Neutral citation number: **[2022] EWFC 67**

Case Number ZZ21D12436

IN THE CENTRAL FAMILY COURT

B E T W E E N:

SC Applicant

- and -

TC Respondent

(Acting by Emma Gaudern, his litigation friend)

IMPORTANT NOTICE

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published, but the anonymity of the members of the family, including the child of the family, must be strictly observed.

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.

Mr Joe Rainer (Counsel instructed by **Withers LLP**, Solicitors) appeared on behalf of the Applicant wife

Ms Lily Mottahedan (Counsel instructed by **Vardags Ltd**, Solicitors) appeared on behalf of the Respondent husband

Written Judgment of His Honour Judge Edward Hess dated 20th May 2022

1. This case concerns the financial remedies proceedings arising out of the divorce between Ms SC (to whom I shall refer as “the wife”) and Mr TC (to whom I shall refer as “the husband”).

2. In a report dated 11th February 2022 from Dr Kiran Chohan, Chartered Clinical Psychologist, the husband was reported as not having mental capacity to conduct these proceedings (or give oral evidence). This finding was not disputed by either party and was accepted by the court and, by my order of 3rd March2022, I accordingly appointed Ms Emma Gaudern of EMG Solicitors to be the husband’s litigation friend. She has acted helpfully in this capacity since then and during the final hearing.

3. The case proceeded to a final hearing over four days on 5th, 6th, 19th and 20th May 2022.

4. Both parties appeared before me by Counsel: Mr Joe Rainer for the wife (instructed by Withers LLP, Solicitors) and Ms Lily Mottahedan for the husband (instructed by Vardags Ltd, Solicitors). I am grateful to both Counsel for the helpful, skilful, courteous and clear way they have respectively conducted their cases – both parties have been represented before me at the highest level; but it has, of course, come at a high cost. The wife has incurred a total of £280,482 in legal costs and the husband a total of £418,236 – nearly £700,000 of family money has gone to lawyers, never to be recovered. In fairness to the Solicitors, this has not been a straightforward case, procedurally or evidentially, and I do not criticise the way in which the case has been handled on either side – but it is still of course a large amount of money to incur in legal fees in the context of the available assets.

5. The court was presented with an electronic bundle running to more than 800 pages and a number of other documents have been exchanged during the final hearing. I have considered all the documents presented to me, in particular I have considered:-

    (i) A collection of applications and court orders.

    (ii) Material from the wife including her Form E dated 18th May 2021, her answers to questionnaire dated 24th June 2021, her replies to a schedule of deficiencies dated 23rd July 2021, and witness statements dated 16th April 2021 and 22nd March 2022.

    (iii) Material from the husband including his Form E dated 21st May 2021, his answers to questionnaire dated 22nd June 2021, his replies to a schedule of deficiencies dated 23rd July 2021, his witness statements dated 24th March 2021 and 25th May 2021 and the statement of Ms Gaudern on his behalf dated 23rd March 2022.

    (iv) Material consisting of various expert reports from Dr Dominic Paviour (Consultant Neurologist) and Dr Michael Gross (Consultant Neurologist), perhaps the most significant of which for my purposes was their joint statement dated 3rd March 2022.

    (v) Material consisting of various expert reports from Ms Amy Goddard, Senior Occupational Therapist.

    (vi) Various material from expert valuers and accountants.

    (vii) The file created by Mr Simon Pigott, a partner in Levison Meltzer Pigott Solicitors, relating to his dealings with the husband in 2014.

    (viii) Properly completed ES1 and ES2 documents.

(ix) Selected correspondence and other disclosure material.

6. I have also heard oral evidence from the wife and from Ms Emma Gaudern, in each case subjected to appropriate cross-examination.

7. I have also had the benefit of full submissions from each counsel in their respective opening notes and their closing partly oral and partly written submissions.

8. The history of the marriage is as follows:-

   (i) The husband is aged 58. He worked successfully for many years in the field of international investment banking, but has not worked since June 2020 as a result of his increasingly debilitating neurological condition, of which more detail later.

   (ii) The wife is aged 50. She is an intelligent and able person, having taken her university education through an Undergraduate Degree at a leading university and on to a Masters level, and worked for a while for NGOs, but has largely been a homemaker in more recent times.

   (iii) They met in 1994 and married in 1994. In 1998 the parties jointly purchased Property X in north London and that became the family home for more than twenty years.

   (iv) The marriage produced one child: MC (now aged 17, very nearly 18, and currently in his last days and weeks at a private boarding school).

   (v) The parties prospered financially during the marriage and purchased a substantial number of valuable real properties, both as homes and as investments. My clear impression is that most of the money for these investments came from the husband's substantial earnings; but that the wife was involved in the buying and managing process and her name appears on the legal title and mortgage of most of the properties. In this sense the purchase and management of real properties was very much a team effort.

   (vi) From about 2003/2004 the husband began to experience the early effects of Parkinson's Disease and his condition was formally diagnosed in 2011 and has progressively deteriorated, of which more detail later.

