Case No: WU 19D 86348

IN THE FAMILY COURT
SITTING AT YORK
MATRIMONIAL CAUSES ACT 1973

B e f o r e :
MR RECORDER SALTER

Between:

AA

Applicant

-and-

AB

Respondent

Ms Julia Nelson (instructed by Jones Myers) for the applicant
Mr Philip Tait (instructed by Hall Brown Family Law) for the respondent

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RESERVED JUDGMENT OF MR RECORDER SALTER DATED 19 MARCH 2021

Mr Recorder Salter:

Introduction

[1] This is the application of AA for a financial remedy order arising from her marriage to AB. I will refer to them as the wife and the husband respectively. I do this purely for convenience and intend no disrespect to either of them in so doing.

[2] The wife has been represented by Miss Julia Nelson and the husband by Mr Philip Tait.

Factual background

[3] The husband is aged 39 and the wife is aged 36. Both are UK nationals.

[4] The parties met in 2005 and commenced cohabitation shortly afterwards in that year with the wife moving into the husband's property in Wales, which he had purchased in 2002. They relocated to the United Arab Emirates in April 2008, where they rented property. During their absence abroad, the Welsh property has been rented for a time to the wife's sister.

[5] They married in November 2011 in the UAE. There is one child of the family, who was born in 2015.

[6] The parties separated on 1 February 2019 and the wife left the UAE for the UK with the child on 31 October 2020. The wife did not have the husband's consent for the removal of the child. She is currently living at her brother's home in England. The wife claims that the husband is cohabiting, which is denied by the husband.

Litigation History

[7] One of the unsatisfactory and complicating features of these proceedings is that there have been contemporaneous proceedings in two jurisdictions, namely, England and Wales and the UAE. I summarise the chronology of the litigation so far as is necessary.

[8] On 26 April 2019, the wife issued a petition for divorce in the Family Court online based upon the husband's unreasonable behaviour. The basis of the court's jurisdiction was stated to be the domicile of both parties in England and Wales. It further recited that there were no other ongoing court cases related to the marriage, property or children. The wife's "correspondence address" (as required by the online system) was stated in the petition to be her brother's address in England, whereas the husband's "correspondence address" was that of the property in Wales. The wife subsequently issued Form A on 1 May 2019 applying for all forms of relief other than maintenance pending suit.

[9] Attempts at mediation in the UAE in May and June of 2019 proved unsuccessful.

[10] The wife applied on 9 September 2019 to the courts in the UAE for child maintenance provision and interim spousal maintenance under case number XX/2019.

[11] In September 2019, Forms E were exchanged in the English financial remedy proceedings.

[12] In September 2019, the husband applied to the courts in the UAE for custody of the parties' child under case number XY/2019.

[13] On 26 September 2019, the first appointment in the English financial remedy proceedings took place in the Family Court at York before Deputy District Judge Willis. The order records that proceedings were pending before the UAE courts under case number XX/2019 dealing with child maintenance, spousal maintenance and contact arrangements. Nevertheless, the parties recorded their agreement that the English court remains seised of the divorce and financial remedy proceedings and that any application that England and Wales was not the proper forum should be filed no later than 21 November 2019.

[14] On 29 September 2019, the first hearing took place in the UAE proceedings. The husband requested a divorce. The wife was not aware of this request, as all the documents were in Arabic and she was unable to attend the hearing as she was in the UK at the time.

[15] A further hearing took place in the UAE proceedings on 29 December 2019.

[16] A decree nisi of divorce was pronounced in the English proceedings on the wife's petition on 8 January 2020.

[17] An unsuccessful FDR took place before District Judge Wright on 21 January 2020. The husband applied for the financial remedy application to be adjourned generally to be restored upon conclusion of the proceedings in the UAE or, alternatively, for the FDR to be adjourned until after 3 March 2020 (ie after the date upon which judgment in the UAE would have been received). This application was refused and permission to appeal that refusal was also refused. The final hearing was listed for the first available date after the date when judgment in the UAE would have been received ie on 30 June/1 July 2020.

[18] A third hearing took place on 26 January 2020 in the UAE and, on [date omitted], the first judgment was given in the UAE. The Court of First Instance by this judgment dissolved the parties' marriage and ordered the husband to pay to the wife monthly child and spousal maintenance of £1,968.47 per month, a lump sum of £6,000 for furniture, 50% of the child's school fees and the child's sponsorship and medical costs.

[19] On [date], the wife filed an appeal in the UAE under case number 2020-XX. On [date], the husband filed an appeal in the UAE under case number 2020-XY.

[20] In March and April 2020, enforcement action for unpaid maintenance was taken in the UAE. There is a dispute as to whether this was commenced by the wife or by the UAE court of its own initiative. An execution order was pasted to the husband's office door. His employer was ordered to deduct maintenance from his salary. A travel ban was placed on the husband, an arrest warrant issued, and his bank account was frozen.

[21] The proceedings first came before me on 4 May 2020 on paper, when I directed that there should be a hearing on the issue of jurisdiction on 15 May 2020. At that hearing, I vacated the final hearing and stayed the proceedings pending further order with both parties having liberty to apply on notice to lift the stay.

