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IN THE FAMILY COURT AT THE CENTRAL FAMILY COURT

BV19D10071

Neutral Citation Number: [2023] EWFC 36 (B)

BETWEEN:

NO

Applicant

and

PQ

Respondent

Mr James Finch (instructed by JMW Solicitors) for the applicant

The respondent appeared in person

Hearing dates 23 - 25 January 2023 and 23 February

JUDGMENT OF RECORDER R TAYLOR

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Introduction

1. This is the final hearing of NO's ("W") application for financial remedies.

2. W and PQ ("H") cohabited from 1988, married in 1994 and separated in or about 2018. W is 60 and H is 58.

3. The marriage produced three children who are now aged 26, 25 and 21. The children are presently residing with W at the five bedroomed former matrimonial home ("FMH"), but as they are now adults they do not feature to any extent in the determination I need to make.

4. Before setting out the unhappy background to my decision, I would like to pay tribute to Mr Finch who has been unfailingly helpful throughout the hearing, both to myself and H who acted without the benefit of legal representation.

5. H also conducted himself with dignity in what must have been a very stressful experience for him. H can be assured that I do not consider him to have been at any material disadvantage for having conducted the hearing without lawyers. Hopefully, H will see that I have listened very carefully to him and clearly heard his arguments.

6. Notwithstanding H's clear arguments before me, I am not persuaded by them.

7. I accept W's evidence and submissions and upon that basis, with her offer to indemnify H in respect of some of his business debts, in particular those which are in joint names and/or secured on the FMH, I make no provision for H.

8. I am acutely aware that this leaves H in a predicament of real need. This is an unusual outcome, I accept, but justified as the only fair one on the facts.

9. The decision, as I will explain, is driven by an informal agreement which the parties arrived at and then acted upon. This has resulted in H having already had "his share" which he has lost in a failed business venture. Any attempt to apply a modest needs based

award, to alleviate H's predicament of real need, would be lost to further creditors. There is nothing I can do to temper the wind to the shorn lamb.

Background

Life prior to the breakdown of the marriage

10. H was a successful restaurateur for many years in South East England. H conducted his business via a limited company called TLF Ltd of which at the material times he was a shareholder and the only director. For about 25 years he ran a restaurant called TL and it enjoyed much success.

11. TLF Ltd also took out a long lease in 2005 on a second premises which operated as a bakery. This was a renewable lease. For many years TL and the bakery enjoyed a symbiotic relationship, with the bakery supplying TL. The lease in respect of the bakery premises plays an important and unhappy role later in the chronology.

12. There are some other debts in H's name but they are lost in the noise of the implications facing H with the unpaid rent litigation.

13. W had a textile, design and jewellery business, but was not the principal earner in the family and cared for the children. Together H and W made an equal contribution to their fortunes and married life.

14. In 2017 H sold TL for £1.8M and netted £1.3M.

15. He retained the bakery which was less successful in the absence of its relationship with TL. It made losses.

16. By 2018 the £1.3M had depleted to about £600,000. This was partly on account of living costs, on account of settling commercial debts which were a legacy of TL, and bearing the losses at the bakery.

17. H and W discussed what they wished to do with their remaining nest egg. There was some discussion as to whether they might purchase some buy-to-let properties but this was not progressed. Eventually in 2018 it was agreed that H would close the bakery and

the parties would develop a high-end restaurant and bar at the bakery premises, which would be revamped.

18. Taking a step back in the chronology, since about 2014, H had been dissatisfied with his lot. H had wanderlust and a desire for an easier life than the restaurant business.

19. H stated that such was his unhappiness that he regarded the marriage was at an end in 2014. H stated that he agreed to stay only for the sake of the children. W accepted that there had been difficulties and that H would sometimes say the marriage was over, after a heated argument. Whatever was said, the parties remained functionally a couple. They shared a bedroom and the mundane aspects of domestic existence together. They presented as a couple socially.

The parties' separation

20. In September 2018, H handed back his wedding ring and shortly after moved out of the family home to rent elsewhere. H had commenced a relationship with another woman in her early thirties who had worked in the business and who was known to the family.

What did the parties agree at the point of separation?

21. From early 2019, W was expressing the view that she did not want to be in business with H anymore. The parties are now in dispute as to what was agreed between them at this stage. I shall detail with this key point in the chronology in more detail shortly.

22. In summary, W puts her case on two bases: her primary case is that the parties agreed that H would take the cash left over from the sale of TL (£600,000) plus retain his pension worth about £50,000 and she would take the FMH (net equity @£800,000) as financial settlement. In the alternative, and as I will find, more realistically, W asserts that it was agreed between the parties that H's investment in the new business, known as the new restaurant ("the new restaurant"), would "come out of his side" of the settlement. Mr Finch realistically accepted in closing that there was "always the spectre of a future financial reconciliation" to ensure a fair settlement.

