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Neutral Citation Number: [2022] EWFC 19

Case No: ZC15D00301

**IN THE FAMILY COURT**

The Royal Courts of Justice
Strand
London
WC2 2AA

Date: 16 March 2022

**Before** :

**Mr Justice Moor**

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**Between :**

**DX**

Applicant

**-and-**

**JX**

Respondent

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Ms Eleri Jones (instructed by Michelmores LLP) for the **Applicant**
The **Respondent** appeared in person

Hearing dates: 2nd to 3rd March 2022

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# JUDGMENT

# MR JUSTICE MOOR:-

1. I have been hearing an application dated 22 March 2021 made by the Applicant, DX to vary and/or terminate a spousal periodical payments order. There is also a cross-application dated 6 May 2021 by the Respondent, JX to dismiss the application. At the time she made the application, she was asserting the court had no jurisdiction to hear it. It was for that reason that this case was transferred to be heard by a High Court Judge. I intend to refer to the parties respectively as "the Husband" and "the Wife" for the sake of convenience. I mean no disrespect to either by so doing. I entirely accept that they have been divorced for some years.

2. The Wife is aged 53. The Husband is also aged 53. They met when they were both working abroad. They started cohabiting in the late 1990s and married in this country in 1999.

3. At the time of the marriage, the Wife was Head of Spanish at a school in the country where the parties met. During the marriage, she had a number of different jobs, including running a language school but I am clear that her main occupation was that of home-maker and child-carer. At one point, she had a serious accident but she is fortunately now largely recovered.

4. The Husband is a Chartered Accountant but has made his career in fund accounting. He has had a number of very responsible positions [specifics omitted].

5. There are three children of the family. A was born in 2002, so he will be twenty years of age this year. He studies in London where I am told the fees are £23,000 per annum. He is now doing his course over only two years, of which this is the second year. B was born in 2003, so she is now 18. She is in her final year at school in Luxembourg, which is a fee paying school. She wishes to study at university in the UK. C was born on in 2008. He is therefore aged 14 and he remains, at present, at the same school in Luxembourg. Very regrettably, the intense hostility between the parents, clearly evident to me in court, has spread, such that the children now have virtually nothing to do with their father. The hostility was perhaps best exemplified by the fact that, during her evidence, the Wife told me that C was unhappy at school and wished to move to a state school in Luxembourg. It was clear she had not told the Husband and seemed to think it was, in some way, his obligation to find out from C. This is all a tragedy and I do hope that, once I have decided this case, it may be possible to repair some bridges between the children and their father.

6. The parties moved to France in 1999 when the Husband was transferred to Luxembourg by this employer. He was based in Luxembourg for 14 years before, in 2013, he obtained a contract as Head of Investment Accounting at an investment fund in the UAE. I accept that this job provided a rate of remuneration to the Husband very significantly in excess of what he had previously been earning. The parties moved willingly to the UAE. It may be of some significance that the initial contract was for three years, so his employment there might not have lasted even for as long as it did.

7. For whatever reason, the marriage broke down after a relatively short period of time in the UAE. The Wife petitioned for divorce in England in early 2015. By doing so, she chose this country as the forum for the resolution of any financial dispute between her and the Husband, although I accept that it may have been the only jurisdiction available to her at the time. In fact, she did not leave the UAE until either May 2016 or June 2016 when she returned to France with the three children. The two elder children were enrolled at school in Luxembourg. C returned to the UAE for one final school year before moving to Luxembourg permanently in 2017. The Husband was served with the divorce proceedings in June 2016. A Decree Nisi was pronounced in January 2017 and made Absolute on 14 March 2017.

8. Negotiations took place between the parties to resolve their finances following the divorce. They managed to reach agreement. Regrettably, it is the only example of these parties behaving sensibly throughout these long running proceedings. I am crystal clear as to what the settlement involved. At the time, the parties' resources were relatively limited. The Form D81 in July 2017 showed that the Wife had assets of £404,843 and the Husband had assets of £494,352. The Wife had a net income of £1,125 per month. The Husband had a net income of £20,661 per month plus a significant bonus. I accept that this took his income up to approximately £35,000 per month net plus some important additional allowances. In any event, ignoring the allowances, he was earning net, each year, about the same as each party had in capital.

9. The parties decided to divide their existing assets equally. The Husband was to pay periodical payments but these were not linked to needs. It was a percentage of his net salary, divided between the children and the Wife. I am clear that the intention was that she would put money aside from this maintenance to achieve a clean break at the age of 65, although I accept that it did not prevent an application to vary should there be a change in circumstances or other good reason for doing so. Indeed, there is no doubt that both parties did put money aside in the following years, such that each now has approximately £1.2 million in assets. Although I recognise that this is a slightly unusual approach, there is clear authority to proceed in this way (see, for example, Parlour v Parlour [2004] 2 FLR 893; Q v Q [2005] 2 FLR 640 and AB v FC [2018] 1 FLR 965). Indeed, I commend the approach, given the huge income that the Husband had suddenly obtained towards the end of the marriage. It was a very sensible way to allow both parties to achieve independence in retirement at a good standard of living.

