one could not help but wonder whether even she believed it.

114. Her evidence that she might enlist the support of the parties' daughter and her partner, or her sister, as guarantor but had not discussed their willingness to assist with them and did not know the current state of their finances, was scarcely more persuasive, and her suggestion that she could ask her partner, a businessman, but would prefer not to do so, took matters no further forward.

The respondent

115. If the applicant's evidence was underwhelming, the respondent's verged on appalling. In a twenty year career in family law, at the bar and on the bench, I cannot recall having heard any witness answer 'I don't know' and 'I can't remember' so frequently or with so little apparent conviction. Occasional recourse to such answers may suggest that a witness is taking care not to overstate their case and can sometimes be a hallmark of reliable testimony. In the respondent's case, however, I am satisfied to at least the requisite standard – the balance of probabilities – and in reality well beyond, that it actually signified his casual indifference as to whether his evidence was of any real assistance to the court or not.

116. His performance in the witness box was consistent, I find, with his approach to the proceedings as a whole, which has been characterised by obfuscation.

117. He was unwilling or unable to explain even what had been meant by apparently simple assertions made in his written evidence, the truth of which he had purported to confirm, under oath, at the outset.

118. To my mind, his mantra – that he had struggled throughout the proceedings, on the verge of a breakdown, having been thrown out of his home – rang hollow, was unsupported by such medical evidence as he had produced, and failed entirely to explain or excuse the long-standing and substantial shortcomings in his approach to the provision of relevant information and documentation.

119. All in all, I found myself impelled to conclude that his oral evidence had almost no real probative value, save to confirm that he had no great interest in assisting the court and providing it with information that was full, frank, clear and accurate.

The intervenors

120. The respondent's brother and sister fared rather better inasmuch as that they did, at least, appear to be doing the best they could to assist the court as well as the respondent.

121. The evidence given by the respondent's brother about his own frustration at the situation in which he felt his brother had landed the family as a whole, for example, appeared to me to have an air of authenticity about it.

122. That said, it very quickly became apparent that the central contention advanced in the evidence of both intervenors who gave evidence before me – that the respondent owes the company around £100,000 on account of costs incurred in these proceedings – simply could not be sustained and was, in fact, undermined by documents they had produced.

123. In reality, according to their own evidence, taken at its highest, the sums advanced by the company on account of the respondent's legal costs, or to satisfy costs orders made against the respondent, amounted to only a fraction of the six-figure sum asserted.

<u>My findings</u>

124. So it is then, against the backdrop of apparent non-disclosure on the respondent's part, and on the basis of fragile expert valuation evidence and generally unimpressive witness evidence, that I must make findings as to the relevant facts and figures, and determine the outcome most likely to achieve fairness in all the circumstances of this difficult case.

125. For the sake of clarity and completeness, in so doing I propose to address each of the relevant criteria in Matrimonial Causes Act 1973, section 25(2), briefly in turn.

Section 25(2)(a)

126. As noted above, the available evidence identifies the existence of two principal assets, namely the jointly owned family home (valued at £550,000 gross and £204,269 net) and the respondent's shareholding (valued at £238,667 gross); I will not repeat here all that I have already said about the fragility of that latter valuation.

127. In additional, the agreed elements of the ES2 indicate that the applicant has two bank accounts with an aggregate credit balance of £9,066 and a £20,200 Land Rover, together with two modest pensions with an aggregate 'cash equivalent' value of £21,551. The respondent reportedly has £500, held in his partner's bank account.

128. In many ways, the central question in this case, the fulcrum around which it turns, is that of the probable extent of any undisclosed property or financial resources enjoyed by the respondent. Having reflected carefully upon all of the evidence that I read and heard, and counsel's submissions, made both in writing in their position statements and orally, I have come to the clear view that:

    a. the respondent has failed to discharge his duty of full and frank disclosure;
    b. I can and should draw appropriate adverse inferences from that failure;
    c. it is probable that the respondent has at least some undisclosed property and/or financial resources; and
    d. it is impossible to reach a view as to the likely nature and extent of any such property and/or financial resources without engaging in impermissible speculation.