23. H asserts there was no agreement or that the only agreement was that H would set up a new restaurant, turn it into a success and then the parties could look at what would be fair in 2026 when the mortgage deal on the FMH was up.

Setting up and financing of the new restaurant

24. W made plain in early 2019 that she did not want to be part of H's new restaurant project. The project was in its early stages at that point. The staff at the loss-making bakery were being laid off and that business was being wound up. I was told by W that about £10,000 - £15,000 had been spent on a licensing application in the early part of January. I accept this evidence and find that H was not obliged to invest the kind of money he subsequently did into the premises. It was his choice. In evidence, H stated that being a restaurateur was the only business that he knew. Whilst that may be true in one sense, setting up a new restaurant also ran contrary to his long-held ambition to travel and have an easier life free of the commitment required to run a successful restaurant business. There would have been any number of options for investment of the parties' nest egg at this stage. It was H's active choice to invest heavily in another restaurant business.

25. The new restaurant project was delayed for reasons which do not matter. H needed further finance in about October 2019 and obtained advice that to do so he would need to offer the FMH as security. W was unhappy about this but acquiesced upon H's reassurances that it was only as security that he would be able to pay off the commercial borrowing shortly and that his business assets would cover the loan in the event of difficulties.

26. I note that H's financial adviser sent H a WhatsApp on 23 October 2019. This was forwarded to W. The adviser stated that W would need independent legal advice before granting a charge over the FMH, unless she was appointed as a director of TLF Ltd. W was appointed a director later that day. H also asked W at around this time not to tell the financial adviser that the parties were seeking a divorce. H secured borrowing of about £383,500.

The lease on the premises

27. I need to come back to the lease on the bakery premises. A lease of about 20 years was taken out by TLF Ltd in about 2005. I am not sure of the exact date the lease was granted or its term. H was clear that it was a renewable lease.

28. At the time the lease was granted in about 2005, H offered a personal guarantee, as did a third party who was then a business partner. H bought out the business partner's interest a few years later but each remained liable under their personal guarantees.

29. Fast forwarding to 2019, H sought to have the business partner released from his obligation and for the lease to be assigned to another entity. The landlord refused.

30. At this point there was a couple of years left unexpired on the lease. H sought advice as to its value and ascertained that it was probably worthless in terms of sale to a third party. H does not appear to have explored at this stage whether and on what terms the landlord might consider a surrender prior to the expiration of the lease. I do not know what the answer to such a request would have been.

31. H told me in evidence that his plan had been to develop the new restaurant into a successful business over the course of the medium term, extend the lease (as he thought he was entitled to do) and then sell a prosperous business benefitting from a renewed lease.

32. At the point the new restaurant failed in 2021, there remained a couple of years unexpired term on the lease. The landlord is now in the process of pursuing H in the County Court on his personal guarantee. The sum claimed is in the order of £223,876. The £223,876 is debt is in addition to the calculations I have set out below.

33. I have given careful consideration as to whether I should characterise the lease as a "matrimonial debt." The liability was incurred during the course of the marriage and the commercial premises formed part of the commercial arrangements which financed the matrimonial lifestyle over many years. On the one hand it might be said that if it started out with a "matrimonial character" it has retained that character and both parties should now share in the latent liability.

34. On the other hand, H knew that the lease was at its fag end and did nothing to explore the terms upon which he might have secured its surrender. On the contrary, H's plan was to financially invest heavily in the development of premises and extend the lease to ready it for a sale in the medium term.

35. On balance, I am persuaded that the lease lost its matrimonial character when H decided to pursue the new restaurant project on his own account at the start of 2019. The lease liability was personal to him and not secured against the FMH. His choice to invest heavily and extend the lease were commercial decisions which came with risk. By that stage, as I will explain shortly, W had made it plain that she wanted nothing to do with the business. Upon that basis this liability lost its matrimonial character and H "took it on" in the minds of the parties, as well as it being his actual legal liability.

Why the restaurant failed

36. The restaurant opened in about December 2019.

37. W is very critical of H's actions at this time. With her version of history, the business subsequently failed due to the fact that H spent too much time with his new partner, who had by now returned to live in France and who fell pregnant in late 2019.

38. Whilst we can all be wise with the benefit of hindsight and some things might have been done differently, I do not accept this central criticism W makes of H. Yes, he was involved in a new relationship which took him to France on a not infrequent basis (when the world was not subject to the lockdowns which were to follow in 2020). On the other hand, prior to the parties' separation they had travelled extensively for five years and H had successfully managed a team remotely at TL. H's idea for the new restaurant had always been to be a hands-off manager so that he could pursue his desire for an easier life.

39. Things might have been done better or differently but that is all water under the bridge now. I do not accept W's central charge that H destroyed the business by his unreasonable lack of diligence and care.

