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

Neutral Citation Number: 2020 EWHC 466 (fam)

IN THE FAMILY COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25 February 2020

Before :

Mr Justice Moor

- -

Between :

RC

Applicant

-and-

JC

Respondent

- -
- -

Mr Tim Bishop QC and Ms Marina Faggionato (instructed by Payne Hicks Beach) for the **Applicant**
Ms Lucy Stone QC and Mr Joseph Rainer (instructed by Kingsley Napley LLP) for the **Respondent**

Hearing dates: 10th to 13th February 2019

- -

JUDGMENT

MR JUSTICE MOOR:-

1. I have been hearing cross-applications for financial provision following the breakdown of the marriage between the Applicant, RC (hereafter "the Husband") and the Respondent, JC (hereafter "the Wife"). I propose to refer to them respectively throughout this judgment as the Husband and the Wife for the sake of convenience. I mean no disrespect to either by so doing.

2. The Husband was born in October 1971. He is therefore aged 48. He currently resides in a rented property in South West London. He is a solicitor and partner at a law firm ("the firm") in the litigation department. The Wife was born in November 1974, so she is aged 45. She is also a solicitor, although she has not practised as one for some years. She is now a housewife and homemaker. She lives at the parties' former matrimonial home, also in South West London.

3. The parties first met at the firm in September 1999, when the Husband was an associate solicitor and the Wife a trainee solicitor. During her training contract, the Wife was sent abroad where she became very ill, possibly from dengue fever following a mosquito bite. She developed septicaemia and she told me she was in a coma for a time. Fortunately, she made a full recovery and it is clear that the firm were very supportive. The firm undoubtedly thought very highly of her. In March 2001, she qualified as a solicitor and was made an associate of the firm, like the Husband.

4. Their relationship commenced in 2002/2003. The Husband became an equity partner at the firm shortly thereafter. The evidence in this case has, understandably, concentrated almost entirely on the Wife's career prospects but I am entirely satisfied that the Husband is a very fine lawyer who has had a stellar career at the firm and deserves recognition and praise for his achievements.

5. In 2006, the Wife was promoted to managing associate. Shortly thereafter, there was a hiatus in the parties' relationship. The Wife's father had not been well and she returned to the area where her family lived. She even went so far as to obtain a job offer from a well-known firm of solicitors with a strong presence in the area but when she offered her resignation to the firm, the partner in charge of the litigation department refused and authorised her to work remotely. She stayed there for approximately eight months before returning to London. The parties resumed their relationship. They became engaged on 1 January 2007, having resolved some issues they had. They began to cohabit at the latest by early 2007.

6. In November 2007, the Wife left the firm and moved to work as an inhouse lawyer at a bank ("the bank"). The circumstances in which she moved are in issue between the parties. In essence, it is the Wife's case that she was destined for partnership in the firm, but the parties were very keen to have children following their marriage. She says they agreed that she would sacrifice her career prospects to move to a job where she would be able to be a hands-on Mother. She adds that she was basically assured at the time that she would be able to work part-time in the legal department of the bank following

the birth of children. Her case is that the Husband was fully in agreement with this course of action and that he wanted her to give up work to have a family. He denies this. He accepts that he did not think it a good idea for her to remain at the firm in the same department as him after their marriage, but he says he suggested she move to another magic circle firm where she had an excellent contact who rated her very highly. He disputes her partnership prospects at the firm and postulates that her health would not have been good enough for her to manage as a partner in the long term. These are all issues I will have to resolve.

7. The parties married in May 2008. In October 2009, they purchased their former matrimonial home, a splendid property in South West London. It is a Grade II listed, seven-bedroom property. It has a lovely garden created by the parties. The average of the various market appraisals of its value is £5,862,500.

8. The parties have two children. S was born in March 2010, so he is now very nearly ten years old. He attends a fee-paying school in South West London. L was born in January 2012, so she is aged 8. She was born with a condition that must have been a great worry to both her parents. Fortunately, she seems now to have made a full recovery from this condition. She attends another fee-paying school in South West London.

9. The Wife became a director of a bank during 2010 but she was on maternity leave from January 2010 with S. When she returned to the bank, she was dealt a blow as, contrary to the indications she believed she had been given when she moved there, she was told that she could not work part-time in the legal department. Fortunately, a chance encounter led to an offer of part-time work at the bank, three days per week, in the business team, which she accepted. She has not worked in the law since then. She had further maternity leave for L but again returned to work part-time thereafter. In December 2016, however, she was made redundant from the bank. Her entire team was shut down. She has not worked at all since.

10. There were difficulties in the marriage during 2017. The Husband's case is that the marriage had broken down by September 2017. He instituted Children Act proceedings in relation to the children on 19 January 2018. There is no doubt that the Wife took the breakdown of the marriage extremely badly. It had a very serious effect on her health. I will return to this in due course. In February 2018, the Husband moved out of the matrimonial home. The Wife filed a petition for divorce in April 2018. A decree nisi was pronounced in April 2009. It has not, as yet, been made absolute. Sensibly, the parties asked Catherine Wood QC to arbitrate the issues in relation to the children. She gave a determination on 10 June 2018 that was subsequently made into a court order. The parents share the care of the children but, during term time, they reside with their mother for nine nights per fortnight and with their father for five nights per fortnight. They are with him every Tuesday night and on alternate weekends from Friday night to Monday morning. They also see him for a period of time on alternate Thursday evenings when they are

not spending the weekend with him. School holidays are shared equally between the parties.

11. There is no doubt that the Wife has been susceptible to anxiety, particularly at times of stress. She had difficulties during her finals at Cambridge University, but she did not take any time off work in relation to such matters throughout her time at the firm or, as I understand it, whilst she was at the bank. She did have anxiety, vomiting and anorexia problems in 2012 whilst she was on maternity leave, following L's ill-health, although she appears to have coped well whilst L was ill. The problems arose after L recovered. Things deteriorated significantly in the run up to/following her redundancy and the breakdown of the marriage. She began to drink to excess and was not at all well in 2018. She was admitted to two separate mental health hospitals as an inpatient. At one point, she made a suicide attempt. In July 2018, she was admitted to a rehabilitation facility for approximately a month for treatment for depression and alcohol misuse. She was discharged in August 2018 on a detailed treatment plan, which included counselling for alcohol usage. She has not drunk alcohol since, which is to her great credit but it is clear that her ill-health is by no means behind her. As the exact position is in issue, I will have to make findings in due course.