   (vii) At least by 2013 (and probably significantly before that) the marriage had become unhappy and turbulent and the absence of sexual intimacy in their relationship was a source of distress to the husband. In late December 2013 matters took a dramatic turn. The husband decided to visit a sex worker. He quickly felt guilty and ashamed about what he had done and regretted his action. In early January 2014 he told the wife what had

happened. Very understandably, she was not happy to hear what she was told and my perception is that she acted with a mixture of distress and anger. One (I think representative) example of her contemporaneous thinking about this event is contained in the text message sent by her to the husband's mother on 14th February 2014 which includes the comment: "*I cry for the death of my husband! My husband died the day he went to see that prostitute in December*". She was not minded readily to forgive the husband for his transgression. In her witness statement, she says: "*I felt emotionally devastated and was in a terrible place personally*". Her initial reaction was, or certainly appeared to the husband to be, to be determined to end the marriage. The husband did not wish this to happen and begged her not to end it. She was persuaded to consider going on with the marriage, but decided to bolster her financial security in the process, as a *quid pro quo* of not pursuing a divorce.

(viii) As a consequence of these events the wife, in January 2014, consulted a Solicitor, Ms Diana Parker at Withers, a leading Solicitor in the financial remedies field. There has been no disclosure of Ms Parker's file (so I am unaware what the wife told Ms Parker or what advice was given about these matters), but a document was quickly drafted by Ms Parker which bore the title "Post-Marital Agreement" and included the narrative: *"In the event of the permanent Breakdown of the Marriage, both parties intend and agree that their respective financial rights and obligations will be solely as governed by this agreement…this agreement shall be treated as binding on each of them….irrespective of their ages or medical conditions at the date of the Permanent breakdown of the Marriage*". This document, as Mr Rainer has accepted, sought to impose a financial outcome if the marriage did ultimately break down, which was significantly more advantageous to the wife than would have been the case had the matter been referred to a court at that stage.

(ix) It is clear from the evidence I have heard and read that the husband's immediate view was then he would take no issue with the proposed agreement, whatever the appropriateness or fairness of its terms. He was in a hurry to sign whatever document was put in front of him; but (no doubt in order to impose more validity and enforceability on the agreement) he was required by Ms Parker to take (and to prove that he had taken) legal advice on the document. With this in mind the husband consulted Mr Simon Pigott, a partner in Levison Meltzer Pigott, and another leading Solicitor in the field of financial remedies. An email from the husband dated 8th February 2014 shows his state of mind as he said: *"(The letter from Ms Parker) focuses only on my Parkinsons and makes no reference to my uneven behaviour and adultery. Please let me be clear. I do not wish to use my illness as a negotiating point…I am confident that any proposal on behalf of my wife will be based on the provision of the best possible outcome for SC and MC …my instructions are we will not challenge any proposal at all".*

(x) It is clear from his letter of 19th February 2014 that Mr Pigott looked closely at the proposed agreement and was fairly horrified by its contents. Amongst the things he recorded in that letter, having properly analysed the agreement, were the following:-

"I am of the view that a fair way of resolving this matter would be for the assets you have broadly speaking to be divided equally, but this is not what is being provided for in this document…the net assets are worth £5,824,000…the very maximum you would have would be £1,177,000 – something akin to 80%/20% in SC's favour…for these reasons I cannot advise you that the current arrangement is fair".

(xi) The terms of this letter failed to pause, even for a moment, the husband's desire to sign the document. He quickly responded by an email dated 20th February 2014:-

"I am of the view that I do NOT wish to contest any of their requirements. Please inform Mrs Parker of my intention to sign as soon as possible".

(xii) Mr Pigott slowed things down a little, and sought to improve one or two of the clauses, but the husband became impatient and, on 26th February 2014, sent an email saying:-

"Given my Parkinsons it makes no sense for me to have any assets in the long term. It is inevitable that one day I will have to stop working and need long term care…if SC and I are no longer married, then the only provision of care will be from the state. The state is the carer of last resort. In that case the best outcome for SC and MC would be for SC to own all assets as the sole owner…In summary my position is that SC should have the maximum possible share of the assets upon a breakdown of our marriage. Please do share this with Mrs Parker so we are all on the same page."

(xiii) Mr Pigott, perhaps despairing, responded to this with an email, also dated 26th February 2014, saying:-

"As I understand it you are offering SC Property Z as well as all the investment properties even though she is not seeking this. You will appreciate that this is against my advice, but I will of course act on your instructions".

(xiv) On 21st March 2014, Mr Pigott saw the husband face to face at his office, when the husband signed the agreement. Mr Pigott's attendance note records:-

"I had advised you of the effect of the agreement…I explained that although…not binding, you had to enter into them on the basis that you would be held to it – in other words you walk into this with your eyes wide open. You understood. I advised you that I thought you were being overly

generous…you understood…you were being…financially imprudent…You understood".

(xv) The wife in due course signed the document as well and by early April 2014 it became a fully executed document, on its face bearing the date of 4th April 2014.

(xvi) And so the marriage resumed and the parties remained in a functioning marriage until 2020. In July 2020 the parties moved together from Property X, their long-standing family home, to Property Y in West London.