10. There is also no doubt whatsoever that the parties discussed the Wife's earning capacity. At the time, the Wife was hardly working. Regrettably, she undoubtedly underplayed her earning capacity, mentioning modest figures such as €150 per day working only two days per week. In my view, this failure has led to many of the problems that have since arisen. She was, however, adamant, that she should be entitled to redevelop her earning capacity without it affecting her maintenance. The Husband undoubtedly accepted that condition. For example, his then solicitors wrote "*our client's proposals in relation to maintenance are generous and provide your client with the ability to obtain her*

*own income without that now affecting the level of spousal maintenance that she is being paid".*

11. In consequence, a consent order was approved by Gibbons DJ sitting in the Central Family Court in November 2017. I do not need to set out the exact detail of how the equal division of the various assets was achieved, although it did provide for a sale of the French property where the Wife and children were living with payment of the proceeds of sale to her. The maintenance provision was 50% of the Husband's net salary, including his bonus, but not taking into account his allowances. His basic net pay was split as to 25% payable as spousal maintenance to the Wife and, in effect, 8.33% to each child, until they respectively attained the age of 18. I make the point that this was a large maintenance award of just over £20,000 per annum per child, excluding school fees. From 2028, the spousal maintenance reduces to 20%. The termination date was the first to occur of the retirement of either party or the Wife's sixty-fifth birthday, whereupon the order would stand dismissed with a section 28(1A) direction preventing any further extension. There were also the usual provisions for the order to end on death or remarriage/cohabitation as well as the normal "further order" provision.

12. Turning to the bonus, the Wife was to receive 50% of the bonus until 2020; 41.67% until 2021; 33.34% until 2026; 25% until 2028; and 20% until 2033 or the Husband's retirement. By my calculations, this meant that, initially, the wife received very nearly £150,000 per annum in maintenance for herself as well as the child maintenance. The Husband gave undertakings to provide documentation as to his income and bonus. He also gave an undertaking not to seek to vary the structure of his remuneration package and he accepted that, if there was a change, a review of the maintenance could take place. He undertook to share with the Wife equally his Luxembourg state pension on receipt at 65. Finally, he was to pay the children's school fees for so long as he received a school fees allowance. If there was a shortfall, it was to be met equally. If the allowance ended, the children would attend a non-fee paying school.

13. In December 2017, the Wife moved to Luxembourg with the children. She purchased a property there and, in 2019, she obtained a fixed-term employment contract as a teacher, which was, in fact, renewed several times. By mid 2020, she was earning €3,694 per month net. Whilst I entirely accept that this was very different from the figure of £1,125 pm set out in the Form D81, it was completely dwarfed by the Husband's income.

14. In September 2019, the Husband applied to vary the maintenance order in Luxembourg. Both parties accept that, in accordance with the EU Maintenance Regulation in force at the time, it was the only court with jurisdiction, namely the Wife's habitual residence. The application was made less than two years after the order had been made by Gibbons DJ and even if the amount the Wife had been receiving by way of maintenance was reduced pound for pound for her additional earnings, the benefit to the Husband would have been modest given the costs he must have incurred.

15. The Luxembourg Court dismissed the Husband's application to vary in June 2020. The court accepted that the Wife's plea of "inadmissibility" could not succeed and that there was jurisdiction, but took the view that the agreement between the parties was a contract resulting from the free will of the parties, which must, except in very serious, exceptional and unforeseeable circumstances at the time of its conclusion, be respected in all circumstances. The court specifically relied on the letter I have already quoted from the Husband's solicitors saying that his offer provided the Wife with the ability to obtain her own income without that affecting the level of spousal periodical payments. In consequence, her change in income was provided for or, at least, not excluded. It makes the point that termination on her retirement of itself shows that it was expected she would have employment. Ms Eleri Jones, on behalf of the Husband, criticises this ruling as not being in compliance with our law by relying on the agreement as a contract and setting far too high a bar to variation. Whilst there is force in those points from the perspective of English law, I am clear that there was no merit in the Husband's application in Luxembourg. If there had been jurisdiction here, I would have dismissed any variation application, at the time, without hesitation. The deal had been done less than two years before. The only real change in circumstances was the increase in the Wife's income, which the correspondence showed she was allowed to earn without it affecting the level of maintenance.

16. For reasons that I simply do not understand, the Husband appealed in Luxembourg in 2020. Inevitably, at least to my eye, the appeal court dismissed the appeal later in 2020. The judgment again shows the court relying on the agreement being a contract that is legally binding on those who have made it. The point was made that the order did not say it was conditional on the Wife residing in France or that she had to refrain from engaging in employment. Indeed, her retirement date was targeted, with reference to her work potential so it was taken into account. Moreover, as the French property was to be sold, the need for her to move was known. The contractual agreement had to be respected unless there were highly serious, exceptional and unforeseeable circumstances which might risk personal and unacceptable tragedies, but there had not been a deterioration in the Husband's circumstances.