12. The parties' respective Forms E were exchanged in November 2018. I do not propose to set out, at this stage, the financial details disclosed as there have been changes since November 2018 and, in any event, there is broad agreement as to the capital and pensions available to the parties. The Husband's Form E dated 9 November 2018 does deal with his income. He says that his profit share has been reduced by 10% to reflect time he needs to spend with the children pursuant to the shared care arrangement. He adds that this may be reduced by a further 10% although it has not been reduced to date. He refers to an incentive to retire as a partner at the firm after he has completed twenty years, to make way for younger lawyers. If he retires then, he says that he will receive a substantial lump sum, but with each year he stays after that, the lump sum will reduce pro rata. At the time of his Form E, his partnership share, for the year ending 30 April 2017, was £1,899,784 gross plus a dividend of £17,252. His net income, at that point, was £986,211 for the year. He put his income needs for himself at £113,864 per annum and at £106,906 per annum for the children, of which school fees came to £28,167. He was also paying rent of £75,000 per annum. He put his capital needs for housing at £2.2 million.

13. The Wife's Form E is dated 14 November 2018. Again, I will deal with her capital position later in this judgment. She has no earned income although she has some rental income from three investment properties. She put her income needs for herself at £331,080 per annum as well as £122,808 for the children, including their school fees. She complains that the Husband had stopped maintaining her in February 2018, so she was funding her expenses out of capital. She said that she hoped and believed her health was improving all the time. She said that, although the parties had enjoyed a high standard of living, they were committed to investing large amounts each year to provide for their retirement on the basis that the Husband would retire in 2024. She quantified

the annual level of savings as being £589,524 per annum. She raises a claim based on relationship generated disadvantage, namely that she had sacrificed her career as a lawyer to look after the children. She adds that the Husband had wanted her to give up her career, although this is very much in issue.

14. The Wife applied in early 2019 for maintenance pending suit on the basis that the Husband was expecting her to live off their savings, held in her name, whilst she paid all the outgoings, including the mortgage instalments and the children's school fees. She also applied for an order that a psychiatrist should report on her health and, in particular, her ability to work. The case was proceeding in the Family Court at Kingston. An FDR took place on 4 April 2019 before Armstrong DJ. No agreement could be reached and the case was transferred to the Royal Courts of Justice for hearing before a High Court Judge. Once the case had been transferred, the Wife renewed her applications. Eventually, the maintenance pending suit element was agreed. The Husband paid, on account, a figure of £165,000 of which £105,000 related to the Wife's legal costs and the balance was viewed as amounting to general maintenance of £10,000 per month for six months. In addition, the Husband agreed to pay £20,000 per annum per child and the school fees. I incorporated this into a consent order on 2 October 2019.

15. On the same day, I made directions for the final hearing. The Husband did not oppose the application for a report from a psychiatrist. I was clear that one was needed. I therefore directed a Single Joint Expert report from Dr Cosmo Hallström as to the Wife's mental health since March 2017; her current mental health needs; and the relevance of her mental health to her earning capacity both now and in the foreseeable future. I directed statements as to relationship generated disadvantage.

<u>The evidence filed</u>

16. The Wife's statement in relation to relationship generated disadvantage is dated 4 November 2019. She says that her ability to earn from her career has been damaged irreparably by decisions taken for the benefit of the marriage and the children. The Husband's career had to take precedence. She cannot now and does not want to resume her career. Nevertheless, she received "excellent" assessments at the firm and was "on the road to partnership" which would have given her earnings equivalent to those of the Husband. When she moved to the bank, her income was £90 – 100,000 per annum with the opportunity to earn a modest bonus of £15 – 20,000 per annum but there had been no significant increase in her income during the nine years she was there. Even the head of the legal department only earned £250,000 pa. After the birth of S, she had been told she could not work 3 days per week in the legal department, as she had previously been promised but was then offered a position in the business department although it was not easy to combine with the children. The Husband's stock response was that she did not need to work. She said that redundancy was inevitable, but she did not seek a package involving getting support for a new job. She has not maintained her practising certificate as a solicitor.

17. She filed three statements in support of her case. The first was from PI who had been a partner at the firm and worked with the Wife on a very large case involving Bank 2 (a client of the firm) from 2000 to 2003. He said that the Wife was "streets ahead of the competition" and destined for partnership. He considered that there was nothing to suggest there was any difference in earning potential between the Husband and the Wife. He said that his appraisals of the Wife were the highest he ever gave an associate at that point in their career.

18. JX, a friend of the family said that the Wife was a first-class student who was extremely hard working, intelligent and driven. The Husband openly said he wanted her to give up work to have a family. On one occasion he said that he wanted to have ten children and she had better give up work soon to get started. Finally, AL, Head of Compliance for EMEA at Bank 3 said that she met the Wife when the Wife was an in-house lawyer at the bank. She was a highly trusted advisor and a specialist role was designed especially for her overseeing contract management requirements. Her work was exemplary.

19. The Husband did not file a separate statement responding on this aspect alone but included his response in his section 25 statement dated 17 December 2019. He said that he does not accept that they agreed that the Wife would give up her career. She was a talented and hard-working lawyer but he discovered she was prone to anxiety and worry. Life became an unpleasant negotiation. He did want her to leave the firm due to it not being healthy to work in such close proximity to your spouse, but it was her decision to move to the bank in-house. He had suggested she move to another firm where she had a very supportive contact. In any event, she could always have moved back to a firm of solicitors. She was not included in even the initial list of possible partners at the firm in 2007. It is always an extremely competitive process, which begins the previous autumn with the litigation department deciding whether to back a candidate or not. The department had not done so with the Wife. He doubts she would have made it thereafter due to her perceived lack of resilience. She was, though, generally well regarded, liked and hard-working. It was very important to her to have children and be a "hands-on" mother. She did not wish to work full-time or in law. She suffered with post-natal depression and anxiety following the birth of L. She was stressed and anxious at the bank. He accepts that he did say she did not need to worry as he earned enough for the whole family.