(xvii) Unfortunately, in November 2020, the marriage completely broke down and the parties separated. The wife remained living at Property Y and the husband moved back to their previous family home at Property X, where he has remained living ever since. A planned sale of Property X was cancelled, with some cost penalties.

(xviii) Divorce proceedings were commenced on 27th January 2021. Decree Nisi was ordered on 24th August 2021. Decree Absolute awaits the outcome of the financial order proceedings and is not, in itself, controversial.

9. The financial remedies proceedings chronology is as follows:-

(i) When instructed by the husband in January 2021, Vardags wrote to Withers saying that they did not consider that the Post-Marital Agreement to be "*determinative, or even influential, in the resolution of this case*".

(ii) Withers did not agree and on 28th January 2021 they issued, on behalf of the wife, a 'Notice to Show Cause' as to why the terms of the 4th April 2014 Post-Marital Agreement should not be made an order of the court. The battle lines were drawn from this early stage.

(iii) On 17th February 2021 the wife issued Form A, to supplement the 'Notice to Show Cause' application and the two applications have been case managed alongside each other since then.

(iv) The case went through a number of normal directions hearings before the court-based FDR before DJ Ashworth on 28th July 2021 (which did not result in a settlement).

(v) Subsequent to the FDR I have dealt with a number of further directions hearings (on 1st September 2021, 22nd November 2021, 3rd March 2022 and 24th March 2022).

(vi) A final hearing has taken place before me on 5th, 6th, 19th and 20th May 2022.

10. In dealing with the applications overall I must, of course, consider the factors set out in Matrimonial Causes Act 1973, section 25, together with any relevant case law.

11. Matrimonial Causes Act 1973, section 25, reads as follows:-

> (1) It shall be the duty of the court in deciding whether to exercise its powers under section 23, 24, 24A or 24B above and, if so, in what manner, to have regard to all the circumstances of the case, first consideration being given to the welfare while a minor of any child of the family who has not attained the age of eighteen.
>
> (2) As regards the exercise of the powers of the court under section 23(1)(*a*), (*b*) or (*c*), 24, 24A or 24B above in relation to a party to the marriage, the court shall in particular have regard to the following matters:-
>
> (a) the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future, including in the case of earning capacity any increase in that capacity which it would in the opinion of the court be reasonable to expect a party to the marriage to take steps to acquire;
>
> (b) the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future;
>
> (c) the standard of living enjoyed by the family before the breakdown of the marriage;
>
> (d) the age of each party to the marriage and the duration of the marriage;
>
> (e) any physical or mental disability of either of the parties to the marriage;
>
> (f) the contributions which each of the parties has made or is likely in the foreseeable future to make to the welfare of the family, including any contribution by looking after the home or caring for the family;
>
> (g) the conduct of each of the parties, if that conduct is such that it would in the opinion of the court be inequitable to disregard it;
>
> (h) in the case of proceedings for divorce or nullity of marriage, the value to each of the parties to the marriage of any benefit which, by reason of the dissolution or annulment of the marriage, that party will lose the chance of acquiring.

12. In the section 25 balancing exercise, on some analyses under the heading of 'conduct' in other analyses under the heading of 'all the circumstances of the case – the distinction doesn't greatly matter, I will need to make an assessment of how much weight I should attach to the terms of the Post-Marital Agreement – formally this is the subject of the 'Notice to Show Cause' application. The wife's case is that I should attach great weight to it, that I should regard it as a magnetic factor which effectively determines the case. The husband's case is that I should attach little or no weight to it, and that a broadly equal division of the assets is the fair outcome.

13. Accordingly, I need to remind myself of some law on the subject of 'Agreements'. Mr Rainer and Ms Mottahedan have both skilfully addressed me on the law in this area and I have been referred (amongst others) to the following cases: *Radmacher v Granatino* [2010] UKSC 42, *WC v HC* [2022] EWFC 22, *Edgar v Edgar* [1980] 1 WLR 1410, *Brack v Brack* [2019] 2 FLR 234 and *NA v MA* [2006] EWHC 2900.

14. The following principles (potentially pertinent to the present case) seem to me to emerge from these cases:-

    (i) There is no material distinction in principle between an ante-nuptial agreement and a post-nuptial agreement; but if an agreement is to carry full weight, it is important is that each party should have all the information that is material to his or her decision, and that each party should intend that the agreement should govern the financial consequences of the marriage coming to an end.

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

    (iii) The parties are unlikely to have intended that their ante-nuptial agreement should result, in the event of the marriage breaking up, in one partner being left in a predicament of real need, while the other enjoys a sufficiency or more, and such a result is likely to render it unfair to hold the parties to their agreement. Equally if the devotion of one partner to looking after the family and the home has left the other free to accumulate wealth, it is likely to be unfair to hold the parties to an agreement that entitles the latter to retain all that he or she has earned.

    (iv) The question of fairness is not to be determined by considering what the court might now have ordered, because the fact of the agreement is

capable of altering what is fair.

(v) In almost every Pre or Post Marital Agreement one or other, or both, parties are under a degree of pressure, and emotions may run high. But in the end, each party has to make a choice and unless undue pressure can be demonstrated, the court will ordinarily uphold the agreement.