17. In early 2021, the Wife inherited the sum of £138,000 following the death of her father. In addition, the company for which she worked was taken over by the Government of Luxembourg and she received a permanent contract at a better rate of pay but, other than that, the circumstances remained entirely the same, when, on 22 March 2021, the Husband made an application in this jurisdiction to vary the consent order. This was only five months after his appeal in Luxembourg had been dismissed. I accept that, by then, the UK had left the European Union and the Maintenance Regulation no longer applied but I have to say that I consider this application to be entirely misconceived and, at the time, utterly hopeless. It appears to me that the Husband was having the most severe case of "buyer's remorse" over the 2017 agreement he reached with the Wife but that does not in any way justify what was a sustained campaign of litigation at huge financial and emotional cost to these parties over a number of years.

18. The Wife responded, on 6 May 2021, by applying to dismiss the application on the basis that the Luxembourg court retained exclusive jurisdiction as she is the maintenance creditor and jurisdiction therefore lies with the court of her habitual residence. She made the better point that the Husband had already aired these arguments in Luxembourg, such that further proceedings were vexatious, oppressive, harassing and intimidating. I have to say that I consider her application to be equally misconceived. The Maintenance Regulation no longer applied. It has been replaced by Article 18 of the Hague Convention 2007, which provides:-

> "*(1) Where a decision is made in a Contracting State where the creditor is habitually resident, proceedings to modify the decision or to make a new decision cannot be brought by the debtor in any other Contracting State as long as the creditor remains habitually resident in the State where the decision was made."*

19. The Borras-Degeling Explanatory Report states, at paragraph 415:-

> *"…It operates by prohibiting the debtor from seizing another jurisdiction to modify a decision or obtain a new decision where the original decision has been made in a Contract State in which the creditor is habitually resident".*

20. I am absolutely clear that Article 18 does not prevent the Husband's application. The decision that the Husband wishes to modify is not the Luxembourg decision. It is the decision of Gibbons DJ in this jurisdiction. Using the expression in the Borras-Degeling Explanatory Report, the court of origin is England and Wales not Luxembourg. No attempt is therefore being made to modify the decision in another Contracting State as the decision that he seeks to modify is from this jurisdiction. It follows that I am entitled to vary the order previously made in this jurisdiction if there is good reason to do so.

21. The Husband also argued that the Wife submitted to the jurisdiction of this court. Given my view of Article 18, this argument does not need to be resolved but I am quite clear that she did not submit to the jurisdiction after the application was made. She immediately made her opposition apparent and applied to dismiss. She was then ordered, against her submissions, to file a Form E. She complied because she had to. It would have been quite wrong to expect her to appeal that order. A slightly better point was that she did ask for a modest modification to the order, although it seems to me that this was actually to put in place what had previously been ordered, namely payment of the maintenance by standing order. It is, of course, correct that, recently, the Wife has submitted to the jurisdiction, following a significant change of circumstances, but that is another matter.

22. Both applications came before Hudd DJ on 1 June 2021. Her order rightly included a recital that the court expected full compliance with the 2017 order pending any variation. She decided to allocate the case to a High Court Judge,

given the issues I have outlined above. As I have already indicated, she did direct that both parties file Forms E.

23. The Husband's Form E is dated 18 May 2021. At the time, he remained employed in the UAE earning almost the same as in 2017. His Form E gives his net income as £448,348 per annum, of which £421,708 was from his UAE employment. I will deal with his capital position later in this judgment. He added that he has very limited pension provision and is unable to make savings, although the latter was clearly wrong both because his resources have increased significantly since the 2017 order and because he had a very large income as well as the availability of very generous allowances, even making allowance for the maintenance he was paying. He puts forward future income needs of £444,703 per annum, including pension contributions of £188,483 and housing costs of over £119,000 per annum. It would be a real move forward if parties did not exaggerate so massively in completing these documents. Such figures just give rise to numerous questions that are, in one sense, entirely justified but, in another, completely irrelevant. By far and away the most significant statement in the Form E was that he said that he intended to relocate to the United Kingdom and seek alternative employment, whereupon his income would reduce to £150,000 per annum. The Wife is, of course, extremely critical of this but she accepts that the possibility of him not remaining in the UAE was discussed at the time of the 2017 order. In any event, a court or ex-spouse cannot require the other spouse to continue working in a particular employment overseas indefinitely. The husband would have been quite within his rights to have given notice to his employer in the UAE and return voluntarily to this country. In fact, I am satisfied that is not what has happened.

24. The Wife's Form E is dated 22 June 2021. She resides in Luxembourg. At the time, she was still on a temporary contract but she accepted that she would get a full contract in July 2021, initially on a two year trial basis. She does say that the Husband has fallen out with the children. She sets out her capital assets but I will deal with that later in this judgment. In terms of income, she deposes to total income of £159,930 net per annum but that included the maintenance. Her income needs were said to be £11,476 per month for herself and £8,100 per month for the children, which comes to £234,912 per annum. Although lower than the Husband's list, it is clear that this schedule was equally unaffordable and had not been spent, given the increase in her assets since 2017. It is fortunate for both parties that they have, at least, increased their assets considerably since 2017 despite the ruinous litigation. Very regrettably, the Wife completed the "conduct" box in her Form E. This really has to stop in cases like this. There is no conduct in this case that it could possibly be inequitable to disregard. Again, it merely stokes the fires.