20. During her evidence in chief, the Wife was referred to a part of her statement where she said "I was informed I would be put forward for partnership and would expect to become a partner". Ms Stone QC, who appears on her behalf with Mr Rainer, asked her who had said this. She said it was CJ, who did her last two appraisals, although she accepted it was a very formal process taken very seriously. This prompted the Husband to contact CJ. His solicitors then obtained an email from CJ. Mr Bishop QC, who appears on behalf of the Husband with Ms Faggionato, then sought permission to put this email before the court. It has to be said that the issue caused a considerable amount of rather unnecessary heat. I agreed to read the email. CJ says he signed the Wife's 2006 and 2007 appraisals, both of which marked her as "excellent".

He was impressed with her work and overall contribution to the business. He regarded her as a very strong performer who was in good standing with the litigation partners. He said it was "realistic" for her to aim for partnership in due course. He is sure he would have told her on a number of occasions that he regarded her as a very strong performer. He may well have told her that it was realistic for her to aim for partnership, but he would have been clear that it was extremely competitive and inherently uncertain. He is quite sure that he did not tell her that she would be put forward for the firm's partnership election process at her 2007 appraisal meeting or at any other time.

21. The final witness was Dr Cosmo Hallström. His final report is dated 4 December 2019. He says that the Wife has a vulnerability to anxiety symptoms, particularly at times of stress. Her drinking problems began during the middle of 2016. She developed an Anxiety Disorder with depression and was using alcohol as self-medication. There was a particularly stormy period during 2017/2018 with several admissions to hospital and one uncharacteristic suicide attempt. She was distressed during her interview with the doctor and quite clearly significantly unwell. She still had a very active Anxiety and Depressive Disorder and has made limited progress over the last year. There is still some way to go in relation to her recovery. As she has been unwell for three years, a good outcome is by no means guaranteed although the doctor hopes a conclusion of the proceedings will aid her recovery. She is at present unable to work in any senior capacity. She has a 50% chance of a full recovery. If so, in five years, she may be able to regain her previous professional capacity as she is resourceful with considerable drive and talent when well. The tests undertaken placed her in the range for a significant and moderately severe anxiety disorder. She said she had been at "rock bottom" last year. Although there had been a 30% improvement, she still has very low self-esteem and sees herself in a negative light, being very self-punitive.

<u>The parties' section 25 Statements and their assets</u>

22. The Wife's section 25 statement is dated 9 December 2019. She reminds the court that she has not worked in any capacity for three years and not as a lawyer for 10 years. She says that her health difficulties will prevent her working in the regulated sector. She remains significantly unwell and her health is her priority. The parties had been investing £586,000 per annum for their retirement to provide a fund that would produce £300,000 per annum but the Husband stopped contributions in November 2017. The Husband was relying on some schedules of outgoings that the Wife had prepared for their investment advisers, that showed the total family expenditure, excluding school fees, as being £155,736 per annum, which included holidays at £60,000 per annum. The Wife said that these schedules were wrong as she had done the calculations too quickly and had left many items out. She sought a housing fund of £4.4 million and contended that the Husband could borrow on mortgage up to £5.6 million.

23. The Husband's statement is dated 17 December 2019. He says that he is worried about his position at the firm. He may run for a more senior position in the foreseeable future. If he is not successful and he is unable to generate

income, he may not survive in the partnership until he completes his 20 years. In any event, his partnership share will taper from 2022. He says that the Wife is highly intelligent, driven and resourceful. He has found the litigation very stressful and has had some irregular heartbeats. He understands that the Wife is now doing much better and is off all medication apart from Venlafaxine. His rented property is worth around £2.1 million.

24. Turning to the assets, they are broadly as follows:-

    (a) The matrimonial home is worth £5,862,500. There is a mortgage of (£400,961). After costs of sale, the net equity is £5,285,664.

    (b) The Wife owns three investment properties in her sole name. One of these, in London E14 was purchased in 1999 with £60,000 she had inherited from a Great Aunt. The other two are in the North of England. They have a combined net value of £549,207 after costs of sale and mortgages.

    (c) Between them, the parties have £884,484 in bank accounts. Of this figure, the vast majority, namely £831,698, is held by the Husband. He makes the point that much of this relates to his income distributions from the firm since the breakdown of the marriage.

    (d) The parties have various liquid investments, including money with their investment advisors. The schedule shows a total value for these funds of £1,055,764 of which the Wife has £504,357 and the Husband has £551,407.

    (e) Both parties have liabilities. The majority of these liabilities relate to costs. The Wife's figure is (£285,423) and the Husband has (£267,663).

    (f) Both parties have pensions and the Husband has capital invested with the firm. The Wife's SIPP is worth £710,464 and the Husband's SIPP is £1,212,832, in relation to which he has claimed Enhanced Protection for tax purposes. His capital account has a value of £559,501.

25. It follows that the total capital in the case is £9,704,830 of which approximately £7.2 million is liquid and £2.5 million is illiquid.

<u>The open offers</u>

26. The Husband made an open offer on 30 September 2019. He proposed an equal division of the assets on the basis of a sale of the matrimonial home. By his calculations, he would have to pay a lump sum to the Wife of £400,000 from his share of the equity in the property. He then offered her a further lump sum of £200,000 on a clean break basis. He proposed child maintenance of £25,000 per annum per child plus school fees.

27. The Wife responded on 27 January 2020. She accepted that the matrimonial home should be sold. The assets should be divided broadly equally although she calculated that she should receive a lump sum of £487,386 accepting that this would give her more like 54% of the liquid assets. She sought a pension share of 20.5% of the Husband's pensions to equalise the pension values. She then said that she should receive periodical payments of £360,000 per annum by way of compensation for relationship generated disadvantage. This would be payable on a joint lives basis and index linked. The provision for the children was agreed.