(vi) It is ordinarily to be assumed that each party to a properly negotiated agreement is a grown up and able to look after himself or herself.

(vii) The court will need to consider whether the facts of the case give rise to any of the standard vitiating factors. In this context the well known extract from the judgment of Ormrod LJ in *Edgar v Edgar* (supra) is still regarded as fundamental to a proper analysis:-

'To decide what weight should be given, in order to reach a just result, to a prior agreement not to claim a lump sum, regard must be had to the conduct of both parties, leading up to the prior agreement, and to their subsequent conduct, in consequence of it. It is not necessary in this connection to think in formal legal terms, such as misrepresentation or estoppel; all the circumstances as they affect each of two human beings must be considered in the complex relationship of marriage. So, the circumstances surrounding the making of the agreement are relevant. Undue pressure by one side, exploitation of a dominant position to secure an unreasonable advantage, inadequate knowledge, possibly bad legal advice, an important change of circumstances, unforeseen or overlooked at the time of making the agreement, are all relevant to the question of justice between the parties. Important too is the general proposition that formal agreements, properly and fairly arrived at with competent legal advice, should not be displaced unless there are good and substantial grounds for concluding that an injustice will be done by holding the parties to the terms of their agreement. There may well be other considerations which affect the justice of this case; the above list is not intended to be an exclusive catalogue".

(viii) Unconscionable conduct such as undue pressure (falling short of duress) will be likely to eliminate the weight to be attached to the agreement, and other unworthy conduct, such as exploitation of a dominant position to secure an unfair advantage, would reduce or eliminate it. The court may take into account a party's emotional state, and what pressures he or she was under to agree. But that again cannot be considered in isolation from what would have happened had he or she not been under those pressures. In cases of this latter nature the influence one person has over another provides scope for misuse without any specific overt acts of persuasion. The relationship between two individuals may be such that, without more, one of them is disposed to agree a course of action proposed by the other. The law has long recognised the need to prevent abuse of influence in these 'relationship' cases despite the absence of evidence of overt acts of

persuasive conduct. The types of relationship in which this principle falls to be applied cannot be listed exhaustively. Relationships are infinitely various. The principle is not confined to cases of abuse of trust and confidence. It also includes, for instance, cases where a vulnerable person has been exploited. Indeed, there is no single touchstone for determining whether the principle is applicable. Several expressions have been used in an endeavour to encapsulate the essence: trust and confidence, reliance, dependence or vulnerability on the one hand and ascendancy, domination or control on the other. None of these descriptions is perfect. None is all embracing. Each has its proper place.

(ix) Even if the court reaches the conclusion that there are no vitiating factors as such, the court retains an overall section 25 discretion and should not, in its search for a fair outcome, necessarily regard itself as being within a straightjacket and thus driven inexorably to a needs-based outcome with a disregard of the sharing principle.

15. Accordingly, I bear in mind that I must give first consideration to the welfare while a minor of any child of the family who has not attained the age of eighteen. In this case MC is (just) under 18; but whichever of the range of outcomes I select here I am confident that the needs of MC will be met comfortably, so it is not necessary for me to dwell further on this issue.

16. In relation to the "**property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future**" most of the figures are not controversial and I need only deal with the following areas of disagreement:-

(i) It is clear that the parties own some chattels of significant value (two Mercedes motor cars, a collection of Indian miniatures, a collection of art, antique furniture, watches and jewellery). At close of submissions there was an expectation that the parties would be able to agree an *in specie* division of these chattels (and I am hoping I will be told about this in due course) so I propose not to say anything more about this at this stage and I do not propose to include these chattels on my asset schedule.

(ii) There is an issue over 'historic tax' liabilities, which I shall touch on below, but which in essence I propose to deal with as a joint debt. For the purposes of my asset schedule I propose to include a debt at the 'worst case scenario' end of the scale, i.e. £169,537.

17. Having made these determinations I am now able to set out my assessment of the assets and debts for distribution in this case.

18. The situation can be summarised as follows:-

REALISABLE ASSETS/DEBTS

Joint

Property X[1]	1,783,657
Property Z[2]	544,003
Property Y[3]	1,343,223
Rental Property A[4]	185,220
Rental Property B[5]	148,478
Rental Property C[6]	107,983
Rental Property D [7]	128,240
Rental Property E [8]	108,341
Rental Property F [9]	157,516
Rental Property G [10]	145,875
Property Co Ltd	17,775
Investment Property Co Ltd	502,397
Potential historic tax debt	-169,537
TOTAL	**5,003,171**

Wife

50% x Property H[11]	213,400
Bank accounts in sole name	66,852
Investments/Policies in sole name	63,318
Monies owed by newspaper	150
Sole tax debt	-3,036
Monies owed to W's mother	-20,000
Litigation Loan debt	-44,378
Outstanding Legal Costs [12]	-69,763
TOTAL	**206,543**

---

[1] This figure is based on a value of £1,850,000 less sale costs and CGT = £1,783,657

[2] This figure is based on a value of £539,000 less sale costs and CGT = £544,003