25. In his statement dated 6 July 2021 in response to the Wife's strike out application, the Husband said that he was seeking to capitalise/terminate the Wife's maintenance. He repeats the complaint that the Wife was not full and frank about her earning capacity in the 2017 negotiations. I have already indicated that I have some sympathy for him in that regard, although the Wife is adamant that she did disclose her wish to move to Luxembourg. The Wife's reply is dated 20 July 2021. She said that the costs of these proceedings had

outweighed her inheritance, which is a great shame. She adds that the Luxembourg court had the power to vary but did not.

26. The matter came before me for directions on 23 July 2021. The Wife wanted me to set the matter down for an interim hearing on jurisdiction. I am very glad that I refused to do so. I am clear that, if I had, I would have dismissed her application to strike out and made her pay the costs. As it was, I set this final hearing down before myself to deal with all matters on a rolled up basis. I did say that compliance by the Wife with my directions would not amount to the Wife submitting to the jurisdiction but I accept that this was going forward only. I directed an FDR, which took place before Holman J on 29 November 2021 but it was, sadly, unsuccessful.

27. On 30 September 2021, the Husband was told that his appointment in the UAE was to be terminated with three months' notice, although he could resign if he felt that would be more advantageous to him in his future job search. He decided, in consequence, to resign and his employment terminated on 31 December 2021. He set about trying to find alternative employment in this country. I will make my findings of fact later in this judgment but I can say that I am satisfied that the Husband did not engineer the termination of his employment, although he would have been within his rights to do so.

28. I had directed Skeleton Arguments as to the jurisdiction issues. I can deal with them very briefly, given that I have already decided the main issues above, given that the answer was so clear. The Wife did say in her Skeleton, drafted expertly on her behalf by Mr Peter Duckworth on 1 November 2021, that it was not a needs based order. It was based on entitlement and was self-regulating. It was to remain constant even if the Wife earned good money. I agree all these points although they do not stop a variation for good reason. The document then made the argument that Luxembourg has exclusive jurisdiction which I have rejected and the better argument that, when instituted, the application was just a re-run of the Luxembourg case.

29. The Husband's Skeleton, drafted on his behalf by Ms Jones, is dated 15 November 2021. Again, it deals with jurisdiction and the "submission to the jurisdiction" argument that I have already determined. The Wife had claimed res judicata following the Luxembourg decision but I do not think res judicata is relevant in applications to vary periodical payments. Of course, there almost always has to be a relevant change of circumstances to justify variation and, absent such a change, an application will almost inevitably fail but I do not view this as a result of "res judicata". The document goes on to make the fair point that there was no consideration in Luxembourg of capitalisation. Finally, it says that the order offends the principal in cases such as Waggott v Waggott [2018] 2 FLR 406 that post-separation income cannot be shared. Even if there is some force in this, income sharing was what they agreed and they did so for good reason at the time.

30. The Husband returned to the UK on 5 December 2021. He told me in evidence that he undertook a wide search for employment at similar levels to the employment he had before he moved to the UAE. He had a number of

interviews for jobs in London without success but he eventually found a job outside of London on a salary of £100,000 per annum plus discretionary performance-related bonus. The Wife has been critical of him taking this employment but I am satisfied that she is wrong to be critical. It is very difficult for an employee, particularly a high achieving one, to obtain work in the financial sector in their fifties. In many respects, it is a "young person's game". The Husband had been out of employment in Europe for the best part of ten years, albeit holding a very responsible job in the UAE. I recognise that he has taken a pay-cut on what he would have been earning had he remained in Europe throughout, but he has made up for that many times by the money he earned in the UAE.

31. He filed a statement dated 28 January 2022 dealing with all of this. He said he had only first been informed that his role in the UAE was at risk on 20 September 2021. He was paid for his three months' notice period and he accepts that he did not pay the Wife her maintenance for that period. He told me, in oral evidence, that the amount concerned was £13,000. The Wife did not appear to dissent about this figure. His termination payment was the relatively modest sum of £13,494. He and his partner have exchanged contracts to purchase a property in the south west of England for £1 million. There is a delayed completion. He has paid a deposit of £100,000, although he makes the point that his stamp duty will be approximately £90,000 as this will be his third property in the United Kingdom. He was raising a mortgage of £700,000, based on his UAE income. There will be a declaration of the beneficial interests in his favour as he will be contributing far more capital than his partner. It is clear that she could invest in this property if she wished to do so but she wants to keep her current home to provide her with an income by renting it out. It is possible to be critical of this purchase. Given his changed circumstances, he certainly cannot afford a mortgage of anything like £700,000 but he can, if he wishes, sell his other properties to reduce the loan. At the end of the day, it is up to him how he arranges his finances provided he complies with his legitimate obligations to his ex-wife and children. He puts his income needs at £106,291 per annum, considerably in excess of his net income, but this does include the unaffordable amount of £31,514 per annum for the mortgage.