40. H gave evidence about the challenges when the new restaurant was opened, including having to warn and then sack a chef prior to March 2020. The manager was also sacked for not being up to the job. H had sourced what he believed to be competent staff via an agency. Then the lockdown came. H quickly re-purposed the business as a fishmonger. A delivery of fish would be about £7,000 worth of stock and so it was an obvious and innovative change of tack during those difficult months. H spoke of learning the craft of being a fish monger with his son (who was assisting) on the job, with them watching YouTube videos on how to gut fish.

41. H spoke of very long hours, both serving customers and also cleaning to ensure that there was not an unpleasant fish smell. This involved working all hours, sometimes finishing at 1am and starting the next day at 5am.

42. Some Covid loans and grants were sought at the start of the lockdown. W assisted with some of the paperwork and even included herself in the application (she having been added as a director the previous October for loan purposes, as I have described). I accept W's account that she did not have the furlough money in her name paid directly to her and that later when she tried to make another claim in her own right she found she was unable to on the basis that her NI number had already been used to make a claim.

43. W did have some financial support from, or on behalf of, H in 2020, in the sum of about £30,000. W thought at the time this was maintenance from H, but she was actually receiving payments from TLF Ltd. This would have been a tax efficient method, albeit not a totally honest way for H to make payments to W.

44. I do not find that W's willingness to assist with the forms, claim furlough monies or the source of some payments at this stage in the chronology indicates that the parties were back in business together. They were exceptional times and W was willing to lend a hand with some forms and indeed sometimes also brought some sandwiches to the new restaurant for H and the workers (which included his sons). The parties were not engaged in business together, however.

45. When the first lockdown came to an end, the restaurant re-opened. H seemed unaware of the "Eat Out to Help Out" campaign and said that he just had his nose to the grindstone and did not pay particular attention to what was going on. I find this a little surprising, given the level of publicity it received, but having broadly accepted that H worked phenomenally hard during those months, this does not change my overall view of his endeavours.

46. H told me that he did not visit his partner for much of 2020 due to work and lockdowns. He went to France in September 2020 and their baby was born shortly thereafter.

47. Once the first lockdown was over it was more difficult to source staff in the hospitality sector. Further lockdowns ensued with consequential disruption to business. Following a return from lockdown in early 2021, the head chef left after five days, taking most of

the kitchen staff with him. They had been able to secure better paid employment elsewhere. H found a replacement chef almost immediately. He was Russian and brought over to keep things going. The chef then got Covid and was sick for a few weeks. A Covid cluster broke out amongst kitchen staff. The restaurant had to close down for ten days. H then sought agency staff. Things did not ultimately work out with the Russian chef and he was sacked in September 2021. A further chef was secured but he suffered ill health.

48. The restaurant was only able to open four days a week due to the various staffing crises and could also not offer breakfast on the days it was open. There were 36 covers and H explained that the business model depended on a high turnover of covers, which was simply not possible if the restaurant was not open seven days a week and not opening for all sessions during the days when it was open.

49. Matters limped along until December. The Omicron variant of Covid then struck. The December bookings, which had looked healthy, began to evaporate at the start of the month. The chef and staff took the view that there would be no money left at the end of the month and so told H they were quitting. The new restaurant was closed once and for all.

50. I have described events in some detail to illustrate that I do not consider that the new restaurant failed due to lack of effort by H. Circumstances were simply against him, even if some things might have been done differently with the benefit of hindsight. H had, however, risked and traded from his share of the settlement.

Money that H has received

51. At the point of failure, H had invested in the order of about £776,000 into the business. This was put by Mr Finch as being:

    51.1 The loan secured against the FMH for £383,000

    51.2 £392,500 from the joint account (£542,500, less a sum of Corporation Tax of £150,000 which is referable to the realisation of the TLF business). The figure of £542,500 is taken from an email dated 6 September 2019 in which W tots up the figures and states "…[this] is your settlement figure, to be used as you please, the new restaurant or other."

52. H sought to challenge an aspect of the 6 September 2019 email by stating that the monies taken from the Nationwide savings account (which forms part of the £542,500) in the sum of £120,200 was spending on the winding up costs of the bakery. H has had many months to articulate and evidence this argument which he failed to do prior to the final hearing. It was not possible for me to make an accurate assessment of this argument, but in any event it can now be seen to be part of the background, given the level of money H has received.

The money W will be left with

53. The sum overall enjoyed by H (joint account monies with or without the £120,200 and secured loan monies) are more than W will exit the marriage with:

    53.1 Equity in family home - £1,095,000
    53.2 Less joint/secured debts (£407,500)
    53.3 Less W outstanding legal costs per Form H1 (£62,000)
    53.4 Total £625,500

54. This figure is cross checked against the money which had been in the parties' joint account, namely £601,000 in January 2019. H asserted that W had spent about £107,000 from that account but after making some adjustments (an error of £25,000 and £6,000) that figure reduces to £76,000. If one takes the £76,000 from the £601,000 says Mr Finch, one is left with £525,000, a figure "adjacent" to the figure of £542,500 quoted above. I agree with this helpful analysis.