[3] This figure is based on a value of £2,350,000 less sale costs and CGT and an outstanding mortgage of £674,878 = £1,343,223

[4] This figure is based on a value of £575,000 less sale costs and CGT and an outstanding mortgage of £320,494 = £185,220

[5] This figure is based on a value of £610,000 less sale costs and CGT and an outstanding mortgage of £356,326 = £148,478

[6] This figure is based on a value of £500,000 less sale costs and CGT and an outstanding mortgage of £320,696 = £107,983

[7] This figure is based on a value of £580,000 less sale costs and CGT and an outstanding mortgage of £365,302 = £128,240

[8] This figure is based on a value of £490,000 less sale costs and CGT and an outstanding mortgage of £312,033 = £108,341

[9] This figure is based on a value of £565,000 less sale costs and CGT and an outstanding mortgage of £320,494 = £157,516

[10] This figure is based on a value of £630,000 less sale costs and CGT and an outstanding mortgage of £407,157 = £145,875

[11] This figure is based on a value of £440,000 less sale costs and CGT = £426,800 x 50% = £213,400

[12] This figure is based on a total of incurred fees of £280,482 less a total of fees paid of £210,719 = £69,763

Husband

Bank accounts in sole name	12,495
Investments/Policies in sole name	630
Sole tax debt	-23,000
Credit card debt	-6,333
Litigation loan debt	-292,665
Outstanding accountants fees	-1,710
Outstanding Legal Costs [13]	-42,498
TOTAL	**-353,081**

PENSION ASSETS

Wife

Aviva pension CE	6,461
TOTAL	**6,461**

Husband

AJ Bell SIPP CE	147,150
ABC UK pension – in payment - CE	289,565
Z Bank pension – in payment - CE	174,670
TOTAL	**611,385**

19. In relation to "**the income, earning capacity…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**" the following picture emerged:-

    (i) The husband is in receipt of pension income (£5,827 per annum gross from his ABC UK pension, £3,695 per annum gross from his Z Bank pension) and he also receives state benefits (PIPs) in the sum of £7,912 per annum. It is common ground he will not work in paid employment again because of his neurological condition.

    (ii) The wife works as an administrator earning £19,356 per annum net and also receives (just – it will very shortly cease) child benefit for MC. It has been suggested that the wife could earn more than she is – and she certainly has the talent and ability to do so, albeit without much recent work experience – but this argument has played a modest part of this case and the wife has not sought to argue a needs based claim beyond her 'agreement' claim or even her 'sharing' claim, so it is not necessary to look at this in detail.

[13] This figure is based on a total of incurred fees of £418,236 less a total of fees paid of £375,738 = £42,498

(iii) There is also income from the investment properties, but in the context of this dispute (where these are likely to be sold, whatever is the outcome) it is perhaps unhelpful to look at this in detail.

20. I want to say something at this stage about the **sharing principle**. As a starting point in the division of capital after a long marriage it is useful to observe that fairness and equality usually ride hand in hand and that (save when there are particular reasons) the court should be slow to go down the road of departing from equality.

21. In the words of Lord Nicholls in *White v White* [2000] UKHL 54:-

    "…a judge would always be well advised to check his tentative views against the yardstick of equality of division. As a general guide, equality should be departed from only if, and to the extent that, there is good reason for doing so. The need to consider and articulate reasons for departing from equality would help the parties and the court to focus on the need to ensure the absence of discrimination".

    and in *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24:-

    "This 'equal sharing' principle derives from the basic concept of equality permeating a marriage as understood today. Marriage, it is often said, is a partnership of equals…The parties commit themselves to sharing their lives. They live and work together. When their partnership ends each is entitled to an equal share of the assets of the partnership, unless there is a good reason to the contrary. Fairness requires no less. But I emphasise the qualifying phrase: 'unless there is good reason to the contrary'. The yardstick of equality is to be applied as an aid, not a rule."

22. In the words of Mostyn J in JL v SL [2015] EWHC 360:-

    "Matrimonial property is the property which the parties have built up by their joint (but inevitably different) efforts during the span of their partnership. It should be divided equally. This principle is reflected in statutory systems in other jurisdictions. It resonates with moral and philosophical values. It promotes equality and banishes discrimination."

23. In this case the husband argues for an equal division of assets; but the wife argues for a substantial departure from equality in her favour.

24. Since the main reason for the departure from equality relates to the existence of a Post-Marital Agreement, I propose next to deal with the '**agreement**' related issues.

25. The Post-Marital Agreement of 4th April 2014 has some features which place it firmly

in the category of agreement to which the court should attach weight. There was proper disclosure. Both parties had proper, indeed top quality, contemporaneous legal advice. The agreement is drafted very professionally and is clear in its content. Both parties were, when it was signed, of mature years and high intelligence and ability and, certainly on one level, knew exactly what they were doing.