[22] On [date], the Court of Appeal in the UAE gave judgment reversing the dissolution of the marriage; removing the spousal maintenance element sought by the wife; varying the housing element of spousal maintenance into an interim housing allowance and requiring the husband to pay for this purpose approximately £9,000 per annum; removing the furniture allowance (as this is only available to divorced couples) beyond what had already been paid; varying the monthly child maintenance to AED 5,000 per month; and requiring the husband to pay 100% of the child's school fees.

[23] Each party had a right to appeal the decision of the Court of Appeal. However, this right was lost as the parties instead negotiated a comprehensive agreement with the intention that a consent order would be made in this jurisdiction and that the UAE proceedings would be dismissed. This was the result of extensive negotiations during September and October 2020, following

which a draft consent order was signed on 13 October 2020 (the October 2020 agreement). The agreement was negotiated, agreed and signed on the basis that the wife and the child would be remaining in the UAE.

[24] The October 2020 agreement records, at paragraph 13, three prior payments made by the husband namely 60,000 AED on 18 April 2020, being backdated child maintenance under an order made in the UAE; 45,000 AED paid to the wife's landlord on 16 September 2020 (of which 5,000 AED has been refunded) and 5,000 AED on 17 September 2020. It provides *inter alia* for a capital and income clean break during the parties' lifetimes and on death (paragraphs 12, 57 and 58); the replacement of the UAE order by a mirror order reflecting the terms of English order (paragraphs 16, 39 and 55); the retention by the husband of the flat in Wales on the basis that the wife had no interest in it (paragraphs 28, 29, 56 and 57); capital provision by way of a series of lump sums reflecting the housing allowance ordered by the Court of Appeal in the UAE, being 30,000 AED on 10 October 2020, which the husband has paid, and 45,000 AED on 1 September 2021 and annually thereafter until the child turns 18 or leaves full-time secondary education, whichever be the sooner (paragraph 40) subject to provisions relating to the husband's potential loss of employment (paragraphs 49-50); child maintenance of 51,600 AED (approximately £850 per month) (paragraph 42); and no order as to costs other than a nominal contribution by the husband towards the wife's costs of drafting the consent order (paragraph 59).

[25] In late October 2020, the husband became aware that the wife might return to the UK, albeit temporarily, with the child. He therefore proposed amendments to the October 2020 agreement catering for the eventuality of the wife leaving the UAE and not returning with the child by 30 August 2021. Under these amendments, which were two in number, the annual lump sum of 45,000 AED and the periodical payments for the child were to terminate on the failure of the wife to return the child to the UAE by 30 August 2021.

[26] On 31 October 2020, the wife left the UAE, together with the child, without the husband's consent and without having agreed to the suggested amendments to the October 2020 agreement. This decision was prompted by the fact that she did not have employment in the UAE and had no family support there. At about

the time of her departure, the husband had Z, one of the family pets, put to sleep and sent the wife a picture of Z from his business email. The husband claims that Z was not well and was constantly in pain, whilst the wife's position was that he had been healthy at the time of her departure. The husband states that he acted upon veterinary advice. The wife's evidence is that the husband insinuated that he had killed the child's nanny and she feared for her own life. Her evidence was that the husband said that "the nanny had gone and you are next". The husband accepts that the sending of the picture was in poor taste, for which he has apologised. He was at a low point in that his child had just left the jurisdiction and he had had to have an animal that he loved put to sleep.

[27] On 5 November 2020, the wife stated that she would agree to the husband's amendments to the October 2020 agreement, if he arranged for the parties' pets to be transported to the UK, confirmation being sought by close of business on 6 November 2020. The issue of the parties' pets is one to which I will return separately later.

[28] The husband's solicitors indicated on 5 November 2020 that they were unable to obtain immediate instructions. On 6 November 2020, the wife's solicitors wrote to say that the wife would now be make an application to reopen the proceedings. In her evidence to me, the wife indicated that she withdrew her proposal because the husband was not intending to pay the child's maintenance. The husband's solicitor had been absent on leave. Thereafter, they enquired on 8 November 2020 whether the wife's proposal remained open for acceptance. The wife's solicitors indicated on 9 November 2020 that she preferred to apply to the court to remove the stay on the English proceedings. Accordingly, on 13 November 2020, the wife issued an application to remove the stay which was heard by me on 1 December 2020, when the stay upon proceedings was lifted and the wife's application was listed for a remote final hearing on 15 and 16 February 2021. Paragraph 6 of the order of 1 December 2020 reads as follows: "And upon the court having expressly warned the parties that there is a danger in this case that the cost of litigation and any final hearing will be disproportionately high relative to the asset base".

[29] I repeated that warning at the outset of the hearing on 15 February 2021, when the parties and their respective counsel spent a good deal of time in

negotiations, regrettably, without success. It was not possible to complete the hearing on 16 February 2021 and I therefore directed that counsel should file written closing submissions. I reserved judgment until today.

The parties' open positions

[30] The open positions of each party have changed as a result of negotiations at the commencement of the final hearing before me. I propose only at this stage to set out the parties' final open positions.