129. I am quite satisfied that for a substantial period of time following the parties' separation, the respondent was effectively left alone to mismanage the company and its funds. Throughout that period it appears to me that he failed to differentiate, properly or at all, between funds belonging to him and funds belonging to the company, treating the latter as if they were the former and spending freely. It appears that no proper record of that spending was kept, to ensure that it was all properly accounted for in the fullness of time. In short, it appears that he treated the company as his own personal 'piggy bank', managing it, insofar as he was doing, in his own interests and not in the interests of all the company's shareholders.

130. It is much less clear whether the respondent's spending goes any way towards explaining what became of the proceeds of sale of the property at Coronation Road, sold by the company at around the time of the parties' separation, of which, according to the single joint expert accountant, at least £88,000, and possibly more, remains unaccounted for.

131. On the balance of probabilities, it appears to me that the respondent is unlikely to enjoy such unfettered access to company funds now that he is no longer a company director and his brother has taken the helm. It is manifestly unclear whether his mismanagement of company funds will ever give rise to action to recover any misspent funds from him, given that the company's directors, and his fellow shareholders, are his brother and sister.

132. The respondent's brother gave evidence that a future redistribution of shares within the sibling group was a possibility, but that appeared to be in connection with the alleged lending of approximately £100,000 to meet legal fees rather than any other expenditure, and it did not appear that there was a cogent, agreed plan in that regard or in any other.

133. The cross-examination of the respondent highlighted a substantial likelihood that he has, or at least has had, access to an undisclosed bank account or accounts, but whether any such accounts are still in existence, and what funds they may hold if so, is far from clear.

134. The available evidence, such as it is, suggests that the applicant has a gross annual income from the letting of rooms at the family home which amounts to approximately £15,000 (the net figure, which I was not given, will be lower but not particularly dissimilar) and the respondent an income from work as a building contractor of approximately £21,000.

135. Neither party advanced with any particular force the suggestion that the other is failing to maximise their income or has a significant, under-utilised earning capacity. Notably, there was a striking paucity of evidence as to what kind of living the applicant could earn if the family home were sold and she needed to find work elsewhere.

Section 25(2)(b)

136. Taking ‘needs, obligations and responsibilities’ out of turn, I begin with ‘obligations’, which I take to be synonymous with ‘liabilities’.

137. The ES2 suggests that the applicant has liabilities amounting in total to -£79,589, including unpaid legal costs of -£39,491. The latter figure is supported by her Form H1, albeit on the basis that projected future costs of implementation are not accounted for. The balance of her liabilities includes the sum of -£21,000 owed to her current partner, -£15,684 owed by way of a ‘bounceback’ business loan and -£3,414 in sundry liabilities.

138. The treatment of the respondent’s debts in the ES2 was, at all times, rather problematic; at times figures appeared in the wrong columns, at others the wrong figures were used. My understanding is that the respondent asserts credit card debt of -£6,666 and a debt of -£101,525 to the company, while the applicant does not accept that those liabilities exist.

139. On any view, I am satisfied that the respondent’s debt position is not, and cannot be, quite as is suggested.

140. In seeking to ascertain the true level of his liabilities it is instructive to consider the respondent’s Form H1 and the costs orders made against him and since satisfied.

141. His Form H1 states that he has paid his solicitors £59,545 on account of total costs of £92,949, leaving an outstanding balance of -£33,404. It is by no means clear that that form has been properly completed – it includes no figure for the costs incurred with the solicitors who acted throughout most of the proceedings and a frankly incredible figure for the costs said to have been incurred with his current solicitors, who have become involved only very recently and have, I believe, never been formally on the court record – but I can do no better than take the bottom line figures at face value.

142. In evidence before me, it was suggested that the respondent’s previous solicitors have an outstanding invoice in respect of which payment is being chased. Doing the best I can, I conclude that despite appearances to the contrary, the respondent’s Form H1 figures include his previous solicitors’ costs, both paid and unpaid.

143. The sums paid under the costs orders made against the respondent come to £16,540.

144. On that basis, the total paid on account of costs, whether his or the applicant's, is £76,085. In my view, even if the company had indeed loaned the respondent all of those funds, and those loans were interest bearing, the total balance outstanding would be unlikely to have reached £100,000 or £101,523. Nobody could satisfactorily explain to me how the latter figure had been arrived at.