26. It was (initially at least) part of the husband's case that the agreement had been procured by the 'blackmail' threats of the wife to inform his parents about his visit to a sex worker if he did not sign the agreement; but, as the case developed, the evidence did not suggest this was a powerful argument and it was (I think appropriately) not really pursued with vigour by the end of the case. It emerged in the evidence that the husband's mother knew about the sex worker event at least by (and probably earlier than) the wife's text message of 14th February 2014 and so a 'blackmail' strategy was unlikely to be of much effect – and I accept the wife's evidence on this that the husband was aware before he signed the agreement that his mother knew what had happened. Further, the evidence for the making of a threat was weak and, of course, the husband was not in a position to give oral evidence to maintain what he had said on this subject prior to his losing mental capacity. Further, the disclosure from the husband's 2014 Solicitors file did not support the proposition that 'blackmail' played any part in the husband's decision-making in early 2014. In so far as the 'blackmail' argument is still being pursued (and it has not been formally abandoned) I reject this as a reason for vitiating the agreement.

27. For me, however, that is not the end of the matter. A number of questions have troubled me in thinking about this case. Why would somebody engaging in rational thought sign a document which was so manifestly to his disadvantage? Why would somebody who had a clear entitlement to assets worth perhaps £2,500,000 or more sign a document restricting his claim to a sum in the region of £1,000,000? In the search for fairness it is adequate to say *"well, he knew the gamble he was taking*"? In the search for fairness is it adequate to say that he was appropriately rewarded by receiving the benefit of the possibility of a continuing marriage, albeit one which might end a few years later, which he otherwise was not going to have? In the search for fairness, how should the court deal with the husband's apparent wish to have less money or even no money to meet his likely future care needs, so as to make himself dependent on local authority support? How should a court deal with a clause in a Post-Marital Agreement which invites the disregard of needs arising from a medical condition, in particular where the existence of those likely future needs is known about at the time the agreement was drafted? In the search for fairness, is a person giving away assets to which he has a secure entitlement to secure the resumption of a marriage to be treated any differently from a person (such as Mr Granatino) who gives away the possibility of sharing in pre-marital assets to secure the commencement of a marriage?

28. In pondering these questions I need to give careful thought to the medical condition of the husband. In this context I note the conclusions of the neurological experts, most conveniently to be found in the joint statement from Dr Paviour and Dr Gross dated

3rd March 2022, which includes some agreed statements about the husband's condition which can perhaps be summarised as follows:-

(i) He has a progressive extra pyramidical syndrome with some features consistent with a diagnosis of young adult onset Parkinson's Disease. This is a neurodegenerative disease which means that brain cells (neurons) involved in the control of balance, movement and cognition are being lost at a faster rate than is normal in healthy aging. The likely onset of this disease process was around 2003-4 with a formal diagnosis in 2011.

(ii) By 2022 he had evident cognitive dysfunction and probable autonomic dysfunction. This is likely to continue to progress, although the recent 'shunt' treatment (CSF diversion procedure) has caused some improvement, this improvement will, on a balance of probabilities, decline over time, perhaps over the next three to five years.

(iii) He is likely to have substantial and increasing dependency on carers in the years ahead. This will in due course need to be more from professionals than family members and ultimately care in a care home or nursing home environment.

(iv) In so far as life expectancy can be accurately predicted, the best case scenario is 10 to 15 years, the middling case scenario is 7 to 9 years and the worst case scenario is 5 to 7 years.

29. These experts have not specifically been asked to comment on the situation as it was in late 2013 and early 2014 in the context of the Post-Marital Agreement; but I have thought it appropriate to look at the contemporaneous evidence which exists in the context of a general impression that the husband's thinking and decision-making at that time was, to an extent, being affected by aspects of or relating to his neurological condition and the treatment being received for it. Ms Mottahedan has skillfully drawn together some of the available evidence of the husband's presentation in late 2013 and early 2014 (and in the periods before and after those dates) which, though falling short of any suggestion that the husband lacked formal mental capacity to sign the agreement at that time, create some significant question marks over what was really going on in his head.

30. Amongst the pieces of contemporaneous evidence drawn to my attention are the following:-

(i) There are a number of documents which appear to have been contemporaneously created by the husband as notes to himself which record the distress and despair he felt in himself as a result of his condition and the limitations it placed on his life. The note of 11th May 2009

recorded his distress at being dismissed by Bank A because his mobility issues, and stumbling gait, caused somebody to complain that he had been drunk at work. The note of 21st May 2012 records: *"Oh me. I fear being alone, dying alone, having no purpose, being a failure, being in pain...In a sense if the disease kills me then it would be clear cut. No lingering pain for me...The unwelcome guest, what can he do to me. There is hope we can keep him in his corner…it would be better if the disease was quick and fatal".* The note of 4th June 2012 records: "*no one knows the shame and pity it will bring…I hate to be pitied. All I ever wanted was to be a success but privately I am a fraud. I am ashamed to say that I have Parkinsons*". The note of 25th January 2013 records: "*The realisation hits home. I have nothing left to offer you. I am past my sell by date".* The wife accepted in her oral evidence that the husband had been made "profoundly depressed" by his condition and these notes to himself rather confirm that depression and self-loathing was a feature of his presentation in the period leading up to the visit to the sex worker and the subsequent signing of the agreement.