55. W spent the £76,000 on legal fees (£47,000), FMH renovation (£23,000) and living expenses.

56. It is almost impossible to conduct a perfect account, but it is possible to get a pretty good feel for the order of the amount of money which was invested into the new restaurant. The expenditure at this level is also confirmed by some WhatsApp messages passing between the parties.

57. W has used the FMH with ingenuity since separation. She rents rooms using Airbnb and Booking.com. In addition to conventional guests, she has also established the property as a place to generate income in a variety of other ways. From that variety of sources since separation in about 2018/2019 to date, this has resulted in W earning about

£200,000. This has formed the bedrock of her income to keep the house going, alongside modest earnings in her business and the support I have noted that she received in 2020 from TLF Ltd. I was not told what drawings H had had from the the new restaurant business, but this is how he financed his existence between December 2019 and December 2021.

The parties' overall positions

58. W made an open offer dated 2 December 2022 in which she proposed that the FMH be transferred into her sole name upon the basis she would indemnify the joint and/or secured borrowings. This would be on clean break basis.

59. In closing, Mr Finch accepted that W would have to sell the FMH if she could not secure H's release from the FMH mortgage within a reasonable period of time. As noted above, this will leave W with £625,000.

60. The joint debts of £407,500 W will take on are made up of:

    60.1 AA loan now standing at £295,000 (this was the principal loan H persuaded W to offer the FMH as a security for once the parties had separation, as described above). AA have sought possession of the FMH but have agreed to an adjournment of their application pending the outcome in these proceedings.

    60.2 Loan to W's father which paid off to B - £58,000. W was party to this loan and B sought to bankrupt W. The only way to avoid bankruptcy was to pay them off and W's father came up with the funds. In the circumstances, I categorise this as a hard debt which must be repaid, even though it is W's father who is actually now the creditor.

    60.3 There are then three smaller loans for which the parties are jointly liable of £10,000 (FBS Ltd), £20,000 (PL) and £24,000 (Nationwide). These are not presently charged against the FMH.

61. I should add that H has done nothing to assist W in fending off the creditors. W has been caught up in dealing with the maelstrom of issues whilst he has remained in France. H gave unsatisfactory explanations as to the fact that he had lost his business email account and did not know what was going on. He also stated at one point that "He was hiding under the duvet rather than putting his head in the sand" which I took him to mean he

was unable to cope with the problems rather than wilfully and coldly leaving W to face the music on her own. Whatever the reason, H's lack of engagement with the creditors reflects poorly on him. W simply has not had the option of any duvet days.

62. H's position in his s.25 statement is that there was no agreement between the parties. In evidence H asserted that there was an agreement that the FMH would be sold in 2026 when the mortgage was up and that there would be a divvy up to divide equity equally. H now wants the FMH sold and each party should have a 50% share of the net proceeds.

63. When H was before District Judge Hudd on 31 August 2022, he stated that he wanted capital to start another business. He repeated this when giving evidence before me, albeit he also stated that he would like to have some money to try and purchase a property in France, as he is currently renting with his new partner and two children they have had together. This suggestion was not put with much conviction and it appears to me that H recognises that he cannot afford to buy. It seems to me, and I find, that if H was in possession of free capital (which was not swallowed up by his creditors), his real ambition is to start another business as he does not believe he is employable at age 58, at least not in occupations which he would wish to consider.

My impression of the parties

64. This case does not turn on the demeanour of the parties in the witness box. That said, I record the following.

65. I found W to be matter of fact and long suffering to the point of being inured by her present unhappy circumstances. W has coped with H's stated dissatisfaction with the marriage, his new relationship and business crises and battle with creditors which she has been sucked into. She has done what she can to keep the FMH going and preserve the equity therein.

66. At one point post separation the parties each invested 50% in a start-up company being run by friends. W told me that as H stated he was treating the money in the joint account as his, she found her share of the investment (£25,000) via a loan from her brother and "cash takings" from her business. It was plain that alongside her declared business income she also dealt in cash. This was not honest.

67. Additionally, when the liquidators were about to take possession of the new restaurant premises, H asked W to go and take some chairs which were part of the business. H rather optimistically suggested on the ES2 that W was in possession of £10,000 worth of chairs. I do not accept that. However, this is another incidence of dishonesty as those chattels were the property of the liquidator and not the parties.

68. In light of this dishonesty, I give myself a *Lucas* style direction and remind myself that dishonesty of a party may legitimately affect the view the court takes of their credibility. However, in the circumstances where a witness has been dishonest, the court must take care to give specific consideration as to how the dishonesty should be factored in when determining an issue of fact. In particular the court should consider whether the dishonesty was deliberate; whether it related to a significant issue; and whether there is anything else, for example shame, misplaced loyalty, fear or distress, which could explain the lie: *R v Lucas* [1981] QB 720; *Re A, B and C (Children)* [2021] EWCA Civ 451.