145. Exhibited to the respondent's brother's final witness statement was a handwritten ledger, the contents of which suggested that the company had paid £51,112 on account of costs, though even cursory consideration revealed that that figure includes legal costs incurred by the intervenors for which the respondent is not liable.

146. Proper scrutiny revealed that £44,317 is said to have been paid on account of either the respondent's costs or costs orders made against the respondent, of which £18,958 was paid to the respondent's previous solicitors, £6,000 to the respondent's previous counsel, £5,319 to the single joint expert accountant and £14,040 to the applicant's solicitors.

147. Also exhibited was the previous solicitors' ledger, which suggested that in total they had received £44,545 on account of the respondent's costs, of which £14,808 was said to have come from the respondent, £951 from his now partner, £11,175 from his brother, £4,500 from his sister and £13,111 from the company. The two payments said to have come from the respondent's brother, of £7,941 and £3,233, both appear in his ledger as having come from the company. Neither of the respondent's siblings, each of whom gave evidence before me, claimed to be owed money by the respondent personally.

148. All in all, the picture is as clear as mud. Doing the best I can, I conclude that it is probable that the respondent owes solicitors -£33,404 and the company no less than -£33,142. That latter figure is the total figure shown in the respondent's brother's

manuscript ledger as having been paid for the respondent's benefit, less the £11,174 included there but shown in the previous solicitors' ledger as having come from the respondent's brother. I suspect that the respondent may well have some credit card debt, but given that the level of debt asserted is in dispute and the figure for which he contends has not been evidenced, he can have no complaints if I take no account of it.

149. While neither party was really cross-examined on the issue, it seems to me that I must take a common sense approach to the parties' liabilities when considering their relative 'hardness'. In so doing, it seems to me that I am entitled to take the view that debts owed by the applicant to her current partner and by the respondent to the company owned by him and his siblings and now effectively operated from day to day by his brother are unlikely to be chased with the same vigour as debts owed to solicitors and other entirely commercial creditors. It seems to me that I should also take note that some are likely to be serviced on a monthly basis and not discharged in full, whatever my decision here, with the applicant's 'bounceback' loan being the case in point.

150. Ordinarily, a court's consideration of parties' liabilities would end there but in this case, it seems to me, I must also take note of the fact that the overwhelming majority of the parties' liabilities have been incurred in meeting the costs of these proceedings.

151. In particular, it seems to me, I must note that £16,540 of the respondent's liabilities are referrable to costs orders made against him due to his non-compliance with rules, practice directions and orders, and that Family Procedure Rules 2010, PD28A, paragraph 4.4, says that I ought not to allow it to be reckoned as a debt in the computation of the assets.

152. Where needs are concerned, once again, the evidence is somewhat unsatisfactory. Simply put, the parties appear to have proceeded on the basis that:

    a. the applicant's housing needs will be met by her retaining the family home;
    b. the respondent's housing needs will be met by him continuing to cohabit; and
    c. income-wise, both parties will have to 'cut their coats according to their cloth'.

153. While all of those things may be true, it would have been of assistance to the court to have been provided with better evidence regarding the likely cost of alternative housing.

Section 25(2)(c)

154. It is clear that the parties enjoyed a good standard of living.

155. They lived comfortably in an attractive, detached house, with six bedrooms in total, now valued at £550,000. It is noteworthy, however, that they did so only with the assistance of a substantial, interest only mortgage for which they seemingly have no identified repayment vehicle.

Section 25(2)(d)

156. The applicant and the respondent are now in their fifties.

157. They began living together in 1998, married in 2004 and separated in either late 2017 or early 2018, so from first cohabitation for final separation their relationship lasted for nearly 20 years. It follows, as I have already observed, that it was, by today's standards, a long marriage.

Section 25(2)(e)

158. None of the evidence placed before me suggests that either party suffers from a disability. Both parties work, in the applicant's case from home and in a self-employed capacity, and neither is in receipt of any state benefits.

159. I do not doubt that at times since the parties' separation, the respondent has struggled with some ill-health. I am satisfied that he was the victim of a violent assault which left him with injuries and I have seen correspondence from his doctor which suggests that he sought some assistance in respect of his mental health and psychological well-being.