The wife's open position

[31] The wife's final open position was that she would adopt the October 2020 agreement subject to certain revisions to reflect her move to the UK. This involves the payment to her, as originally envisaged by paragraph 40 of the October 2020 agreement, of a series of lump sums. This approach in turn reflects the provision in the UAE order of an annual housing allowance. The wife acknowledges that 30,000 AED (approximately £6,000) due on 10 October 2020 has been paid. However, she requires the payment of £24,950 within two months to meet her immediate needs. This sum comprises £8,750 for six months' rent, £9,000 for a second-hand car and driving lessons, £3,000 for furniture and £4,200 towards her legal costs. The October 2020 agreement provided at paragraph 40(c) and (d) for the payment of a lump sum of 45,000 AED (approximately £9,000) on 1 September in each year commencing 1 September 2021 until the child attains 18 years or leaves full-time secondary education, whichever is the sooner. Instead of a series of lump sums at the rate of £9,000 per annum, the wife seeks a series of such payments of the rate of £6,000 per annum. These proposals are put on the basis of an income and capital clean break during the parties' lives and on death with the husband retaining the flat in Wales.

[32] The October 2020 agreement provided for the child's maintenance at paragraph 42. It contained provisions relating to school transportation, medical cover and a nanny, all of which now fall by the wayside. General maintenance was set at 51,600 AED per annum (approximately £10,320 per annum or £860 per month). The wife now seeks £1,000 per month until the child attains the age of 18 or ceases full-time secondary education, whichever is the later.

[33] The wife asks that a mirror order be made in the UAE for enforcement purposes with the existing order being discharged.

[34] The wife, by her counsel's closing written submissions, seeks a contribution towards her costs in excess of the figure referred to at paragraph [31]. I return to this later.

[35] Unhelpfully, in her written closing submissions at paragraph 18, Miss Nelson indicated that the wife was seeking a deferred clean break on the basis of a global maintenance order in the sum of £1,000 per month payable until the child's 18th birthday to be reduced pound for pound by any sums paid to her under the UAE order and in relation to the parties' pets. I am assuming that this submission was included in error in that it rehearses part of the wife's narrative statement at paragraph 99, which had been overtaken by the wife's final open position at the beginning of the hearing.

The husband's open position

[36] The husband mirrors the format of the wife's proposal. He offers an immediate lump sum of £10,750, comprising £8,750 sought for rent and £2,000 for furniture. Further, he will offer £4,000 for a car payable in September 2021. He also adopts the structure of a series of lump sums and offers annual payments of £3,000 commencing on 1 September 2021 for the duration set out in the wife's proposal. The proposal for the child's general maintenance is agreed at £1,000 per month, although the husband points to the fact that this represents something approaching £1,800 per annum over and above what was agreed in the October 2020 agreement. He accepts that a mirror order should be made in the UAE, but asserts that the existing order still in place there must be discharged to place matters beyond doubt.

[37] The husband seeks his costs incurred from the date of the October 2020 agreement.

The evidence

[38] I have before me an electronic main bundle, two supplementary bundles and a bundle of authorities. In addition to oral submissions, detailed opening and closing submissions have been filed on behalf of each party. I have heard oral

evidence from each of the parties. I decide the evidence on the civil standard of proof, that is to say, on a balance of probabilities.

[39] I did not find either of the parties to be entirely satisfactory witnesses. The wife was more restrained in the manner in which she gave her evidence. The husband gave his evidence with confidence, but was at times extremely discursive in the accounts provided. I appreciate that each of them has found the breakdown of the marriage very difficult. The way in which each has reacted to it does them no credit whatsoever.

The issues

[40] In order to achieve a fair outcome, there are two main issues that I need to address in addition to the factors which I am required to consider under the Matrimonial Causes Act 1973, s 25. These are, first, the impact of the October 2020 agreement and, secondly, what order (if any) should be made for costs in the particular circumstances of this case. A subsidiary issue also arises in relation to the family pets.

Matrimonial Causes Act 1973, s 25 factors

[41] I set out below my consideration of those section 25 factors which I consider to be relevant to the present application.

The parties' child

[42] My first consideration must be the welfare of the child, while he is a minor. He is currently aged 5 and lives with his mother. He has [omitted].

Property and other resources

[43] The parties' overall financial position is in deficit. I set out the position in summary form below, although I take notice of the fact that the husband has already made payments to the wife voluntarily and pursuant to the October 2020 agreement and UAE orders in excess of £70,000.

Assets/Liabilities	Wife	Husband	Total	Comments
Welsh flat		£78,264.40	£78,264.40	Net of

				mortgage, CGT and costs at 3%
Wife's funds	£747.57		£747.57	
Husband's funds		£671.17	£671.17	The husband encashed AXA shares worth €22,000 in December 2020 to pay costs
Wife's liabilities	(£66,499)		(£66,499)	Includes costs as per Form H1
Husband's liabilities		(£74,923.89)	(£74,923.89)	Includes costs as per Form H1, loan from employer and debts relating to Welsh flat
Total net	(£65,751.43)	£4,011.68	(£61,739.75)	
Pension	£4,461		£4,461	
Net total including pension	(£61,290.43)	£4,011.68	(£57,278.75)	

[44] Where there are differences in the figures presented by the parties, I prefer those of the husband. The wife has left out of account the husband's loan from

his employer, upon which £25,384 is outstanding. This loan represents an advance payment of the husband's monthly housing allowance from August 2020 to August 2021. I have left out of account any figure for chattels. The remaining differences are marginal and nothing turns up on this margin of difference. I note that the husband's debts are hard commercial debts, whereas those of the wife are, apart from her sizeable legal costs, soft loans from her brother and a friend.