28. The Husband revised his Open Offer on 28 January 2020. It is his case that the Wife should have accepted his proposal made on 30 September 2019. He argues that very significant costs have been incurred since then so he should not have to pay the additional sum of £200,000 any longer. His proposal would, in fact, give him slightly more than half the assets on a clean break basis but that, he says, is fair to reflect that part of the money from the firm relates to work done after the breakdown of the marriage.

29. Both parties rely on alternative property particulars in their area of South West London. I have been provided with a map to show where the various houses are situated. The Wife's two main particulars both have asking prices of £3.95 million. The Husband's particulars have asking prices between £2.15 million and £2.5 million.

<u>The law I have to apply</u>

30. I must apply section 25 of the Matrimonial Causes Act 1973, as amended, in deciding what orders to make pursuant to sections 23 and 24. It is the duty of the court to have regard to all the circumstances of the case. I must give first consideration to the welfare, while a minor, of the two children of the family. I must then have particular regard to the matters set out in subsection (2), namely:-

    (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; and

(h) The value to each of the parties to the marriage of any benefit which, by reason of the dissolution …of the marriage, that party will lose the chance of acquiring.

31. Section 25A provides that:-

> "(1) Where…..the court decides to exercise its powers…above 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….to make a 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…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.

32. The overall requirement in applying section 25 is to achieve fairness. It was made clear in the seminal House of Lords decision of White v White [2000] UKHL 54; [2001] 1 AC 596 that there is to be no discrimination in financial remedy cases between a husband and wife.

33. In the case of Miller/McFarlane [2006] UKHL 24; [2006] 2 AC 618, the House of Lords identified three principles that should guide the court in trying to achieve fairness, namely:-

(a) The sharing of matrimonial property generated by the parties during their marriage;
(b) Compensation for relationship generated disadvantage; and
(c) Needs balanced against ability to pay.

34. I have been referred in detail to the speeches of Baroness Hale and Lord Nicholls in the House of Lords in Miller/McFarlane. Baroness Hale said:-

> "[140] *A second rationale, which is closely related to need, is compensation for relationship-generated disadvantage. Indeed, some consider the provision for need is compensation for relationship-generated disadvantage. But the economic disadvantage generated by the relationship may go beyond need, however generously interpreted.*

The best example is a wife, like Mrs McFarlane, who has given up what would very probably have been a lucrative and successful career. If the other party, who has been the beneficiary of the choices made during the marriage, is a high earner with a substantial surplus over what is required to meet the parties' needs, then a premium above needs can reflect that relationship-generated disadvantage".

[154] *"She is also entitled to a share in the very large surplus, on the principles both of sharing the fruits of the matrimonial partnership and of compensation for the comparable position which she might have been in had she not compromised her own career for the sake of them all. The fact that she might have wanted to do this is neither here nor there. Most breadwinners want to go on breadwinning. The fact that they enjoy their works does not disentitle them to a proper share in the fruits of their labours."*

35. Lord Nicholls said:-

"[92] A fourth feature is that the career foregone by the wife was a professional career as successful and highly paid as the husband's. This is not a case where the wife's future success was a matter of speculation. Speculation of this character is seldom helpful. Here the wife had a proven track record when the parties agreed she should give up her job. A fifth feature is that, as primary carer of the three children, the wife continued to be at an economic disadvantage and continued to make a contribution from which the children and, indirectly, the husband benefited. He was relieved of the day to day responsibility for their children.

[99] As to needs, the claimant's resources are always a matter to be taken into account. And claimants for financial [remedies]….are expected to manage their financial affairs sensibly and responsibly. Thus far I agree with the Court of Appeal. But the wife's claim for compensation stands differently. Her compensation claim is not needs-related; it is loss-related. So, the compensation element of her claim is not directly affected by the use she makes of her resources."

36. I entirely accept that McFarlane was an unusual case where the capital was not nearly as high as in this case, whereas the Husband's income was very high. A periodical payments order was probably inevitable in McFarlane in any event, but the figure awarded of £250,000 per annum was considerably higher than need alone would justify. I accept Mr Bishop's submission that there have not been many successful claims for compensation for relationship generated disadvantage. In my view, this is, primarily, because, even if there is sufficient evidence of loss, a respondent can either argue that the applicant would never have been able to earn as much as they are going to be awarded from their share of the marital assets or that the assets and income are insufficient to do more than cover the parties' needs. Equally, I remind myself that an earning capacity is not capable of being a matrimonial asset to which the sharing principle applies. A spouse is not, therefore, entitled to share it

going forward (Waggott v Waggott [2018] EWCA Civ 727). If I take the view that the Wife has satisfied me that there was relationship generated disadvantage, I am clear that I must comply with section 25A and see if I can reflect that disadvantage fairly within the capital division such that a clean break can still be achieved.

37. I have been referred to a number of authorities on the standard of living enjoyed by the parties during the marriage. This is a factor that is specifically mentioned in section 25(2)(c) but I have always been careful to avoid making an order that penalises those who have spent frugally during the marriage, whilst benefiting those that have spent lavishly. I accept the observations of Mostyn J in SS v NS [2014] EWHC 4183 that the standard of living:-

> "*…is relevant to the quantum of spousal maintenance but it is not decisive. That standard should be carefully weighed against the desired objective of eventual independence…it is a mistake to regard the marital standard of living as being the lodestar. As time passes, how the parties lived in the marriage becomes increasingly irrelevant. And too much emphasis on it imperils the prospects of eventual independence."*

In this regard, I have to be cautious of forensically motivated budgets. As Thorpe LJ said in Purba v Purba [2000] 1 FLR 444 at 449C:-

> *"In this field of litigation, budgets prepared by the parties often have a high degree of unreality – usually the applicant's budget is much inflated…the essential task of the judge is not to go through these budgets item by item but stand back and ask, what is the appropriate proportion of the husband's available income that should go to the support of the wife?"*

38. Finally, there has been some debate as to the recollections of the various witnesses as to exactly what was said to the Wife about her prospects of attaining partnership. In this regard, I have reminded myself of the cases of Lachaux [2017] EWHC 385 (at first instance) and Rothschild v de Souza [2018] EWHC 1855. In the latter case, Mostyn J said at paragraph [7]:-

> *"The court will primarily rely on contemporaneous evidence, that is to say documents which came into existence at the relevant time such as correspondence, minutes or attendance notes, or other contemporaneous records of conversations. Leggatt J, echoing an earlier pronouncement by Lord Pearce, has had some potent things to say about the (lack of) utility of carefully polished witness statements and elaborate oral evidence in the search for historical truth. Far better, they suggest, to focus on the contemporaneous records".*

39. The point is that the human memory is fallible, particularly when trying to look back to things said thirteen or fourteen years ago. Different recollections of what transpired is to be expected, rather than seized on. It is only human nature to recollect what you wished you had said or thought you should have

said rather than what you did say. Equally, the human brain regularly interprets what is said in totally different ways. In other words, people hear what they want to hear. This can lead to misunderstandings, but it does not make the erroneous historian of fact into a liar.