160. However, I am satisfied, on the balance of probabilities, that he is currently suffering from no impairment which could be said to amount to a disability, properly-so-called, and similarly, for the avoidance of doubt, I am satisfied to at least the relevant standard that such ill-health as he has experienced neither explains nor excuses his longstanding failure to provide full and frank disclosure.

161. It would be surprising if this legal battle, which has lasted for four years, has not taken some toll on the health and well-being of both parties and, one imagines, the intervenors. It is my sincere hope that this judgment will now bring finality, clarity and peace of mind for all concerned and enable them to 'draw a line' and move on with their lives.

Section 25(2)(f)

162. I am entirely satisfied that, as is commonplace, both the applicant and the respondent made all manner of contributions to the welfare of the family, throughout their married lives together, in different ways, at different times, to the best of their respective abilities, and that it would be manifestly contrary to the approach for which the seminal modern authorities call to now laud the contributions of one or denigrate those of the other.

163. I note, for what it is worth, that the respondent's interest in the company was received, by way of inheritance, during the marriage. Accordingly, it could quite properly be said that at the point of acquisition, at least, it was his non-matrimonial property and so, according to one analysis, a 'contribution' that he brought to the marriage.

164. In different circumstances, that fact, and the fact that both parties then worked in the business for a number of years, might have given rise to arguments about 'mingling' or 'matrimonialisation', and the extent to which the shares had or had not retained a non-matrimonial character. Quite properly, the parties kept all such argument to an absolute minimum, recognising, as I do, that this is very clearly 'a needs case' in which arguments about the origins of a given asset can be expected to carry little weight, if any.

Section 25(2)(g)

165. Insofar as 'conduct' is in issue in this case, it is the respondent's litigation conduct and failure to provide full and frank disclosure, so conduct falling within the third and fourth of the four categories referred to in *OG v AG* [2020] EWFC 52 that falls to be considered. It follows that the appropriate remedies are likely to lie in the drawing of adverse inferences and the application of costs sanctions, rather than in any alteration of approach to the distribution of assets more generally.

Section 25(2)(h)

166. Section 25(2)(h) is simply a reminder that the court must consider the parties' pensions. Here, the applicant discloses funds worth £21,551 and the respondent discloses none. Those funds are almost entirely immaterial to the decisions that I must make in this case, although I do not lose sight of the fact that they are assets which the applicant has.

Discussion

167. According to my findings:

a. the parties are currently jointly entitled to equity in the family home of £204,629;
b. the applicant has sundry capital assets of £29,266;
c. she has pensions of £21,551;
d. she has liabilities, some 'harder' than others, amounting to -£79,589;
e. the respondent has shares with an extremely fragile gross value of £238,667;
f. he reportedly has £500 held in his partner's bank account;
g. he has undisclosed property and/or financial resources of uncertain value;
h. he has debts, some 'harder' than others, amounting to -£66,546;
i. at least -£16,540 of that debt ought not to be reckoned in any computation;
j. net of that -£16,540, the residual debt figure would be -£50,546.

168. Were I not satisfied, on the balance of probabilities, that the respondent has undisclosed property and/or financial resources, I would almost certainly have struggled to conclude that either party's final open proposal would, if implemented, lead to a fair outcome.

169. Were I satisfied that the known assets were the only assets, I do not believe that I could have concluded that the applicant receiving the family home and there otherwise being a clean break would be fair, much less that the applicant receiving the family home, together with a lump sum, and there otherwise being a clean break would be fair.

170. Were they the only assets, the applicant receiving the family home and retaining her own capital and pension assets and the respondent retaining his shareholding would not have been fair, having regard to the different risk- and liquidity-profiles of the assets.

171. The question with which I have ultimately had to wrestle is as to how the inferences that I draw about the respondent's undisclosed property and/or financial resources bear upon my assessment of what is fair in all the circumstances of the case.