Income and earning capacity

[45] Both parties built up successful careers in the UAE. The husband is employed by Company A in the UAE earning a basic salary of £79,000 per annum in addition to various allowances, some of which fall away because of the child's removal to England, for example, the educational allowance. Taking into account the allowances solely referable to the husband, his total net annual income is approximately £115,000 per annum. The husband has historically received a discretionary bonus, which could be in excess of £20,000 per annum. His evidence is that he does not expect to receive such a payment in the foreseeable future because he has been given a final written warning because of a breach of the Company A's IT policy resulting from a complaint made by the wife. The Welsh flat is capable of producing some rental income for the husband. Until recently, it was occupied by the wife's sister. The husband was unaware until the commencement of the final hearing that the sister had in fact vacated the property. I cannot on the evidence before me be satisfied that the husband is cohabiting with a person contributing towards the outgoings of his home.

[46] Whilst in the UAE, the wife worked for Company B as a manager and earned approximately £86,000 net per annum, which employment ended in June 2020. The wife is currently not in employment following her return to the UK. She is currently applying for child benefit and investigating her entitlement for universal credit. She puts her earning capacity at £60/70,000 per annum gross, having already been offered a role earning £60,000 that was put on hold pending the end of lockdown.

Needs

[47] It is common ground between the parties that this is a needs case. Because this is the case, I do not need to consider whether or not the husband's Welsh property is non-matrimonial. If needs be, recourse may be had to it to meet the wife's needs. I return to this issue at paragraph [67].

[48] The wife ultimately acknowledged, as was agreed in the October 2020 agreement, that an immediate clean break was appropriate. She does not seek maintenance for herself. While she will be earning less than was the case when she was working in the UAE, it is acknowledged by both parties that the living costs in the UAE are much higher than in England. Each party acknowledges that they should live in rented property.

[49] The husband puts his outgoings in terms of servicing borrowings, rent and maintenance for the child at £8,157 per month. This includes £3,175 per month he pays towards the loan from his employers, which will be cleared in about 8 months. This leaves him currently with approximately £1,430 per month to meet his living costs including making provision for the annual lump sums payable to the wife.

[50] The wife will have the primary burden of caring for the child. It is now recognised by the wife that there are insufficient assets to provide capital to enable her to clear her liabilities. She states that her main needs are to set up in a rented home and to obtain a driving licence with a modest car. Her updated estimated monthly outgoings for the child and herself total £5,103. She was not cross-examined about this figure. However, it is clear in my judgment that economies could be made in the very comprehensive list which results in this total. That said, a salary at the upper end of her projected income bracket would result in a net monthly salary of about £4,100 in addition to which she has been offered monthly maintenance for the child of £1,000.

Standard of living

[51] The parties enjoyed a very good standard of expatriate-style living whilst in the UAE commensurate with their high joint income. This enabled them to spend freely.

Physical or mental disability of the parties

[52] The wife asserts that the husband suffers from a bipolar disorder, which diagnosis he does not accept. In any event, the wife acknowledges that this condition does not have a bearing on the husband's ability to remain in employment. The wife suffers from significant levels of stress arising from these proceedings.

Age of the parties

[53] The wife is aged 36; the husband is aged 39.

Duration of the marriage

[54] This is a cohabiting relationship/marriage of approximately 13 years' duration.

Contributions

[55] The property in Wales was acquired by the husband in 2002 prior to the commencement of the relationship. The deposit was funded from an inheritance from his mother. The wife asserts that she paid £5,000 for the installation of a new bathroom in the property in April 2017, which assertion is refuted by the husband.

Conduct

[56] Each party has made allegations of conduct against the other. The husband does not seek to raise conduct as an issue. However, I note that he records that he had to attend hospital after an assault by the wife, that she directed a voluminous number of emails to his work address, including to his managers, putting his employment at risk, and also sent abusive emails to his sister and previous solicitor. He is critical of her for indulging in what he describes as forum- shopping.

[57] For her part, the wife sets out various allegations in paragraphs 72-87 of her narrative statement. She alleges psychological and physical abuse, lack of appropriate financial provision, lack of disclosure, attempting to obtain a divorce in the UAE without notice and having one of the family pets, Z, destroyed. As I have already indicated, the wife asserts that Z was a healthy dog, which is not accepted by the husband. He accepts that he arranged for Z to be destroyed on veterinary advice.