69. Not declaring income to HMRC and hiding assets from a liquidator are respectively both dishonest and a criminal offence. Whilst this court does not condone such behaviour, this has not affected my overall view of W on the key issues I have to decide in this case.

70. H struck me as being as wishful as to the story which the contemporaneous documents in the case tell, which I am about to describe. He came across as an engaging individual, but appearing to lack a proper understanding of what he has put W through by failing to engage with the creditors. He appears somewhat self-absorbed with his own situation.

71. For his part he paid W "maintenance" via TLF Ltd when she was not working for him (albeit she was a director for the technical reason of avoiding her having independent legal advice when H obtained the secured loan) and also sought to defraud creditors by asking W to remove chairs prior to the liquidator taking possession. I give myself the same *Lucas* style direction as I recited above. Again, his dishonesty with these episodes does not affect my overall judgment on the issues on which I must determine.

What did the parties agree?

72. It is my determination that the parties agreed that H's investment in the new restaurant would come from his side of the settlement. This is W's alternative case which I outlined above. I do not accept that the parties agreed that W would take the FMH and H would

take the cash from the sale of TL. The difference in those sums (£800,000 FMH, £600,000 cash plus, say, £50,000 pension) was such that I do not accept that the parties agreed such a division. I accept W's alternative case for the following reasons.

73. On 9 January 2019 at 18.38, W sent a WhatsApp message to H in the following terms:

> "Please know that all I am trying to do is secure a future for myself and our children in light of current circumstances.
>
> I felt it was only fair to discuss theses things sooner rather than later in case you would like to reconsider how best you would like your future to unfold.
>
> If we were to discuss such things in a years time it could [sic] be more complicated as the new restaurant would be up and running.
>
> You may or may not decide to go ahead with the new restaurant but I want that to be your decision, not one that you feel pressured to make.
>
> I will support whichever decision you make. …"

74. In an email dated 16 January 2019, W stated to H that to go into business together would not be a healthy solution. W stated that she had been looking forward to working on the project together if they could work as a team "…but in light of recent events and historical events the trust has gone."

75. Mr Finch described these messages as "the line in the sand" when W made plain her unwillingness to continue in business with H. It is clear that matters were not agreed immediately and there were further exchanges and discussions which take us to April 2019.

76. On 5 April 2019 at 12.26, H sent an email message to W in the following terms:

> "Any share taken from our joint account for the new restaurant project will be deducted from my share of the settlement as NOis not part of this project."

77. There was some controversy over this message in the hearing. For the first time in the life of the litigation, H sought to assert, in a note filed on the Friday before the commencement of the hearing on the Monday, that this email had not been sent by him and that his computer may have been accessed by another member of the family.

78. This was an unwise allegation to make which did not bear any scrutiny. Mr Finch applied to introduce contemporaneous WhatsApp messages which were also being exchanged between the parties at around the time this email was sent. H opposed this application, but it was only fair I had the full picture. It is abundantly clear that the parties were in conversation via several WhatsApp messages which I do not need to recite about the wording of the email. For H to try and say his email had been hacked is wrong and misleading and, in fairness to him, he dropped the point once he could see that the contemporaneous documents had blown this argument right out of the water.

79. H then sought to assert that he had been told what to say by W in the prior WhatsApp exchanges and that this was not really his view. I reject that argument entirely.

80. The parties had to make a decision about the future of the new restaurant project in early 2019 which had not, at that stage, been fully committed to. W wanted out. H wanted to proceed. With the matrimonial finances unresolved, these two capable adults decided on a way forward which they both perfectly understood and made perfect sense at the time: H's spending on the new restaurant would come out of his ultimate share of the matrimonial settlement, which would need some reconciliation to get to a fair division in due course.

81. Whilst this informal agreement is not final or couched in a formal legal document, the intentions of the parties are clear. The parties then relied upon it. H traded with and risked money from his share of the settlement.

82. On 13 April 2019, H sent W a message stating that he needed money "for the project to start."

83. There are subsequent WhatsApp exchanges between the parties which only make sense if the parties had had a prior agreement. For example, H stating in a WhatsApp message that he did not want W to take money from the joint account for an investment as "the value of the property and the cash are maybe equivalent." Later WhatsApp messages

from H, which are unnecessary to recite in detail, have H referencing back to the effect of accounting for the £150,000 Corporation Tax bill which would have to come out of the joint account consequent to the realisation of the equity in TL.

The law

84. Factual disputes are resolved in the Family Court on the balance of probabilities. The burden of proving that an allegation is true lies with the party making the allegation. Findings must be based on evidence, including inferences that can properly be drawn from the evidence, and not on suspicion or speculation. The law operates a binary system and may only find either that something happened or that it did not happen: *Re B* [2008] UKHL 35.