32. The Wife began to act as a litigant in person on 28 January 2022. I heard a Pre-Trial Review remotely on 15 February 2022. I made it clear that I did expect the Wife to make an Open Offer. I was troubled by the very detailed disclosure being sought by both parties, which I considered not to be proportionate to a variation application, as opposed to a first application. I do accept that, if the court is dealing with termination of maintenance and issues as to capitalisation, the court does need to have the overall financial picture but detailed bank statements and credit card statements for long periods are not conducive to keeping the costs within sensible boundaries. I did, however, direct both parties to reply to the latest round of questions, "save for just exceptions". Indeed, the replies really advanced the case not one jot. The Wife did say that she only received £111,000 from her father's estate, which was half the value of the house. She let her brother keep approximately £26,000 for administering the estate. She told me in oral evidence that he had looked after her father for years

whilst she was abroad and she thought this was only fair. I am certainly not going to criticise her in that regard.

33. The Husband's Open Offer is dated 24 February 2022. He seeks a complete termination of the Wife's periodical payments order and a financial clean break between them. He says the Wife should pay his costs. He offers periodical payments of £460 per month for C and £500 per month towards his school fees. He accepts that the CMS assessment figure would be around £800 per month, although this figure is not, of course, binding upon me, given that the Wife and C are in Luxembourg. He reduces the figure from £800 to £460 per month to reflect the costs of travel to see C, although he is not, at present, having any contact with C. He blames the Wife and he says she should not benefit from this by receiving higher maintenance as a result.

34. The Wife made her Open Offer in her Case Summary. She sought transfer to her of two UK properties owned by the Husband, mortgage free. The total value transferred would be £671,400, but she says it would give her £557,385 net after CGT and stamp duty. I don't think she is right about that as I do not believe she would pay stamp duty. She also sought a lump sum of £200,000. Finally, she sought capitalisation of C's maintenance at £68,592 although she gives no reason why this case is one that would justify such an unusual order for the capitalisation of child maintenance. She says that capitalisation at a figure of £871,400 would be a discount to 26% of the full value of her claims. Whilst I do not entirely understand the calculations, I note that the Husband responds with a table that shows that such a solution would leave him with less than £400,000. The Wife would have £2.2 million but they would have very similar incomes. Indeed, the Wife seemed to see some force in this during the hearing as, in her final submissions, she tentatively suggested transfer of one of the properties only as a solution.

35. I now turn briefly to deal with the assets schedules. There was considerable dispute between the parties at the time the composite ES2 document was filed. For example, the Husband said his assets were £1,270,392 and the Wife said they were £3,114,897. So far as her assets are concerned, he said she had assets worth £1,449,943 and she said her figure was £1,750,961. In almost every respect, I am entirely satisfied that I should take the assets at the figures suggested by each party for themselves, rather than as suggested by the other for them. The one, significant, exception, is the Luxembourg pensions.

36. The Husband has two properties in England, P, which is subject to a modest mortgage, and Z. I accept his figures for their gross values, not the figure for P given by the Wife. He has sold his property in Luxembourg and the proceeds are included in his bank accounts. In closing, Ms Jones put his assets at £1,229,958 although I do think this is slightly misleading as it excludes the £100,000 deposit on his new purchase. I do recognise that he will have significant stamp duty on the purchase of his new home although I have already indicated real reservations about a purchase at £1 million and his partner does have an obligation to contribute, given that she does have her own property. I reject entirely the Wife's suggestion that I should add in the sum of £1,055,905 for his Luxembourg pension. This is not the value of the pension. It is the

amount he earned, gross of any deductions, during his entire time in Luxembourg. It is tolerably clear that he will not be entitled to any Luxembourg pension anyway unless he is living in Luxembourg when he retires. I cannot conceive that he would return to Luxembourg just to achieve such a pension. It would certainly not be reasonable to expect him to do so. I do accept that there is a modest value to this pension, which I will deal with later in this judgment.

37. Turning to the Wife, she owns two properties in Luxembourg and two in the United Kingdom, namely H and G. All four are subject to mortgages of varying amounts. The Husband accepted by the end of the hearing that I should take her figures for their values. She includes £64,000 as a valuation of her chattels. I am quite clear these should not be included. The Husband has not included anything for chattels, apart from an Apple iMac worth £1,000. Moreover, chattels are almost always a depreciating asset, certainly at this level. They cannot be used to fund living expenses going forward. Second, she has included £481,998 as the value of her Luxembourg pension. Unlike the Husband, I am clear that she will benefit from such a pension but, again, the figure given is not the value of her pension. It is not even the contributions she has made. It is the amount she has earned gross, so it cannot possibly be the value of the pension. Making these adjustments gives her capital of £1,179,005. Whilst this is marginally less than the Husband, I am satisfied that her Luxembourg pension is likely to be considerably more valuable than his just because she resides there. In short, on a very broad brush basis, I consider their respective capital positions are very similar.