[58] As Robert Peel QC (sitting as he then was as a deputy High Court judge) explained in *RM v TM* [2020] EWFC 41 at [29] citing Moor J's earlier decision in that case "(i) there is no place for conduct to feature merely as one of the general circumstances and (ii) if conduct is to be pursued, it must be specifically pleaded under s25(2)(g) with each party having the opportunity to deal with the allegations in narrative evidence. Otherwise parties will be encouraged to introduce acts or omissions through the back door which they are not permitted to introduce through the front door". The wife did not seek an appropriate direction at the hearing before me on 1 December 2020. Paragraph 8 of the order made on that occasion directed the simultaneous filing and service of concise statements addressing the section 25 factors ..... and "the extent to which [the parties] say the agreement reached on 13 October 2020 should determine the outcome of the case". The result of the wife's failure to make it clear that she wished to rely upon conduct and to seek the appropriate direction is that the husband has not being afforded an opportunity to file a statement in answer. In the event, Miss Nelson did not pursue the issue of conduct on the wife's behalf in her closing written submissions.

[59] This issue has undoubtedly substantially contributed to the disproportionate costs in this application. I am in no doubt that, whilst the issues concerned have resulted in raised emotions on each side, they do not fall within the categories of conduct which would be relevant under s 25(2)(g), as summarised by Mostyn J in *OG v AG* [2020] EWFC 52. What is, however, relevant in the context of s 25(2)(g) is the October 2020 agreement, as the wording of paragraph 8 of the order of 1 December 2020 makes clear. As Ormrod LJ held in *Edgar v Edgar* (1981) 2 FLR 19, an agreement should be taken into account under the heading of conduct, stating that "when people make an agreement ... it is a very important factor in considering what is the just outcome of the proceedings". He elucidated on this in the well-known passage in his judgment at 25 where he stated:

> "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".

[60] This decision has been hugely influential in the approach to the private ordering of financial remedy orders in the decades that followed. The decision of the Supreme Court in *Radmacher v Granatino* [2010] 2 FLR 1900 is emblematic of this approach in the context of pre-marital agreements.

Discussion

The October 2020 agreement

[61] The October 2020 agreement was reached with each party having the benefit of legal advice in two jurisdictions. It was not in any way a rushed agreement. The wife accepts this and makes no allegation of any vitiating factor. There had, nonetheless, been a change in circumstances following the conclusion of the agreement, when the wife decided to return to England with the child. This may of course result in the court scrutinising the agreement with care to see whether it still represents a fair outcome, as Ormrod LJ envisaged in *Edgar* in the passage I have cited in paragraph [59]. However, the changed situation is reflected by the fact that the parties themselves set about addressing the fresh circumstances. I have set out the relevant factual background at paragraphs [25] - [28] above. Whilst it is the case that the parties were not totally *ad idem* over the revisions to the agreement, I am left in no doubt whatsoever that they would have been had the wife not decided to seek to abandon what had been achieved in negotiations and reopen the litigation.

[62] The areas of difference between the parties were not insuperable, as subsequent negotiations have demonstrated. Clarity was needed on the duration of the husband's obligation to pay the series of lump sums and the child's maintenance in the light of the wife's decision to remain permanently in England and on the issue of the repatriation of the pets.

[63] It is of significance to my mind that the husband has, in reliance on the October 2020 agreement (and the antecedent UAE orders upon which it was based),

paid significant sums to the wife. The precise amounts involved were in issue. The wife accepts that, since February 2019, the husband has paid approximately £44,000. The husband asserts that in the same period he has paid just over £72,000. The wife's figure does not include the payment of 45,000 AED (approximately £9,000) made on 16 September 2020 towards the wife's accommodation in a hotel, of which she refunded 5,000 AED when she returned to England nor her use of the husband's credit card. Furthermore, the lapse of time involved in the negotiations leading to the October 2020 agreement meant that neither party had any longer the right to challenge the UAE order by way of appeal.

The pets

[64] There are two remaining pets, namely, X and Y. At present, they remain in UAE. The wife seeks the return of these pets to England. I expressed my doubts as to what jurisdiction I had to make any order in relation to what are, at the end of the day, chattels in an overseas jurisdiction. There is no expert evidence as to the legal position in the UAE as regards the enforceability of any order I might make in this regard. In any event, I would not regard such evidence as either necessary or proportionate. Undeterred, Miss Nelson asks that I should make an order on this issue and that there should be a recital in my order making provision for a mirror order to be made in the courts of the UAE. The husband has already given an undertaking to keep the pets safe pending my final order. There is thankfully a measure of an agreement on this issue. The husband is prepared to co-operate in ensuring that the two pets can be repatriated as the wife wishes. The area of contention is over the costs of repatriation, which are in the region of £3,000. The issue must be addressed with a sense of proportionality. The costs of repatriation can be dealt with as part of the capital provision made for the wife.

Outcome

[65] As well as bearing at the forefront of my mind the factors referred to above found in the Matrimonial Causes Act 1973, s 25, I also bear in mind that the court's overall objective is to achieve a fair outcome. There is no place for discrimination between the husband and the wife and their respective roles. There should be no bias in favour of the money-earner as against the

homemaker or child-carer. As a general rule, equality should be departed from only if, and to the extent that, there is a good reason for doing so. There are two primary factors which justify such a departure in this case, first, the fact that it is (and is accepted to be) a needs case and secondly, the prior agreement reached between the parties. The agreement reached between the parties is, in my judgment, the magnetic factor in my determination and should only be departed from as far as is necessary to reflect the changed circumstances of the wife's residence in England.