85. I must apply s.25(1) and (2) and s.25A of the Matrimonial Causes Act 1973. In so doing I am required to take into account all of the circumstances of the case, including:

    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.

86. I have had these factors firmly in mind throughout this judgment.

87. By s.25A Matrimonial Causes Act 1973 I must consider whether to exercise the court's redistributive powers such that the financial obligations of each party towards the other will be terminated as soon after the making of the order as the court considers just and reasonable. This is the statutory steer in favour of a clean break if just and reasonable.

88. In *HD v WB* [2023] EWFC 2, Peel J provides a helpful summary of how the court should treat nuptial agreements:

> "44. The starting point for my purposes is *Radmacher v Granatino* [2010] UKSC 42 from which the following propositions can be drawn:
>
> > i) There is no material distinction between an ante-nuptial agreement and a post-nuptial agreement (para 57).
> >
> > ii) If an ante-nuptial agreement, or a post-nuptial agreement, is to carry full weight, "what is important is that each party should have all the information that is material to his or her decision, and that each party should intend that the agreement should govern the financial consequences of the marriage coming to an end" (para 69).
> >
> > iii) It is to be assumed that each party to a properly negotiated agreement is a grown up and able to look after himself or herself (para 51).
> >
> > iv) The reason why the court should give weight to a nuptial agreement is that there should be respect for individual autonomy. The court should accord respect to the decision of a married couple as to the manner in which their financial affairs should be regulated. It would be paternalistic and patronising to override their agreement simply on the basis that the court knows best. This is particularly true where the parties' agreement addresses existing circumstances and not merely the contingencies of an uncertain future (para 78).
> >
> > v) The first question will be whether any of the standard vitiating factors, duress, fraud or misrepresentation, is present. Even if the

agreement does not have contractual force, those factors will negate any effect the agreement might otherwise have. But unconscionable conduct such as undue pressure (falling short of duress) will also be likely to eliminate the weight to be attached to the agreement, and other unworthy conduct, such as exploitation of a dominant position to secure an unfair advantage, would reduce or eliminate it (para 71). The court may take into account a party's emotional state, and what pressures he or she was under to agree. But that again cannot be considered in isolation from what would have happened had he or she not been under those pressures (para 72).

vi) The court should give effect to a nuptial agreement that is freely entered into by each party with a full appreciation of its implications unless in the circumstances prevailing it would not be fair to hold the parties to their agreement. (para 75).

vii) Of the three strands identified in *White v White* and *Miller v Miller*, it is the first two, needs and compensation, which can most readily render it unfair to hold the parties to an ante-nuptial agreement. The parties are unlikely to have intended that their ante-nuptial agreement should result, in the event of the marriage breaking up, in one partner being left in a predicament of real need, while the other enjoys a sufficiency or more, and such a result is likely to render it unfair to hold the parties to their agreement. Equally if the devotion of one partner to looking after the family and the home has left the other free to accumulate wealth, it is likely to be unfair to hold the parties to an agreement that entitles the latter to retain all that he or she has earned (para 81).

viii) Where, however, these considerations do not apply and each party is in a position to meet his or her needs, fairness may well not require a departure from their agreement as to the regulation of their financial affairs in the circumstances that have come to pass. Thus, it is in relation to the third strand, sharing, that the court will be most likely to make an order in the terms of the nuptial agreement in place

of the order that it would otherwise have made (para 82).

ix) It is the court that determines the result after applying the Act (para 83).

45. Sound legal advice is "desirable" (*Radmacher* at para 69), but not essential. In *V v V* [2012] 1 FLR 1315 Charles J held that the agreement should be upheld notwithstanding lack of legal advice or disclosure because it was readily understood by an intelligent (but legally unadvised) reader (para 50), and both parties intended the marriage settlement to be effective and were aware of its obvious purpose. In *Versteegh v Versteegh* [2018] 2 FLR 1417, a similar approach was adopted. When considering the absence of legal advice, the court should, in my view, look at all the circumstances, including whether the party had the opportunity to take legal advice, and whether the party had a sufficient understanding of the meaning and consequences of the PNA. I cannot accept that absence of legal advice is, by itself, a vitiating factor, or "fatal" to W's case, as H suggests in his counsels' opening note, such that no weight can be attributed to it.

46. Ultimately, the court remains under an obligation to consider all the s25 factors: para 103 of *Brack v Brack* [2018] EWCA Civ 2862."