The oral evidence

40. I now turn to the oral evidence I heard. I can make it plain from the very outset that my observations above as to the fallibility of human memory applies entirely to this case. No witness, who gave evidence to me, deliberately lied to me. They were all doing their best to tell me the truth as they saw it. There were, however, inconsistencies between what they said and I will have to make findings where necessary to my overall decision.

41. As the Husband had applied first by Form A, he gave evidence first. It is fair to say that he did start his evidence in quite a combative manner that somewhat surprised me given his immense litigation experience, but he was more measured as his evidence progressed. He is clearly an extremely intelligent and able man. Indeed, it is impossible to see how he could have been so successful at the firm if that was not the case. He was somewhat ungallant as to the Wife's abilities telling me that he did not think she was an exceptional candidate despite her two exceptional grades in her 2006 and 2007 appraisals. He has clearly convinced himself that her frailties mean she would never have been made a partner at the firm.

42. In cross-examination by Ms Stone, he said that he did not know if the Wife ever took any time off work for anxiety related issues, but he had to concede that there were none that he knew about. He added that he respected Dr Hallström's professional opinion. He acknowledged that he had written the Wife's appraisal in 2000/2001 which gave her grades of either excellent or very good throughout and, in which, he had praised her abilities effusively. One entry points out that she had spotted a point in a piece of litigation that the rest of the team had missed. He did accept that she had performed very strongly and that it had been a pleasure to have her working with him. She was a very strong trainee, who did a really good job. He accepted that it was his wish for her to leave the firm and that she might have been in the frame for partnership in the autumn of 2007 but she had left as he wanted her to. He said he did not oppose her move to the bank. Turning to her time at the bank, he accepted that she had to work some long hours there as well, including some very late nights and some weekends. He said it was not right that he wanted her to look after the children, saying that, whilst he wanted her involved with them, he did not want her to do that to the exclusion of all else. He said that Mr X's observations on the matter were "total and utter rubbish". He said that he did not necessarily agree that he would not have stood back in his role at the firm had it been necessary, but he accepted that he had not actually done so. He justified not paying any maintenance after the separation on the basis that the Wife had several hundred thousand pounds to deal with all the costs of the family.

43. The Wife was, at times, very distressed during her evidence but I was clear that it was, predominately, when she was talking about her health. At other times, she was far more robust. I put this to Dr Hallström who said that he thought she put on a brave face. Ms Stone had, independently, put her observations of the Wife's evidence in writing for her closing submissions before she had heard what I had to say. Ms Stone wrote that the Wife is bright and articulate but also highly vulnerable. She was highly emotional when speaking about her health but, at other times, the "old" JC was plainly visible – "on top of her material and the detail; fluent; incisive". I accept this characterisation entirely.

44. In cross-examination by Mr Bishop, the Wife told me that she remembered CJ's statement as to her partnership prospects as "it meant so much to me". She was clear that there were three big issues that the parties had to agree before they could marry, in relation to the venue for their wedding (church or register office), whether children should be christened, and the Wife's career. Compromises had to be made. Her evidence is that they agreed to a church wedding; there would be no christening, but the children would be blessed; and that the Wife would put her career to one side for the children. She accepted that the Husband did not make her give up her career, but she told me she was "incredibly driven" and it was very difficult for her to leave the firm. She did not want to give up her financial security or the "badge of honour". She added that she felt aggrieved by the bank reneging on the promise that she could work part-time in the legal department after the birth of S. She discussed it with the Husband, but it was the end of her legal career.

45. Mr Bishop then asked her about her health. She said that she had never had a single day off work with anxiety. Although she has always been of an anxious disposition, it had never affected her career. She "fell off a cliff" at the time of the breakdown of the marriage. She had never come close to that before. She made the point that her health is now an issue in relation to future employment due to the importance of regulation and ensuring compliance with all sorts of legal requirements. She said she had trouble reading Dr Hallström's report and it took her weeks to summon up the courage to do so. She said that she wanted to tell him that she was fine, but she knew she wasn't. She was asked about her property particulars and her income needs. I will deal with this when I make my findings of fact in due course.

46. I then heard from her two supporting witnesses, Mr I and Mr X. Mr I told me that the Wife was very much on track for partnership. His impression was that she was electable. She was definitely of the quality to be elected, although he accepted that could be said about a number of associates. He acknowledged, in answer to Mr Bishop, that management was not exactly his thing and he was not, therefore, keeping a close eye on what was happening. He would have been interested to know the views of others in 2007 as, by then, his views would have been somewhat historic. He had not worked with the Wife meaningfully since the end of a very large project in around 2003. Everybody would put their views into the mix. If anyone had misgivings, it would have had an impact, but he didn't recall any. I accept his evidence.

47. Mr X confirmed his written evidence saying the Husband had repeated his views several times as that is what he wanted to happen. He said that the reference to ten children stuck in his mind. Mr Bishop suggested it was a flippant comment, but Mr X replied that it was indicative of the Husband's approach. He had been asked to provide an example and had therefore done so. He accepted that the Husband may have been trying to be supportive of his Wife's decisions, but it was his recollection that this was a consistent message over a number of years rather than a single comment in private to support her decision. He acknowledged that the Husband's response to his statement was "well at odds" with his recollection of what had been said but it was his impression that the Husband was very driven and very successful and he had every intention of his career taking precedence. I have to say that I considered Mr X to be a witness in whom I could have confidence.