[66] It is fundamental, in my judgment, that the court should accord respect for agreements reached in litigation of this type. It should not be open to a party whimsically to abandon what is already agreed in the absence of some vitiating factor with the all the incumbent costs of doing so in the hope of seeking some further advantage. To do so would run entirely contrary to the long-established principles to which I have already referred. The extent to which financial claims had already been determined in the UAE proceedings had been subsumed within the October 2020 agreement. I attach very substantial weight to that agreement alongside the marginal adjustments which the parties were on the verge of agreeing to reflect the changed circumstances brought about by the wife's return to England. There is substantial part performance on the part of the husband. The final open positions of the parties reflect this approach.

[67] How then should this approach now be reflected? The only asset of any significance is the flat vested in the husband's name in Wales. In view of the source of funding for the deposit, its date of acquisition and the fact that the parties only lived in the property briefly prior to marriage, it would in my judgment be correct to characterise it as non-matrimonial in nature. That said, because this is a needs case, recourse could be had to the equity in the property should this be necessary. However, the overall position is one of a joint deficit approaching £60,000. The indebtedness arises from legal fees, payments made by the husband to the wife and credit card expenditure. It would be wrong in my judgment to characterise the husband's credit card expenditure as wanton. I accept that it is normal practice in the UAE for all expenditure to be charged to a credit card. Much of the expenditure also has been incurred by the wife.

[68] Each party acknowledges that the change in circumstances created by the wife's return to England requires an additional payment or payments to be made during the course of this year, over and above those contained in the October 2020 agreement, to meet her needs. The appropriate order in my judgment is that the husband should pay to the wife a lump sum of £12,500 within 56 days of the date of this order to provide her with six months' rent (£8,750), a further sum towards the acquisition of furniture (£2,250) and a contribution towards the transportation of the two remaining pets to England of £1,500. Additionally, the husband shall pay a further lump sum on 1 September 2021 of £7,000 towards the acquisition of a car and the provision of driving lessons.

[69] It is common ground between the parties that they wish to maintain the formula contained in the October 2020 agreement of a series of lump sums payable on 1 September in each year commencing on 1 September 2021 until the child turns 18 or leaves secondary education, whichever is the sooner. The issue is in relation to the annual amount. I accept that the wife's annual salary in England will be lower than in the UAE, but that her living costs will also be lower. The evidence indicates that rental costs alone are roughly half in England of what they are in the UAE. Taking into account all of the arguments made, I have reached the conclusion that the appropriate amount for the series of lump sums is an annual payment of £5,000.

[70] There is no dispute between the parties that there should be an order for periodical payments in relation to the child at the rate of £1,000 per month payable until he attains the age of 18 years or ceases full-time secondary education, whichever is the later. I so order.

[71] My approach throughout has been to accord respect to the parties' agreement making only such adjustments as are necessary to reflect the changed circumstances in the light of the parties' submissions.

[72] I raised with counsel a number of issues in relation to the form of order, namely, first, in the light of the fact that the series of lump sum orders will be non-variable, whether any provision was required for lapse on the wife's remarriage or permanent cohabitation and whether there should be any provision for inflation; secondly, in view of the complaints made by the wife as to

enforceability whether the order should be secured; and, thirdly, what aspects of the original consent order had now become redundant in view of the wife's relocation.

[73] As to the first issue, it strikes me that this was not one which the parties had previously specifically addressed despite the lengthy negotiations with the benefit of legal advice. If I am to accord respect for their prior agreement, it would depart significantly from that approach if I were now to introduce a provision for lapse on the wife's remarriage or permanent cohabitation. The series of lump sums is in fact a housing allowance as much for the child's benefit as for the wife's, even though the husband is paying child periodical payments. For identical reasons, it would be inappropriate to include any automatic variation formula into the order for a series of lump sums to reflect inflation. However, the order should provide for the potential loss of employment by the husband replicating paragraphs 49 and 50 of the October 2020 agreement.

[74] I understand the wife's unease as to whether the husband will discharge the obligations imposed upon him by my order when they are living in separate jurisdictions, although her evidence to me was that the child's maintenance was usually paid regularly. I acknowledge that it would be open to me to make an immediate final charging order against the Welsh property (*Velupillai v Velupillai* [2015] EWHC 3095 (Fam)). However, in my judgment, if I were to take this step immediately it would once again run contrary to the form of agreement reached between the parties. If difficulties arise in relation to the payment of the annual lump sum, it will be open to the wife to apply at that stage for a charging order to secure payments due and to become due under the order.

[75] Finally, there are a number of provisions in the October 2020 agreement which are now redundant in view of the fact that the wife is living in England and the child is being educated here in the state sector. These provisions are those for school fees, a nanny, visa fees, private medical insurance and school transportation costs.

[76] The order is made on the basis of a continuation of the undertakings contained in the order made on 16 February 2021 and, further, that the husband

undertakes to make arrangements to repatriate the two remaining pets, Y and X to England at the wife's expense.

[77] As previously agreed in paragraph 55 of the October 2020 agreement, the parties will provide a copy of this order to the UAE courts requesting that an order be made in that jurisdiction to reflect the terms of this order by way of a mirror order and that the prior orders made in the UAE be discharged.