89. Peel J then goes on to review the modern authorities which consider the phrase and effect of a "predicament of real need":

"47. An interesting question is what "predicament of real need" means. Counsel for W submit that any order should be confined to ensuring that the supplicant party (in this case H) has sufficient to be kept from "destitution" (the word used by Mostyn J at para 72(iv)(c) of *Kremen v Agrest* (No 11) [2021] EWHC 45 (Fam). Or does it mean, as counsel for H submit, that if the PNA entered into by the parties leaves one of them in a predicament of real need on divorce, the court then moves on to consider needs in accordance with all the s25 criteria, and is not confined to alleviating a predicament of real need; in other words, the "predicament of real need" is a gateway through which the supplicant party must go before s25 is fully engaged.

48. In *V v V* (supra) Charles J at paras 81 and 82 did not restrict the interpretation of needs in the way suggested by W in this case.

49. In *WW v HW* [2015] EWHC 1844 Deputy High Court Judge Nicholas Cusworth QC (as he was) said:

> "[53] So, should the husband's need here necessarily be interpreted as the minimum amount that is required to keep him from destitution? This will not invariably be the case, even where an agreement would otherwise produce such an extreme situation. As Lord Phillips confirmed in *Granatino v Radmacher (Formerly Granatino)* [2010] UKSC 42, [2011] 1 AC 534, [2010] 2 FLR 1900 at [75]: 'The fact of the agreement is capable of altering what is fair'. However, even where there is an agreement, fairness will not necessarily equate to near destitution. The level at which a party's needs should be assessed, if they are not met by an agreement which might otherwise be binding upon them, must surely depend upon all the circumstances of the case, amongst which the fact of the agreement may feature prominently as a depressing factor. But each case will be different."
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> [54] In *Radmacher* itself, having rejected the view adopted by Wilson LJ in the Court of Appeal that the agreement should be binding irrespective of need, the Supreme Court went on to find that in that case the husband's needs were in fact met by the award made, albeit it not at the level he might have expected absent the agreement. Given the earning capacity which they were inferentially able to attribute to him, this could hardly be equated to 'destitution'. In *Luckwell v Limata* [2014] EWHC 502 (Fam), [2014] 2 FLR 168, Holman J found of the husband in that case at para [143] that: 'He has no home, no current income, no capital, considerable debt and absolutely no further borrowing capacity'. He justified further provision on the basis at para [148] that: 'the need to provide an adequate home in which the children can visit and stay with their father is very important'.
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> [55] Unlike *Luckwell*, and more closely like *Radmacher*, this is a case where any provision which W makes will have a significant effect on the

quality of the children's lives whilst they are with her. There is thus no need to balance the effect on the children of losing their home with one parent to provide adequate accommodation in which they can stay with the other. However, it should be borne in mind that any award to meet need, even absent the agreement in this case, is being made from non-matrimonial assets; and here those assets were specifically protected by the agreement which H willingly entered into. There is consequently no obvious basis for any generosity in the interpretation of these needs."

50. Roberts J at para 100 of *KA V MA* [2018] EWHC 499 (Fam) agreed with those observations.

51. In *Ipecki v McConnell* [2019] EWFC 19 at para 27 (iv) Mostyn J said:

> "The agreement does not meet any needs of the husband. I do not take the language used by the Supreme Court, namely "predicament of real need" as signifying that needs when assessed in circumstances where there is a valid prenuptial agreement in play should be markedly less than needs assessed in ordinary circumstances. If you have reasonable needs which you cannot meet from your own resources, then you are in a predicament. Those needs are real needs."

52. In *Brack v Brack (supra)* King LJ said at para 131:

> "It should also be recognised that even in a case where the court considers a needs-based approach to be fair, the court will as in *KA v MA* , retain a degree of latitude when it comes to deciding on the level of generosity or frugality which should appropriately be brought to the assessment of those needs".

53. I take the view that whether a party should be confined to needs at the minimum level required to meet a "predicament of real need" will depend on the circumstances of the case. There is a world of difference between, say; (i) a childless couple whose marriage lasts for 2 years, enjoying only a modest lifestyle, at the end of which one party might need no more than short term maintenance or a highly attenuated housing budget (perhaps restricted to time

limited rental), and (ii) as here, a couple with 3 children, who have been together 20 years, who each contributed to the welfare of the family in different ways, and who enjoyed a high standard of living. I adopt the words of King LJ which seem to me to describe accurately the flexibility of the discretionary exercise. Of course, the court will always, in conducting the s25 evaluation, have regard to the fact of a PNA and its terms. I would not therefore adopt the approach of W's counsel, which seemed to me to be too straitjacketing. Nor do I consider that the two stage gateway process suggested by H's counsel is made out on the authorities."

90. I also have in mind *Edgar v Edgar* (1981)_ 2 FLR 20 in which it was suggested that one of the grounds for not holding a party to an agreement might be "…an important change of circumstances, unforeseen or overlooked at the time of making the agreement …"

91. *BT v CU* [2021] EWFC 87, [2022] 2 FLR 26 held the line espoused in *Myerson v Myserson (No 2)* [2009] EWCA Civ 282, [2009] 2 FLR 147 that seismic unforeseen world changing events such as the 2007/2008 world financial crises and then Covid do not justify the high bar for setting aside final *orders* made in financial remedy cases.