38. I now turn to income. The Husband's net income from his employment is £65,693 per annum. He also has the potential for a bonus. I accept it is not guaranteed. I further accept his oral evidence to me that it is not going to be the sort of bonus that those on the investment side of the business might be able to generate. He told me that his new company had a pretty good year last year. Those entitled to a bonus have been getting between 10 and 15%. If I take a mid-point figure of 12.5%, his bonus would be £12,500 or approximately £6,875 net, although there might be some additional national insurance and pension contributions to make. If a figure of £6,500 is taken, his income would be £72,193 pa net. In addition, he has rental income of £7,066 per annum and some dividend income. The Wife's net income is £58,186 per annum plus a 13th month bonus of £2,800, making a total of £60,986 pa. She has higher rental income of £16,823 but, given that both parties have almost identical assets, it seems tolerably clear that I should treat their ability to generate additional unearned income as identical. It follows that, in terms of earned income, the Husband's income is likely to be higher than that of the wife by just over £10,000 pa net but that does depend on him receiving the bonus.

39. I do not need to spend long detailing the law. I must apply section 31 of the Matrimonial Causes Act 1973, which gives me the power to vary, discharge, suspend or revive an existing order. I can remit any arrears if I consider it just to do so. I have to have regard to all the circumstances of the case, giving first consideration to the welfare of C. The circumstances shall include any change in any of the matters to which the court was required to have regard when making the order to which the application relates. I have a duty to consider

whether a clean break can be achieved. In particular, I must consider whether to continue the order only for such period as will enable the party in whose favour the order was made to adjust without undue hardship to the termination of those payments.

40. I do have power, pursuant to section 31(7B), to capitalise any entitlement to maintenance to achieve a clean break. Whilst this can include making a property adjustment order or a pension sharing order, the only relevant order, in this case, that I can make, is a lump sum order as I am clear that it would not be appropriate to direct any further transfer of property.

41. A large number of cases have been cited to me. I have considered them all carefully. I have referred to some already. I do not need to refer to any further authority here. Overall, I must deal with the case justly without any discrimination. Ms Jones did remind me that the so-called "stock-piling" authorities were, by and large, for short periods to achieve a clean break. She said four to five years is the norm in the reported decisions. Even if that is the case, these parties agreed something different and that cannot simply be ignored.

42. I heard oral evidence from both parties. To be frank, it did not assist me very much, although it did help to correct one or two factual matters that I had misunderstood, such as the effect of the Wife's accident.

43. The Husband went first. The Wife did her very best to cross-examine him, in what I accept where very difficult circumstances. She was clearly concerned for the rest of the case that she had not asked all the questions she should have asked. Whilst more questions might have been asked on her behalf by a lawyer, I am entirely satisfied that everything that I need to know to decide this case was covered. The Husband told me that it was incorrect that the parties negotiated in 2017 on the basis that he would stay overseas until retirement. He said they had always discussed that it would be likely that he would move back to the UK at some point. Indeed, the Wife, very fairly, accepted this. He then said that he had not indicated to his employers in the UAE that he wished to stop working there, adding that he would not have received the severance payment if he had. I accept his evidence as to this, even though the Wife has described the timing as "suspicious". He then told me that his job in England is the same as he was doing in the UAE. He is described as "Co-Head" as he is Head of Europe but there is also a Head of North America. He is paid the going rate for an out of London post, which, he accepts, is nothing like as generous as the amount paid by his former UAE employer. He added that this was why the family took the decision to move out to the Middle East. Again, I accept his evidence. In relation to his Luxembourg pension, he said it would be "a nonsense" for him to return to live in Luxembourg for even six months at the end of his career just to secure a pension there. This is something the Wife does not accept but I intend to proceed on the basis that it would be unreasonable to expect him to do so and he will not do so.

44. The Wife then gave her evidence. She dealt with the Luxembourg pension. She did tell me that, if the Husband does not return there before he retires, he will get a lump sum. Indeed, it would seem quite unjust if he received nothing. I

find that the most likely scenario is that he will receive a return of his contributions. Whether he would receive interest on them is unclear, although I would have thought it would be more likely than not. The Wife did say that the rate of contribution is between 7 and 8%. On the basis of the mid point at 7.5% and taking his gross earned income at £1,055,905, his contributions would have been £79,192. I then did my very best to clarify what pension might be received if the person concerned remains resident in Luxembourg. The Wife told me that it would be based on an average of the last five years income and the number of years worked, although that does not include the crucial detail of the rate of accrual. The Wife has thirteen years accrued to date and could well get to 26 years by the time of her retirement. Her current gross salary is approximately €104,000. She thought her pension based on current service might be €1,200 per month, which would presumably increase to around €2,400 per month on retirement. I accept entirely that this is speculation and may be materially wrong but it is the best evidence I have and both parties accept that the system provides a much more generous pension than in this country. Moreover, it is just possible that the Wife may be able to use some UK contributions to top this up. My understanding is that this might include years she has earned in this country in her own right and, potentially even, those earned by the Husband before Decree Absolute. I do stress, however, that this is nothing more than supposition and I am certainly not basing my decision on this scenario.