48. Finally, I heard from Dr Hallström. I have already referred to his response to me that the Wife can "put a brave face on it". He added that she is a woman of great personal resources but also fragilities. He was clear that he had made a recommendation that the Wife receive therapy from his colleague Dr McPhillips. The Wife's interpretation that this was just to get advice on her dosage of medication was wrong. I accept that. He said that there is a lot of work to be done over several years although some benefits may be noticed in the first few weeks. The core problem, however, is a genetic vulnerability to anxiety. Once the switch was turned on, other factors will fuel it and turning off a "stressor", such as the litigation, does not necessarily improve the matter. He made the point that it was after L got better that the Wife went downhill. He said that she probably will recover to some degree, but it requires a great deal of motivation to go back to a senior position in a legal department and he was uncertain. I make it clear that so am I. He was strongly of the view that the likely outcome within two to three years would be for the Wife to be able to do some work that is far less stressful. In response to questions from Ms Stone, he told me that most people (80%) recover within a few months. Some people don't and the Wife hadn't. As a result, she is more vulnerable and less likely to recover, even when the stressors are removed. I accept his evidence.

<u>The issues</u>

49. I have to deal with a number of specific issues. They broadly fall into the following categories:-

    (a) The Wife's claim for relationship generated disadvantage.

    (b) The Wife's health and earning capacity.

    (c) The Husband's future career at the firm and beyond.

    (d) The parties' respective housing needs.

    (e) The parties' income needs.

<u>Relationship generated disadvantage</u>

50. I do not have a crystal ball and I cannot speculate. I cannot be sure whether the Wife would have become a partner at the firm, but I can say that she stood a very good chance. I have seen all her appraisals. In general, they show an extremely successful career at the firm. All the grades are either excellent or very good. For the last three years that we have copies of the appraisals, she was graded excellent. The comments lavish praise and are not remotely critical. The words that feature, some regularly, include "impressive"; "excellent"; "hugely committed and motivated"; "hard working"; "fantastic"; "first rate"; "inspires confidence"; "outstanding contribution"; "very dedicated"; "outstandingly strong litigator"; "excellent ambassador for the firm"; "very bright prospect for the future"; and "one of the very best litigation associates that we have".

51. Mr I thought she was destined for partnership. CJ thought it was "realistic for her to aim for partnership". Whilst I accept that CJ is sure he did not tell her she would be put forward for partnership, I have no doubt that he was sufficiently encouraging to the Wife that she thought she would be put forward at some point. The process would have been rigorous and the outcome not certain. It is, of course, possible that her vulnerabilities that have since emerged so clearly might have emerged in the partnership process and denied her the opportunity, but she had stood up well to the pressures throughout her time at the firm. The answer to the question is, therefore, that she might well have become a partner with the huge financial rewards that would have brought. It would not have been in 2007 but it could well have been in one of the immediately following years.

52. I am, however, clear about what did, in fact, happen. It is agreed that the Husband did not want her to remain at the firm if they were to marry and she accepted that she could not remain. I am satisfied that, by the time the decision was taken to leave, she had formulated her plan which involved both marriage and, hopefully, children. She viewed herself as the parent who would take primary responsibility for the children. The Husband's career took precedence. She therefore rejected any suggestion of trying to establish herself at another magic circle firm, in favour of a move to the legal department of the bank. I am clear that the Husband was fully supportive of this decision.

53. There is a stark difference between the remuneration of managing associates and partners at law firms, even though managing associates are not paid badly. It is clear that the remuneration on offer at the bank was broadly akin to that of a managing associate at the firm at the time, namely around £100,000 per annum plus a potential bonus of about £20,000 to £30,000. The Wife did, therefore, give up the chance, as opposed to the certainty, of far higher remuneration. I further accept that the Wife understood the bank would allow her to go part-time in the legal department, namely three days per week, once she had children. When it came to the crunch, such a role was not available. Rather than return full-time, she chose to give up her legal career. At the very least, the Husband went along with that decision. She went into the business side of the business on a part-time basis but, eventually, that was closed off to

her as well by her redundancy. I take the view that her subsequent ill-health is not relevant to these findings as she had not displayed any significant difficulties during her working life either at the firm or the bank. She had not taken so much as a working day off in this regard over many years. Indeed, it may have been that her career acted as something of a buttress against any such problems. I accept that it is unusual to find significant relationship generated disadvantage that may lead to a claim for compensation, but I am clear that this is one such case. The Wife gave up her legal career, with the support of the Husband. The effect that this has on the outcome is, of course, an entirely different matter.

The Wife's health and earning capacity

54. I have already indicated that I accept the evidence of Dr Hallström. Unfortunately, the Wife is still not well. She has had a very bad time of it over the last three years. It is hoped that the end of these legal proceedings will assist her although she will still have to sell the former matrimonial home and move into her new home. I am satisfied that the collapse of her health was instigated by the combination of her redundancy and the breakdown of the marriage. Such a "double whammy" of bad news is unlikely to be repeated but she has been unwell for a long time now. She clearly cannot return to work at present. I hope she will, with the assistance of Dr McPhillips, see an improvement in her health. I am, however, not convinced that she can resume either a legal career or a banking career at the level postulated by Mr Bishop. In his opening note, he submitted she could earn £60,000 per annum gross within 18 – 24 months and £100,000 per annum gross in four years' time when L is aged 12. The Wife raised issues as to what obligation she would have to disclose her health difficulties. I do not know the answer to that, but I do have to consider that she has not worked as a lawyer for nine years. She retains significant child-care responsibilities. Employing a nanny does not make much financial sense if the earnings are relatively modest. Of course, it would be beneficial for her to do something in the years ahead, but I am going to treat her earning capacity and that of the Husband, after he leaves the firm, in the same way. If they earn money, it will enable them to live to a higher standard than would otherwise be the case. It follows that I am not going to ascribe an earning capacity to the Wife.