[78] The wife will within seven days of decree absolute take such steps as are necessary to remove the entry against the Welsh property registered by her at HM Land Registry.

[79] Except as provided for by the terms of this order, there shall be a complete capital and income clean break between the parties as well as a clean break on death.

[80] There shall be liberty to apply generally as to the timing and implementation of the terms of this order.

Costs

[81] The husband seeks his costs totalling £29,669 from the October 2020 agreement until today. The wife seeks a contribution towards her costs, in relation to which £27,372 remains outstanding to her current solicitors. The level of contribution which she seeks in her counsel's closing submissions is a minimum of €10,614 (roughly £9,100) representing one half of the encashment of the husband's AXA shares which he applied towards his own legal costs. Her final open position at the commencement of the hearing on 15 February 2021 was to seek a contribution of £4,200. The wife's Form H1 puts her costs (incurred or to be incurred) with her current and former solicitors at £61,167.80. Of this sum, the wife is unable to apportion £42,041.60 as between her former and current solicitors. Under an interim arrangement, she is paying £200 per month to her former solicitors and £500 per month to her current solicitors.

[82] The level of costs in these proceedings has been ruinous to the parties. It is utterly disproportionate to the assets involved. To put the issue in context, the wife's costs alone are just short of £4,000 in excess of the parties' joint deficit.

Issues have been pursued which did not merit any significant expenditure of costs. Warnings as to the costs being incurred have gone ignored.

[83] The general rule as to costs in financial remedy proceedings is that the court will not make any order for costs (FPR 2010, r 28.3(5)). This general rule is subject to the important exception that the court may make an order requiring one party to pay the costs of another party where it considers it appropriate because of the conduct of a party in relation to the proceedings (FPR 2010, r 28.3(6)). FPR 2010, r 28.3(7) sets out the factors to which the court must have regard in deciding what order (if any) to make under FPR 2010, r 28.3(6). These factors are:

(a) any failure by a party to comply with the FPR 2010, any order of the court or any practice direction which the court considers relevant;

(b) any open offer to settle made by a party;

(c) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;

(d) the manner in which a party has pursued or responded to the application or a particular allegation or issue;

(e) any other aspect of the parties' conduct in relation to proceedings which the court considers relevant; and

(f) the financial effect on the parties of any costs order.

[84] Further guidance is provided by FPR 2010, PD 28A, paragraph 4.4, which was amended on 27 May 2019:

> "In considering the conduct of the parties for the purposes of rule 28.3(6) and (7) (including any open office to settle), the court will have regard to the obligation of the parties to help the court to further the overriding objective (see rules 1.1 and 1.3) and will take into account the nature, importance and complexity of the issues in the case. This may be of particular significance in applications for variation orders and interim variation orders or other cases where there is a risk of the costs becoming disproportionate to the amounts in dispute. The court will take a broad view of conduct for the purposes of this rule and will generally conclude that to refuse openly to negotiate or reasonably and responsibly will amount to conduct in respect of which the court will consider making an order for cost. This includes in a 'needs' case where the applicant litigates unreasonably resulting in the costs incurred by each party becoming disproportionate to the award made by

the court. Where an order for costs is made at an interim stage the court will not usually allow any resulting liability to be reckoned as a debt in the computation of the assets".

[85] These provisions were further strengthened by amendments to FPR 2010, r 9.27 and the insertion of r 9.27A (containing further provisions in relation to open offers) by the Family Procedure (Amendment) Rules 2020 with effect from 6 July 2020.

[86] The courts have had to consider a number of cases where the parties have spent a large proportion of their assets on legal costs to disastrous effect. I will refer only to the most recent and most important of these. In *WG v HG* [2018] EWFC 84, Francis J found that the wife's costs were excessive, that she had presented an unreasonable case, but that the Duxbury fund she was to be awarded could not be completely undermined and that the husband's offer had been too low. Accordingly, the wife was awarded an additional £400,000 towards her costs leaving her to find some £500,000, which would deplete her Duxbury fund. As Francis J graphically put it (at [91])"… people cannot litigate on the basis that they are bound to be reimbursed for their costs ... no one enters litigation simply expecting a blank cheque". He continued (at [93]): "It might be said that I have assessed her needs at a given figure. If I have done that, then how can I leave her with a lower sum which, by definition, does not meet her needs? This conundrum happens in so many cases. People who engage in litigation need to know that it has a cost …. She will have to make the sort of decisions about budget managing that other people have to make day in day out".

[87] In *MB v EB (No 2)* [2019] EWHC 3676 (Fam), Cohen J viewed the case as one which should have been very easy to settle, and that the reason it had not was because of the way in which the husband had chosen to run his case. Although the wife's first offer was light, had there been a sensible (or any) response to her offer, there would have been a quick resolution. It was found that the husband's needs, costs aside, amounted to £335,000. However, the husband's unpaid costs were £380,000. Applying paragraph 4.4, Cohen J limited the costs payment to £150,000 acknowledging that the husband would be left only with the net sum of £105,000.