172. I have concluded that I am satisfied that it is fair for the applicant to receive the family home and retain her own capital and pension assets and for the respondent to retain his shareholding. To put it another way, I am satisfied that the total net capital and pensions with which she will be left in that scenario amount to no more than her fair share of the parties' total assets, once due account is taken of the probable extent of the respondent's undisclosed property and/or financial resources. I am, of course, very much fortified in that conclusion by the respondent's open concession that it should be so.

173. After a great deal of careful reflection, however, I find myself unable to conclude that the probable extent of the respondent's undisclosed property and/or financial resources is such as to make it fair for the applicant to receive the family home plus a lump sum, of £70,000 or any other amount, as well as retaining her own capital and pensions.

174. Accordingly, having considered all of the relevant circumstances of this particular case, the criteria in Matrimonial Causes Act 1973, needs and sharing, I have concluded that the family home should be transferred to the applicant, on terms with which I deal shortly.

175. Such an outcome will leave neither party homeless nor without the means to earn a living; to that limited extent, at least, the needs of both parties will be met. It will also, I find, on the balance of probabilities, afford each party a fair share of the total available assets, disclosed and undisclosed, known and unknown to the court.

176. In accordance with the reasoning articulated in *Moher v Moher* [2019] EWCA Civ 1482, I have effectively given the applicant the benefit of the doubt that the respondent created, but even having done so I have found myself unable to conclude that her entitlement extends to a lump sum payment of up to £70,000 in addition to the other assets she will retain or receive in light of my decision.

177. That my decision and the reasons for it have had to be expressed in terms that are more 'impressionistic' than 'scientific' and I am unable to make a precise net effect calculation is entirely the fault of the parties and primarily that of the respondent.

178. I am absolutely clear that it would not be reasonable to expect that the applicant should procure the respondent's release from liability under the mortgage within just eight weeks. Such a tight timetable might be reasonable if it were clear that the applicant need only write to the existing lender, asking nicely, or make a simple application for a new loan in her sole name which the court could be confident would be successful. Plainly, however, this is not such a case.

179. The detriment the applicant would suffer in the event of an enforced sale (i.e. the loss of her home and her current livelihood) would be out of all proportion to any benefit that would accrue to the respondent, who, on his own case, has neither a borrowing capacity nor a deposit, and no plan to purchase a new home for himself at any point in the reasonably foreseeable future. To my mind, those factors militate forcefully in favour of allowing the applicant rather longer to try to make the necessary arrangements.

180. The evidence did not make clear to me why she felt that she could achieve in 18 months what she potentially could not in 12 months or six months. Equally, however, it struck me that in conceding that the guillotine should fall after 18 months, she made a

significant concession when she could properly have argued that it should instead fall on the expiry of the existing mortgage term in around three and a half years.

181. I am entitled to look outside of the parameters suggested by the parties' open proposals and I have considered whether I should do so, and allow more than 18 months, particularly given the applicant will not receive the lump sum for which she hoped and will therefore be left with liabilities that she would have hoped to be able to clear through recourse to it, which will certainly do nothing to assist her in refinancing the existing mortgage borrowing.

182. Ultimately, I have decided that I ought not to allow any more than 18 months but, equally, I ought not to allow any less.

183. Having regard to the circumstances of this case, and the 'statutory steer' in section 25A of the 1973 Act, I have no hesitation in concurring with the parties that there should be a full and immediate clear break as to capital and income.

184. Barring any application to reopen proceedings as a result of a material non-disclosure having been brought to light, it is my very firm, clear view that this written judgment and the order that flows from it should be the last words in respect of the parties' claims arising from their marriage and their divorce.

Costs

185. Unusually, I invited counsel to address the issue of costs, alongside all other issues, when making their closing submissions as it appeared to me then, and still appears to me, that the question of whether I should hold fast to, or depart from, the general rule that there should be no order as to costs turns largely on factors other than how closely my final decision resembles any open proposal(s) put forward by either party.

186. My decision accords with each party's final open proposal to an extent. The respondent may reasonably be said to have achieved a measure of success in resisting the applicant's claim for a lump sum, but it must be borne in mind that it was only on 7 December 2023, just two clear working days prior to the final hearing, that he made his open proposals providing that there should be no lump sum payment made either way. Until that point, his open position was that he should receive a lump sum of £100,000 from the applicant. That position was unsustainable, as his final open offer tacitly acknowledged.