The Husband's future career at the firm and beyond

55. The Husband told me about his concerns as to his position at the firm. He too has clearly found these proceedings difficult and it may be that he will find matters easier after they have been concluded. I very much hope that he gets the role he aspires to. In any event, he accepted that the partnership always tries to reach a consensus with those who are close to retirement and, in the absence of a vote of the partners, he cannot be forced out. I accept entirely that his partnership share may fall in 2022 but I take the view that I should proceed on the basis that he will do a further four years at the firm. At present, this will entitle him to a significant lump sum on retirement. He did

say that there are some discussions about this but, given the need to incentivise retirement, it seems to me likely that he will receive something significant at that point.

56. His income for the year ending 30 April 2017 was £1,899,784 plus dividends of £17,252 giving him a net income of £986,211. For the year ending 30 April 2018, it was £1,941,606 gross which amounted to £998,000 net. For the year ending 30 April 2019, it was £1,888,014 or £969,000 net. He accepted that the firm's profits have continued to rise, at least to date. This suggests that he will earn approximately £1 million per annum net until 2022 and then around £775,000 per annum net for the final two years, assuming his partnership share reduces. The Husband will, out of this sum, have to pay £50,000 per annum for the children as well as their school fees. He will have to continue this for several years after he has retired. Moreover, he will have to rebuild whatever capital I award to the Wife from his half-share due to her claim for relationship-generated disadvantage.

57. Thereafter, I take the view that it will be entirely up to him what he does. Most of the examples given in evidence of partners who had retired and had gone into new ventures did not appear to involve them earning large amounts of money, certainly in comparison with their partnership profits. I accept that, if like Mr I, you start your own firm, much larger income may be available but, as with the Wife, I take the view that this is entirely a matter for the Husband. If he wants to take such a course, with the resulting hard work and risk involved, that is a matter for him. I am certainly not building any such income into my calculations.

The parties' respective housing needs

58. I have considered very carefully the housing particulars put before me and the evidence given on the topic by the parties. I have also looked closely at the map provided. I am quite satisfied that the Wife does not require £3.95 million or anything like that figure for an alternative property. I remind myself that South West London is not Central London. It is clear that very nice properties can be found there in excess of £2 million. I accept that it is always possible to find something wrong with a property, but all the Husband's particulars were within a couple of miles of the children's schools in good residential areas. One property proposed by H is very close to the Wife's two main particulars and L's school. It was on the market for £2.5 million. The Wife told me that the location was good. It had a nice garden. Parking was less of an issue. Her complaint was that it was a "probate" house and a "project". In other words, a new owner would have to spend hundreds of thousands, if not millions, refurbishing it. I cannot accept that. I have seen interior photographs and, whilst I accept that some of the rooms look a bit tired, it is only a multi-millionaire who would spend vast sums on it. In any event, the other particulars that the Husband relied on were good sized properties, with four or five bedrooms, relatively close to the schools and in decent suburban areas. These were properties with asking prices between £2.1 million and £2.4 million. If there was no off-street parking, there were resident's parking permits available. Even if some roads in South West

London are busy during the rush hour, I am satisfied that driving a maximum of around 2.5 miles to the schools is not unreasonable. It will, of course, be entirely up to the Wife what proportion of her award she spends on housing, but I am quite satisfied that, even including SDLT, costs of moving and some modest refurbishment, both parties can purchase suitable alternative properties for £2.5 million. I am not of the view that either party should have to trade down at some future point when the children are independent. I have not acceded to the Wife's application for the best part of £4 million for housing. If I had done so, the trade down request would have been far more reasonable. I have allocated both parties the same amount for housing. It is entirely a matter for them if they eventually chose to move but it would be wrong to require either to do so.

The parties' income needs

59. It is clear to me that these parties did not spend extravagantly during the marriage. I accept that the schedule of expenditure prepared by the Wife for their investment advisors did not include every item of expenditure, but I am satisfied that it was considerably closer to what the family spent during the marriage than the Wife's Form E budget. I have already noted that the Form E budget, excluding the children's expenditure, is £331,080 per annum. There are some items there that are inappropriate such as £300 per month for pension contributions; £1,666 per month for savings plans; and £1,473 per month for her three investment properties. In relation to the latter, either they are sold, or any such expenditure is financed from the rent. There are also numerous items that I consider to be massively overstated. By way of example only, I am not sure how a mother with two young children can spend £480 per month on takeaways or £62.50 per month on batteries and lightbulbs. If the Wife is not working, it is difficult to justify £1,325 per month for a cleaner and £982 per month for a gardener on top of £800 per month for garden expenditure. There are numerous other items of a similar nature. The figure of £71,500 per annum for holidays and weekend breaks is very high in the context of this case.

60. I cannot entirely forget that this was a marriage of about eleven years' duration albeit with two children and a serious effect on the Wife's earning capacity but a budget for the Wife of £100,000 per annum for herself and £50,000 per annum for the children would give a very comfortable and appropriate standard of living going forward in a mortgage free property and with the children's school fees paid.

Outcome

61. There are three strands to the quantification of the award, namely sharing, needs and compensation for relationship generated disadvantage. I will deal with each in turn although I am of the view that the relationship generated disadvantage has some relevance to all three.

62. I have formed the clear conclusion that all the assets in this case should be treated as matrimonial assets. Both parties have urged modest departures from equality upon me, but I cannot see the force of any of their respective submissions in this regard. In particular, I do not consider that the Husband's case that he has earned money since the breakdown of the marriage justifies a departure for a number of different reasons. First, he did not maintain the Wife and children following the separation. For a long time, he expected the Wife to use matrimonial assets that are, therefore, no longer available. Second, there is an element by which his income post-separation was earned before separation, given the way the partnership works. Third, although a minor point, the Wife's three investment properties were all purchased prior to the marriage and she invested into her property in E14 the sum of £60,000 which she had inherited. Fourth, I have found that she gave up her career. All other things being equal, I would have divided the assets equally which would have given each party £4.85 million. I accept that part of this sum will be illiquid. As I am dividing the assets equally, I can see no reason why their pensions should not be divided equally but the Husband will have to accept, on his side of the balance sheet, his partnership capital. Whilst that is currently illiquid, he should receive it on leaving the partnership in four years. The Wife did, at one point, suggest the Husband should pay her a lump sum up front to cover her interest in her three investment properties. I cannot see why he should do so.