[88] The decision most directly on the interpretation of paragraph 4.4 of FPR 2010, PD28A is that of Mostyn J in *OG v AG* [2020] EWFC 52, where the parties had run up around £1m in costs. Whilst this was mostly referable the husband's litigation conduct, the wife had also failed to negotiate openly and in a reasonable way. In relation to this failure, Mostyn J said (at [31]):

> "It is important that I enunciate this principle loud and clear: if, once the financial landscape is clear, you do not openly negotiate or reasonably, then you will likely suffer a penalty in costs. This applies whether the case is big or small, whether it is being decided by reference to needs or sharing".

[89] In *RM v TM,* to which I have referred at paragraph [58], the combined legal costs were £594,000, representing 94% of the proceeds of sale of the only liquid asset of substance, the former family home worth £630,000, when the difference between the parties' offers was only £191,000. Neither party was found to be entirely free from blame in the conduct of the litigation, although the husband was found to be more blameworthy. Consequently, the court felt ample justification in making a modest costs order against the husband of £15,000. Because this was offset against a costs order made in the husband's favour earlier in the proceedings, the net outcome would leave the substantive decision undisturbed.

[90] The Court of Appeal in *Rothschild v de Souza* [2020] EWCA Civ 1215 set out the correct approach to the issue of litigation conduct within financial remedy proceedings, including in needs cases, at [61]-[80]. Paragraph [78] of the judgment of Moylan LJ is of particular relevance:

> "The depletion of matrimonial assets through litigation misconduct will plainly not always be remedied by an order for costs. As I have said, such an order simply reallocates the remaining assets between the parties and does not necessarily remedy the effect of there being less wealth to be distributed between the parties. What is important is that, whether by taking the effect of the conduct into account when determining the distribution of the parties' financial resources (both income and capital) and/or by making an order for costs, the outcome which is achieved is a fair outcome which properly reflects all the circumstances and gives first consideration to the welfare of any minor children".

[91] I have set out in detail the course of negotiations between 13 October 2020, being the date of the October 2020 agreement and 13 November 2020 when the wife issued her application to lift the stay and pursue her financial remedy application, at paragraphs [23]-[28]. What strikes me immediately is that all that followed from mid-November onwards has been so unnecessary and wasteful. It was quite unreasonable of the wife to insist, as she did, on 5 November 2020

that she would agree terms if the husband accepted her additional condition within 24 hours. However, that is not the sum total of my concerns as to the wife's conduct.

[92] I am concerned as to the extent of the wife's costs insofar as she has seen fit to litigate in two jurisdictions without any convincing explanation. Further, she has pursued issues which it was not reasonable to pursue, for example, conduct within the meaning of s 25(2)(g), without an appropriate direction having been made, and excessive spending on the part of the husband.

[93] The open correspondence, after the warning which I delivered at the hearing on 1 December 2020, shows a failure on the wife's part to engage in the husband's attempts to negotiate. Instead, the correspondence reveals a focus on the repatriation of the pets. I understand the importance of these to her, but she had in my judgment lost sight of the bigger picture.

[94] Finally, I must have regard to the wife's open position at various stages. At the commencement of the hearing on 15 February 2021, the wife sought additional capital from the husband of £64,132, which would have obliged husband either to sell or mortgage further the Welsh flat. The husband would have been left with £14,132 from the proceeds of sale of the flat, if sold, together with debts in excess of £70,000 incurred to meet *inter alia* sums paid to the wife and to meet legal costs. This was in marked contrast to her position in the October 2020 agreement (as amended by her on 5 November 2020) and her ultimate open position on the morning of 15 February 2021, which even at this late stage included seeking a contribution to her costs of £4,200.

[95] The wife says that she could not be expected to accept an amendment to the previously agreed terms as a result of which her financial support would come to an end on 30 August 2021. I have a number of difficulties with this analysis. First, the wife had herself accepted this position. Secondly, even when it became apparent that she wished to remain in England indefinitely, it was incumbent upon her to negotiate further. As the open offers have demonstrated, a continuation of the series of lump sums up to the child's 18th birthday was not the stumbling block; it has been the quantum that has been the issue. I accept the husband's evidence that he introduced the August 2021

termination event in order to encourage the wife to return to the UAE, but that it was never his intention to terminate maintenance for the child altogether.

[96] It must be acknowledged that the husband's litigation conduct has on occasions been found wanting. His final open offer was on the low side, but taken overall his offers have been more realistic. I take these factors into account. However, I am in no doubt that the balance of culpability lies with the wife.

[97] I have ultimately come to the conclusion, having regard to paragraph 4.4 of FPR 2010, PD28A, that the appropriate costs order is that the wife should make a contribution of £10,000 towards the husband's costs. This will be paid by way of a deduction of £1,000 from the series of lump sums payable on 1 September 2021 to 1 September 2030 inclusive, as a result of which the lump sums payable to the wife in this period will be £4,000 rather than £5,000. The lump sums will revert to £5,000 as from 1 September 2031. This may cause the wife some hardship, which is an inevitable consequence of her conduct. However, the costs order has been structured to mitigate that hardship so far as possible. I also recognise that the husband will not benefit from an immediate reimbursement towards his costs.

[98] That is my judgment.

D A Salter
Recorder

Dated: 19 March 2021