(ii) The evidence suggests that the husband, in and about January 2014, had formed the view that the wife was conducting an affair with her gynaecologist and he became pre-occupied with what their sexual intimacy might consist of and asked her questions about it. The wife told me that there was no truth in this and that this was a paranoid thought by the husband and I accept what she says about this. For me, these apparently paranoid assertions are perhaps corroborative of the thought that the husband's mind and decision-making was not working properly at this stage. It is difficult to disaggregate the constituent parts, but my impression is that this was tied up with his feeling of guilt and remorse about visiting the sex worker in December 2013.

(iii) The contemporaneous medical evidence suggests that the husband did have some significant medical issues in the early months of 2014 which are pertinent to this discussion. The reports of Dr AB (a treating Consultant Haemato-Oncologist reporting on 22nd January 2014) and Dr AK (a treating Consultant Neurologist reporting on 24th January 2014) both that the testosterone which the husband had been receiving since May 2013 for his pituitary insufficiency had caused him to suffer from polycythaemia in early 2014 (the NHS website suggests that some symptoms of this condition are tiredness and confusion). Dr AK (who had been treating the husband for some time by then and knew him well) saw the husband on 24th January 2014, prescribed Madopar and commented that "*he was not at all himself*" and asked him to come to a return appointment "*in a few weeks time*". Further, the medical notes confirm that the husband was admitted to hospital on 25th February 2014 with possible "*acute coronary syndrome"* and was kept overnight, having had left sided chest pain for two weeks prior to admission, possibly related to commencing the Madopar medication, and had high Haemoglobin and Eosinophil counts of concern.

31. In this context I also need to consider the case in the context of the legal principle that: "*The court should give effect to a nuptial agreement that is freely entered into by each party with a full appreciation of its implications unless in the circumstances prevailing it would not be fair to hold the parties to their agreement…The parties are unlikely to have intended that their ante-nuptial agreement should result, in the event of the marriage breaking up, in one partner being left in a predicament of real need"*. How should a judgment be made on this question in the context that the agreement itself appears to invite the court to disregard needs related to a medical condition. How does this proposition fit with the search for fairness?

32. What needs does the husband have? It has the following elements:-

    (i) He has a housing need. Just because the husband has a serious medical condition, and has significant and worsening disabilities, his social needs should not in my view be disregarded. His lack of litigation capacity does not mean that he does not reasonably need the things which other people without disabilities reasonably need – in particular a reasonably comfortable house. In my view there is a strong case on the facts here for arguing that he reasonably needs to remain in the familiar surroundings of the house that has been his home for many years, that is Property X, and I find myself unattracted by the wife's arguments that it would be fair to provide a much less valuable home for him (Mr Rainer's closing submissions suggest a house at £675,000 would be adequate to meet his need). She wishes to continue living in a house with a value of £2,350,000. It seems to me not at all unreasonable for him to wish to continue living in a house with a value of £1,850,000.

    (ii) Further, the husband has real and identifiable needs for home care. The evidence suggests that there may well come a time when his care needs are such that he will objectively need to be in a nursing home or a care home – which will be cheaper in costs terms than living at home with a bespoke care package; but Ms Mottahedan invites me to note the evidence that the husband has a strong view that he wishes to remain living at home (as to opposed to living in a care home) for as long as this is possible. Indeed, one of the reasons for the separation in 2020 was the husband's perception and fear that the wife would be likely to put the husband in a care home at the earliest opportunity – a fear which was rather confirmed by the evidence which the wife gave on this subject before me. My view is that the husband does have a real and identifiable need for home care, which may be over a long period, and any needs assessment needs to take this into account. I reject as unfair any suggestion that the agreement's invitation to ignore medical condition should be treated as overriding the requirement for the court to make an assessment of need.

    (iii) In terms of the quantum of the need I propose to adopt the analysis of Ms Amy Goddard, the Senior Occupational Therapist, who has suggested that

if the husband remains at home with a bespoke care package, and lives to the highest end of the life expectancy range, then he would need to fund care costs to a sum of £1,603,684.

(iv) The sum of £1,850,000 and £1,603,684 is above a half share of the assets in this case. Ms Mottahedan says this: "*The reality is that the full extent of the husband's needs cannot be met on a 50% share of the assets. But he will take his half share and balance his housing, income and care needs at different points in time by the people who care for him and love him*". I find myself very much in agreement with this approach.

(v) Mr Rainer has suggested a counter-argument: "*Can H manage his twilight years…with medical needs effectively underwritten by the state in circumstances where he himself foresaw and wished for this outcome in 2014? W says yes. There may be less needs headroom/cushioning than the court would otherwise order absent the agreement, but H knew this in 2014 and welcomed it with clear eyes and open arms".* Although Mr Rainer has put this view powerfully and cogently, I find myself not agreeing with this approach. Is it fair that if his home care budget should run out and the husband be left with no option other than local authority-funded care home provision? Is it fair that his choices should be removed from him in this way? In my view the suggestion of Mr Rainer falls foul of the *Radmacher v Granatino* (supra) fairness test and would be quite likely (perhaps unless he died very much at the worst case scenario end of the scale) to leave the husband in a predicament of real need.