63. In terms of needs, there is no doubt that the Husband will be able to meet his needs. So far as the Wife is concerned, Mr Bishop has urged the length of the marriage on me as a reason to say that the Wife should not receive an award that encompasses her needs for the rest of her life. I disagree. The relationship-generated disadvantage is relevant to this aspect as well. If it had not been for this marriage, she would have retained her career in the law and, potentially, very high earnings with it. I am satisfied, therefore, that a whole-life award is reasonable.

64. I have already assessed her housing needs at £2.5 million in total. A Duxbury requirement of £100,000 per annum net for the rest of her life would necessitate a capital sum of £2.35 million. This makes a total of £4.85 million which is exactly her half-share. The one difficulty with that is that Duxbury postulates free capital, whereas around £960,000 of her award will be in pensions. She can, of course, take 25% as a tax-free lump sum and, thereafter, use income drawdown. I accept that the income from a pure Duxbury fund is also taxable but the utilisation of the capital itself is not. There will, therefore, be a financial hit as compared to a normal Duxbury, but it is very difficult to quantify. Having said that, if it had not been for the relationship generated disadvantage, I would have found that a sum of £4.85 million was sufficient after an eleven-year marriage.

65. Finally, I turn to compensation for relationship generated disadvantage. I have found quantification of this claim very difficult. First, I am satisfied that I should take the Husband's future working life at four years until he has attained twenty years in the partnership. His income is likely to fall during that period and he will have an obligation to maintain the children both as to

their maintenance and their school fees for a considerable number of years thereafter. Given the way that I intend to structure my award, he is also likely to require a mortgage to enable him to buy a property for £2.5 million. I am of the view that he should be able to discharge that mortgage within four years so that he too is mortgage free by the time he retires. All these commitments will be a considerable drain on his income.

66. I have formed the very clear view that there should be a clean break in this case. First, I have to apply the statutory provisions. It is my duty, pursuant to section 25A(1) to consider whether to terminate the financial obligations of each party towards the other as soon after the grant of the decree as is just and reasonable. Second, even if I did not do so, I would have to consider the undue hardship test in section 25A(2). The difference between this case and Miller/McFarlane is that the assets in the latter case were not sufficient to terminate the Wife's periodical payments without undue hardship to her. Third, I accept entirely the points Mr Bishop makes on behalf of the Husband of the potentially disastrous consequences of continuing dependency between these parties going forward. As in McFarlane, I consider it almost inevitable that there would be further litigation in the future, particularly at the time the Husband leaves the firm partnership. The history to date suggests such litigation might well be hotly contested, very expensive and extremely stressful for the parties.

67. The Wife has already benefited from the Husband's earnings since she gave up work until now, given my equal division of the assets. I am clear that, when I look at relationship generated disadvantage, it is the next four years that I have to consider. I have not said that the Wife would have become a partner at the firm. I have found that she had a very good chance. Her income, as a managing associate at the firm and whilst she was working at the bank, was, at the time, broadly £100,000 per annum gross with a modest bonus opportunity. I accept it would have increased by now but probably not to a great deal more than £150,000 gross plus a bonus opportunity. Netting down, such a figure would have been approximately the figure I have awarded her by way of Duxbury fund but that does not factor in the chance that she would have attained partnership.

68. I have come to the conclusion that an appropriate sum to award for relationship generated disadvantage, over and above her half share of the assets, is the sum of £400,000. Whilst this could be portrayed as being an additional £100,000 per annum for the likely remainder of the Husband's time at the firm, it will be paid up front on the sale of the former matrimonial home, which is a modest additional advantage to the Wife. Pending sale of the home, he must pay her £8,333 per month which equates to my Duxbury award of £100,000 per annum. There will be a clean break on sale of the family home. There will be child periodical payments of £25,000 per annum per child, index linked plus a school fees order.

69. Whilst I will not close the door to any arguments about costs, the normal regime is "no order as to costs". The costs of both parties have been taken fully into account in reaching the figure for net assets to be divided. The

Husband has complained vociferously that the Wife should have accepted the offer he made in September 2019, but that proposal only gave the Wife an additional sum of £200,000, as against the sum of £400,000 I have awarded her.

70. The Wife's liquid assets are as follows:-

(a)	One-half the equity in the family home	£2,642,832
(b)	Her three investment properties	£ 549,207
(c)	Her bank accounts	£ 52,786
(d)	Her investments	£ 504,357
(e)	Her liabilities	(£ 285,423)
	Total	£3,463,759

71. Her half share of the assets is £4,852,415 to which needs to be added the additional sum of £400,000, making a total award of £5,252,415 (some 54%). Equalising the pensions by a pension share of the Husband's Investcentre SIPP to the tune of 20.7% will give her an additional £251,184 taking her pension entitlement to £961,648. Her assets of £3,463,759 and her pension share of £961,648, take the figure to £4,425,407 meaning that she is entitled to a lump sum of £827,008 from the sale proceeds of the former matrimonial home. This will mean, by my calculations, that she will receive £3,469,840 and the Husband will get £1,815,824 on the basis of the current valuation. As this valuation is not certain, there will have to be a percentage division, namely 65.65% to the Wife and 34.35% to the Husband.

Conclusion

72. Exceptionally, in this case, I have found there to have been relationship generated disadvantage sufficient to justify an award of compensation. I continue to be of the view that such cases will be very much the exception rather than the rule. It is rare to be able to make the findings of fact that I have made in this case. Even having done so, I have been clear that the case remains a suitable one for a clean break with, by the standards of such cases, a relatively modest additional award. I have already made the point that, in many of these cases, the assets will be such that any loss is already covered by the applicant's sharing claim. In other cases, the assets/income will be insufficient to justify such a claim in the first place. It follows that litigants should think long and hard before launching a claim for relationship generated disadvantage and they should not take this judgment as any sort of "green light" to do so unless the circumstances are truly exceptional.

Mr Justice Moor
25 February 2020