45. Ms Jones asked the Wife a number of questions about her financial position and I have factored my conclusions as to those questions in the findings of fact that I have already made as to the assets available to the parties. The Wife did accept that it was not expected that the Husband would remain in the UAE until his retirement. She said that he knew her intention was to maximise her earnings but, in fairness, she accepted that her extremely pessimistic view of her earning potential in the 2017 negotiations had caused many problems. She did make the point that her earnings, when the Husband applied in Luxembourg to vary, were seven times less than his. Again, I accept her evidence. She was not trying to mislead me.

46. I now turn to my conclusions. I have already accepted that the order was a fixed percentage of income, so it is abundantly clear it was not calculated by reference to needs. Equally, it was not to change even if the Wife's earnings changed. The Wife did, at least initially, suggest that, as the order was a fixed percentage, it could simply continue, albeit on the basis that 25% would be much lower than it was when the Husband was in the UAE. I reject such a solution. The parties' incomes are very similar. It would be a real imposition on the Husband to expect him to pay 25% of £65,693 pa to the Wife (£16,423 pa) and 8.33% for C (£5,472 pa). Ignoring his bonus, which he may not receive, and investment income, she would end up with £77,409 pa net, excluding child maintenance and he would have £49,270 pa, out of which he would have to pay the child maintenance. That would not be just or fair. So the order must be varied. The percentage division cannot continue, simply because the Husband's income has fallen so far.

47. I am equally clear that this case is now crying out for a clean break. The enmity between these parties is doing nothing but harm to both of them and their children. The costs are out of all proportion. The litigation has been almost constant and very damaging.

48. At present, there is no claim for maintenance. The parties earn very similar figures. There is no principle of equality and the Wife cannot justify a maintenance order on the basis of need, given an income of £60,000 per annum net as well as investment income. Even if she could, it would not be right to expect the Husband to pay, given that he has responsibilities for C and needs of his own. Is this likely to change? I have decided that it is not. I consider it likely that both parties will continue to earn the sort of money that they are currently earning. I find that the Husband will not now return to very highly remunerated tax free expatriate rates. I accept that he has marginally more scope than the Wife to improve his position, perhaps by moving to London but that comes with far greater expenses. The Wife has what appears to be secure employment as a teacher. She is already well remunerated in this role compared with UK teaching salaries. She may go up the pay scales somewhat but her situation is stable.

49. Finally, I am clear that she can adjust without undue hardship to the termination of her maintenance. Very broadly, she has £1.2 million. Her property in Luxembourg is worth half of her resources. She therefore has around £600,000 for a Duxbury fund. The Duxbury Tables suggest this would generate £35,000 net per annum index linked for the rest of her life. She also has a valuable state pension in Luxembourg. It is therefore quite impossible to say that she cannot adjust without undue hardship to the termination of her maintenance. I recognise that this seems harsh given the very large sums she has been receiving. She calculated that the Husband would have earned £5.17 million if he had continued working to retirement in the UAE, of which she would have received £1.23 million. That will not now happen, although it was fortunate that he got the job in the first place as she has had generous provision over the last few years, estimated at approximately £700,000, which she simply would not have had if he had remained employed in Europe. In any event, the simple fact is that the goose that laid the golden egg is no more, with significant financial consequences for both parties.

50. In one sense, these conclusions would suggest a termination of maintenance without any lump sum payment. There are, however, three further matters that I must consider. The first is arrears. The second is bonus provision. The third is the Luxembourg pension.

51. I can deal with the arrears very briefly. The Husband accepted he did not pay the Wife the sum of £13,000 due to her from his earnings during the last three months of his contract in the UAE. Hudd DJ had made it abundantly clear that the order had to be complied with in full until it was varied or suspended. It had not been varied or suspended. The Husband must now pay these arrears. There will have been some modest additional arrears for the period since he commenced working for Colmore, namely the 25% of his net income. I have

determined that he has no obligation to the Wife following his employment with his new employer. Those arrears will be remitted.

52. I next turn to bonus provision. At present, the Wife is entitled to 33.34% of the Husband's bonus, although this figure reduces in stages to 20%. If his bonus was £6,500 per annum net, this would be £2,166 per annum. There is no question that this order must be discharged. It would be anathema to a clean break for it to continue and would be almost certain to generate yet further litigation. As the agreement provided for these payments, almost as a capital entitlement, I did wonder if I should, in some way, capitalise the entitlement. I have decided not to do so. First, I consider the quantum is uncertain. It would be very difficult, and potentially unfair, to reach any figure for capitalisation. Second, I have already determined that the Wife can adjust without undue hardship to the termination of her maintenance, which clearly includes this award. Third, I have found that the Wife has a valuable pension in Luxembourg, whereas the Husband has, essentially, lost his entitlement there, other than to a refund of contributions. It follows that I have come to the clear conclusion that the Wife should not be recompensed for the loss of the bonus sharing.