187. In any event, it seems to me, this is not a case in which the parties' open proposals can properly be seen as 'the be all and end all' when it comes to decision making on costs.

188. The decision of Mostyn J in *OG v AG* [2020] EWFC 52 suggests that the legal duty under Family Procedure Rules 2010, PD28A, paragraph 4.4, to negotiate openly is engaged "*once the financial landscape is clear*".

189. Here, owing to the respondent's litigation conduct, much of that landscape has remained shrouded in fog and it has been left to me to infer what the true lie of the land might have been seen to be, had that fog ever cleared.

190. In the circumstances, I am absolutely satisfied that it would ill-behove the respondent to pray in aid of his case the applicant's 'failure' to accept his offer of 7 December 2023 or to negotiate openly around it.

191. When considering the question of costs, and the criteria in rule 28.3(7), it is clear to me that the one feature of truly magnetic importance is the respondent's litigation conduct. Mostyn J, of course, says that such conduct "*should be severely penalised in costs*".

192. Taking a broad view of the respondent's conduct, as suggested in PD28A, paragraph 4.4, I have come to a conclusion that this is a case is which I am compelled to conclude that there must a departure from the general rule that there should be no order as to costs and the respondent must be required to pay a large contribution towards the applicant's costs, in recognition of the extent to which those costs have been increased by his conduct.

193. Doing the best I can to strike the appropriate balance, I have concluded that in addition to the sums already paid, the respondent ought properly to make a further contribution of £40,000 towards the applicant's costs.

194. Before arriving at my decision to order a contribution in a fixed sum, I considered and discounted the possibility of ordering the respondent to pay a percentage of the applicant's costs, the extent of which would have to be assessed in detail if not agreed, on the basis that that would be contrary to the overriding objective.

195. In deciding to order a fixed contribution, and in quantifying that contribution as I have, I bore carefully in mind the following factors:

a. there have been four previous costs orders made against the respondent;
b. there are some costs in respect of which the court has previously made no order;
c. my order ought not to 'go behind' any previous orders;
d. the costs still in issue include those of the ineffective final hearing in April 2023, the pre-trial review in October 2023 and the final hearing in December 2023;
e. some costs may have been saved by my vacating day three of the final hearing;
f. the 'indemnity principle' means the applicant cannot recover from the respondent any costs she would not have been liable to meet herself;
g. it was reasonable to expect that the applicant would incur some costs in any event;
h. £40,000 represents almost half of the total costs said to have been incurred by her;
i. payment of a further £40,000 will take the respondent's total contribution towards the applicant's costs to well in excess of half of the total said to have been incurred;
j. on my findings, I am unable to point directly to a liquid capital asset valued at £40,000 or more from which the funds required to make the payment can be taken;
k. requiring the respondent to make such a substantial contribution will have a significant adverse effect on his overall financial position; and
l. effectively relieving the applicant of the burden of her unpaid costs will have a significant positive effect on her overall financial position.

196. I consider that the applicant's net contribution to her own costs, after deduction of the sums ordered to be paid by the respondent, is commensurate with the level of expense that would reasonably have been expected had the respondent provided timely, full, frank, clear and accurate disclosure when he was required to do so, and cooperated fully and openly with the single joint expert accountant, as he was plainly required to do, thereby satisfying his disclosure obligations and discharging his duty to assist the court in furthering its overriding objective, detailed in Family Procedure Rules 2010, rule 1.1, of dealing with the case justly (that is expeditiously, fairly, in a proportionate way, ensuring that the parties are on an equal footing, saving expense and allotting an appropriate share of the court's resources).

197. For the avoidance of doubt, I am satisfied that the outcome which will result from my decision, including as to costs, is the fairest outcome achievable in all the circumstances.

198. As between the intervenors, on the one hand, and the applicant and the respondent, on the other, I make no order as to costs. In large part, the costs arising from the intervention have already been dealt with by the order made in March 2022; between March 2022 and April 2023, the intervenors played no effective part in the proceedings; and insofar as costs have been incurred in connection with their participation in the proceedings since April 2023, I see no good reason whatsoever to make any costs order in relation to them.

Recorder Day

21 December 2023