33. In summary on this area of the case, I have reached the conclusion that it would be wrong for me to place weight on the Pre-Marital Agreement. Not only was it very much to the husband's disadvantage in financial terms, I have reached the overall conclusion that, at the time that it was signed, he was a vulnerable person (in the ways described above) and the wife rather took advantage of that vulnerable situation to gain a substantial financial advantage. I reject the suggestion that she engaged in blackmail or direct threats or that she imposed any direct pressure; but (not thinking in "*formal legal terms*", rather considering "*all the circumstances as they affect each of two human beings…in the complex relationship of marriage")* it is my view that the agreement was not a fair one. In my view this is a case where these words resonate: "*The relationship between two individuals may be such that, without more, one of them is disposed to agree a course of action proposed by the other. The law has long recognised the need to prevent abuse of influence in these 'relationship' cases despite the absence of evidence of overt acts of persuasive conduct."*

34. Further, I have reached the conclusion that to enforce the agreement runs the risk of leaving the husband in a predicament of real need, possibly leaving him in inadequate accommodation and/or running the risk that he would have no option other than to do the one thing he wants to avoid – going into a care home. For me, the fact that his own words contemplated this situation in 2014 does not, given the question marks over his decision-making ability in 2014, change my view that it would be unfair to

hold him to the strict terms of the agreement.

35. In relation to the "**financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future**" I have really dealt with these in the paragraphs above. Likewise, I have had in my mind the **standard of living** that the parties jointly enjoyed during the marriage, the **ages of the parties**, the **duration of the marriage,** the respective **contributions** of the parties, the **conduct** of the parties and **disability**. I have nothing more to add on these subjects.

36. It will be apparent from the above that I have reached the overall conclusion that the right way for me to deal with this case is to divide the assets equally. A number of particular questions arise as to how that should be done.

37. As far as the 'historic tax' liability is concerned I propose to regard that as a joint debt to which each party should contribute equally (in so far as a debt arises) and the parties should cooperate to minimise. The possible liability arises from the fact that for tax purposes the rent from the investment properties were declared (I believe for quite a number of years) as having been divided 90:10 in the wife's favour (so attracting a lower rate of tax because of her lower employment earnings). It has emerged that, in fact, to claim this differential it was necessary for some formal documentation to be executed and (possibly) served on HMRC evidencing the fact that this division was a common intention. Although it is agreed that this was the common intention, it appears that the necessary documentation was not executed and/or served. It may still be possible to argue with HMRC that all is in order, but it may not. At present this is uncertain. I am content to record in my order a recital / finding that it was the parties' common intention that this was the situation, and I am told this may help the argument with HMRC, but my order needs to be drafted in a way that this is an ongoing project in relation to which both parties should cooperate.

38. In terms of a division, it seems to be common ground that the husband should have Property X transferred to him and the wife should have Property Y transferred to her.

39. In relation to the other jointly owned properties (and I include the two companies in this) I propose to order that they should be transferred to the wife with a credit of the figure in the asset schedule (if she wishes to keep them or any of them) or sold (if she does not wish to keep them or any of them). There will be an equalisation payment based on the figure in the asset schedule (if retained) or the actual net sale proceeds (if sold). Undoubtedly some timing issues will arise from this which will need to be addressed in the order.

40. The cash/investments/policies should remain where they are; but the equalisation payment calculated by reference to the figure in my schedule.

41. As far as the pensions are concerned, there is a difference of opinion and I need to have in mind the section 25 factor of the **loss of potential pension benefits** arising from the divorce and whether or not there is anything to be gained from any pension sharing order. In this case, because other issues have no doubt been more pressing, there is no PODE report to suggest what may be the most advantageous way to proceed from an actuarial perspective. I propose to say the following:-

    (i) I do not agree with the suggestion (if it indeed is being made) that the husband's defined benefit pensions should be treated as having a zero value in his hands because they are in payment.

    (ii) I do not have any evidence to tell me whether the making of a pension sharing order here will have the effect of unnecessarily destroying value; but nobody here has suggested that it would be the case.

    (iii) Any pension sharing order in favour of the wife would give access to cash by allowing (if she so chose) the wife to pay the credit into a personal pension scheme which could then be cashed in, albeit subject to tax.

    (iv) I therefore propose to make the following orders. I will make 100% pension sharing orders against the husband's pensions with ABC UK and Z Bank. I will otherwise leave the pensions where they stand. For the purposes of the calculation of the equalisation payment, I agree with the suggestion that a 30% notional tax deduction should be made against all the pension CEs to reflect the likely cost of turning these assets into cash.

42. This is my decision and I invite counsel to produce a draft order which matches these conclusions.

43. When I formally hand down this judgment I wish to have a discussion with counsel and the parties about the publication of this judgment on TNA / BAILII and what anonymisations/redactions are to be sought. My provisional view is that the judgment should be published, but anonymously, and with appropriate redactions to prevent the identification of the parties by any reader, but allowing the reader to understand the decision and the reasons for it. If I do approve this course, I will invite Counsel in the first instance to try and agree a redacted and anonymised version for publication.

HHJ Edward Hess
Central Family Court

20th May 2022