53. Finally, there is the Luxembourg pension. The agreement provides that the Husband is to share whatever he gets relating to his pension earned between 1 August 1999 and 1 July 2013 with the Wife equally. He gave an undertaking to this effect. He cannot simply be released from this undertaking in the way I have dealt with the bonus. The agreement was clear and it relates to an asset earned during the marriage. I am clear, however, that I must deal with this in a way that ensures finality now. Ms Jones raised two reasons why that would be wrong. First, she disputed my jurisdiction to do so. She referred me to the case of Birch v Birch [2017] UKSC 53 but I am clear that it does not assist her. I can release a party from an undertaking. What I cannot do is impose a different undertaking on a party. Second, she said that her client will comply with his undertaking and, given the uncertainty as to the pension, it would be wrong to capitalise the entitlement now. Again, I disagree. Dealing first with the question of the Husband's approach, I have not queried the bona fides of the evidence he has given to me but I am of the view that he has adopted a wholly disproportionate approach to the 2017 order in his determination to have it set aside or substantially varied almost from the word go. I would have dismissed his application in Luxembourg and not countenanced an appeal. If it had not been for the loss of his employment in the UAE two months ago, I am clear that this application would have been dismissed as well.

54. I consider there is real opportunity for further conflict and dispute over this undertaking. It is entirely right that it might well not be the Husband making the waves, in that it is clear that the Wife genuinely believes he should move back to Luxembourg for six months before he retires to obtain the pension and even use his UK pension contributions to enhance this Luxembourg pension. I am clear that the court could not possibly impose that on him but there would be the need for disclosure and, potentially, consideration of what is available. In any event, given all the litigation that the Husband has instigated, he cannot complain if I now decide to deal with this undertaking as part of the termination exercise. His second point, namely that the amount that he will receive is too

uncertain, can be dealt with easily by assuming that he receives the least amount realistically possible from this pension, namely that all he will get back is his contributions. Doing the best I can, I take his earnings at £1,055,905. I apply a rate of 7.5% for his contributions, giving a figure very close to £80,000. One half of that is £40,000. Ms Jones says I should then discount this for early payment. A counter-argument would be that the Husband may get interest but, equally, he may not. I have come to the conclusion that I should discount the figure. Twelve years is a long time in the future. I have decided that the correct figure is £25,000. In the current climate, the Wife would do well to earn 5% on that figure each year. If she did, the value would get to £40,000 in ten years. The discounted figure is therefore broadly correct.

55. In conclusion, I intend to capitalise the periodical payments order for the sum of £38,000, namely the arrears of £13,000 and the pension payment of £25,000. I discharge the periodical payments order both in relation to the spousal maintenance and the bonus payments. I release the Husband from all his undertakings, including to pay the Wife 50% of anything he receives from his Luxembourg pension. All arrears are remitted. There will be a life and death clean break.

56. I now turn, finally, to child periodical payments. I am told that the CMS figure is £800 per month. This is the order that I intend to make. A sum of just under £10,000 per annum is perfectly proper for a boy aged 14 and a father earning £100,000 per annum gross plus discretionary bonus. I do not consider it right to reduce this sum by any notional travel expenses, particularly when no such contact is taking place. If contact recommences, I expect the parents to contribute equally to the travel costs. I have already made it abundantly clear that I expect the hostility to end. Contact is C's right and it is extremely damaging to children if they do not have a good relationship with both their parents. Moreover, a failure to have such a relationship can often rebound disastrously at a later stage. I have seen a significant number of cases where the child has, perhaps entirely unfairly, blamed the resident parent for the ending of the relationship with the non-resident parent and moved to live permanently with the other parent. I would not want to see anything like that happening in this case. The answer is that both parents must make adjustments; think in a child focussed way; and not blame the children for the sins of the parents.

57. During the hearing, the Wife said that C might not be remaining at his current school. I have already made the point that it was quite wrong for the Husband to find this out in this way. I could, of course, hold her to that and say that the Father's obligation to pay half the school fees should end this summer. I consider that would be unfair as the Wife did not say that this was a definite move. If C remains at his current school, the Husband is to pay the fixed sum of £6,000 per annum, as he offers, again to avoid further conflict. If the parties have to pay school fees out of capital, so be it.

58. The issue of tertiary education is not covered in the order. It is not before me. I make no order. I remind myself that the maintenance paid to the Wife for the children over the last four years has been very generous. I hope she will be able

to obtain loans for the degree courses. If not, it is a matter between the children and their father.

59. Ms Jones has said everything that could possibly be said on behalf of her client. The Wife conducted herself with dignity in what I accept were very difficult circumstances for her. Her Case Summary was an excellent document. Indeed, I thought she had been given legal assistance in drafting it. I am quite satisfied that there was no point available to her that she did not take or that I have not considered.

Mr Justice Moor
4 March 2022