92. This situation is different in that I am considering only an informal and unperfected agreement between the parties and not a court order. That said, it does seem to me that an unforeseen change of circumstances can only be one factor in the scales when considering whether the parties should be held to their bargain.

93. I was also referred to *H v H (Financial Relief)* [2010] EWHC 158 (Fam), [2010] 1 FLR 1864 in which Munby LJ (as he then was, and sitting as a judge of the Family Division) largely supported the husband's unilateral division of assets shortly after separation in circumstances where the husband had greatly enhanced "his share" by the time of the division. Munby LJ stated:

"If the unilateral division of the family assets a year after separation was objectively fair, then there was no principled basis for going behind it, because after dividing the assets, the husband had ceased to 'gamble' with the wife's undivided share of the assets. Provided the division was fair, following the division the husband and wife should each bear the

consequences, good or bad, of any subsequent changes in the values of their respective portfolios."

94. The comments of Munby LJ seem to have force in this case. By an informal agreement (which arguably has even more magnetic force than unilateral, albeit fair, action), H agreed that he could "gamble" the money in the joint account, subject to any later fine tuning. That was understood by the parties at the time, as I have found, and objectively fair.

95. If anything, H's subsequent obtaining of the secured loan over the FMH tipped the scales on the agreement in such a way that it cannot possibly now be said that he has not had his share. But I am afraid that in these unhappy circumstances as I have described, H must bear the consequences of his commercial risk.

96. I also note the case of *A v B (Financial Remedies)(No 2)* [2018] EWFC 45, [20119] 1 FLR 17 much of which is not at all relevant to this case. However, at its heart was the fact that the parties were held to an informal agreement which they had struck together in a pub.

97. I was also referred to some conduct authorities, but given my findings about the reasons for the failure of the business, I do not need to dwell upon those.

Should I make a needs based award?

98. Having come to the conclusions that I have, it seems to me that H does not have any entitlement to a share of the equity in the FMH.

99. But applying the approach of Peel J that I have set out above concerning nuptial agreements (informal agreements between husband and wife are still nuptial) and a real predicament of need, should I make some kind of award to alleviate H's predicament of real need?

100. H lives with his new partner in a rented property in France. She works and they also receive some support from her family, which may have to be paid back or may be a soft loan. H has yet to identify employment which he considers to be congenial and fears he will not do so at age 58. He is a long way from the carefree existence he set out for at the end of the marriage. That said, he has a roof over his head and his partner (and mother of

his two children) brings home an income. I am afraid that H may be right in fearing that his options for congenial employment are limited – but he is still young enough to work and he will be able to find *some* work, even if it is work he would rather not do. So, whilst H is now shorn of capital, he is not destitute. He has a home, a partner with an income and he has the ability to go and earn some money.

101. There are two forceful drivers against making any needs based provision. The first is that any sum I awarded would be swallowed up in H's litigation with the landlord over the unpaid rent. Whilst the authorities encourage me to do what I can to avoid a predicament of real need, here I am unable to do anything which will actually assist H in a practical sense. H has no entitlement to more and I am not required to award him money which I can see will just disappear in further litigation he faces.

102. Even if I was wrong about that, H's stated intention before DJ Hudd and in evidence before me is that he would like a lump sum to start another business. The balance of his evidence is not for a roof over his head (although I accept he has also mentioned this, it did not seem to me to be the driving issue for H). That is not the kind of alleviation of real need which I consider to be appropriate in this case. H's opportunity for risking capital generated during the marriage must now be considered to be at an end.

Other points

103. After the hearing H sent an email to my clerk after the email. I did not study its contents and asked my clerk to indicate that I would not be reading it as the evidence and time for submissions was over.

104. There are some chattels which remain in dispute. These should be agreed or subject to a further application. If no further application is made within six weeks from the date of the order then any claim in respect of chattels should be dismissed and the chattels will be the property of the party presently with possession.

105. I accept that the FMH, which has an agreed value of £2.1M, subject to mortgage and secured loans is beyond W's needs. The equity left in the property after W has dealt with debt is in the order of £600,000. That will purchase a comfortable but relatively modest accommodation in the South East London area. It seems to me, absent of any third-party

assistance, unlikely that she be able to refinance, but she wishes to have the opportunity to try.

106. There should be a clean break both ways. Each is going to have to make their own way here.

107. I would invite Mr Finch to settle an order in the terms which he sought, namely a transfer of the FMH to W upon her undertaking to use her best endeavours to secure the release of H from the mortgage and to indemnify the joint and/or secured loans, with a sale in default if not achieved within seven months.

108. This is my judgment.

Recorder R Taylor

23 February 2023