Neutral Citation Number: [2019] EWHC 1649 (Fam)

Case No: ZC17D00215

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/06/2019

Before :

Double-click to add the Judges name

- -

Between :

MB **Applicant**

- and –

EB **Respondent**

- -

Mr P Mitchell (instructed by **Vardags**) for the **Applicant husband**
Mr N Cusworth QC (instructed by **Payne Hicks Beach**) for the **Respondent wife**

Hearing dates: 18th – 20th, 25th June

- -

JUDGMENT

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

MR JUSTICE COHEN

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

The Honourable Mr Justice Cohen :

1. On 2nd November 2018 Mrs Justice Roberts directed that there should be a preliminary issue hearing to determine: i) the length of the marriage between the parties; ii) the impact of the separation agreement entered into in 2011; and iii) whether there is any marital acquest.

2. In this most unusual of cases it is necessary that I should set out a more extended chronology than would be normal.

3. The wife ("W") is aged 63 and the husband ("H") is 58. Neither has any children. They met in 1999. She was and is a businesswoman and he was, at that time a student at an art college and is now an artist.

4. According to H, at the time of meeting H had been forced to take a year off his studies from film school in Bournemouth due to suffering severe depression following a nervous breakdown. He was living in a rented room in a shared house in West London. H has a long history of health difficulties to which I will return.

5. W was living in an apartment at the Grosvenor House Hotel. Apparently, they met when H, who was supporting himself by doing modelling work, accompanied her as a male escort as his first and last client. H says that if they had not met he would have gone back to his studies in Bournemouth but I can have no confidence in that as his health difficulties were such that it later became clear to his tutors that he was having difficulty in coping.

6. The parties did not co-habit before their marriage which took place on 17th April 2000. They went on honeymoon to the South of France and just a couple of weeks after the marriage H fell and hit his head on the pavement and suffered a cerebral haemorrhage. He was extremely ill and in a coma for about 3 weeks.

7. He was discharged from hospital in about June 2000 and went with W to Munich where they stayed with W's father and his second wife in their apartment whilst he underwent convalescence with a team of expert doctors and therapists. Whilst they were there H says that he and W shared a bedroom whilst she says they slept in separate rooms. I do not think anything turns on this.

8. At some stage there was a falling out between the adults in the apartment and W and H moved into a rented flat for a few months. By about the middle to end of 2002 H's treatment had concluded and the parties then moved to Vienna where he had contacts in the art world. It would appear from the statements that sometimes the parties lived in the same accommodation and sometimes they lived separately.

9. In 2004 W tried to get long-term Austrian residency. She became involved in some form of scam, the details of which I do not know, and she was arrested and remanded in custody. H says that this was for a period of 9 months and W and her mother for no more than a couple of days. What is clear though is that following her release, which I am inclined to think was sooner rather than later, her passport was confiscated and she was unable to leave the country.

10. In 2004 H made a brief visit to England and struck up a friendship with a woman called Georgina. In early 2005 he moved permanently back to England and went to live in Georgina's house and commenced an affair with her.

11. In the middle of 2005 W was free to travel again and she went to Monaco where her family, who are very wealthy, had a flat. In August 2005 H went to visit W in Monaco and told her that Georgina was pregnant and he wanted a divorce. Her account of the conversation, which has not been challenged, is that H had been staying in the flat in Monaco for a couple of days and it was only just as he was leaving to go to the airport that he broke the news to her and presented her with a document, presumably connected with the proposed divorce proceedings, which he asked her to sign. She declined to sign it. H returned to London and resumed his affair.

12. He says that their sexual relationship came to an end in 2006. She says that there was no sexual relationship since the accident in 2000. It may be that there were attempts to continue the relationship during H's convalescence but I find that it did not continue after 2004. I come to that conclusion based on H's own case that he returned to England whilst she was still in prison and that by the summer of 2005 the marriage was plainly in great difficulties when H was seeking divorce and the wife was, as I accept, horrified at the news of his infidelity.

13. In 2006, W returned to England. She took a rented apartment in SG, Chelsea. Her part-time PA Ms S, whose evidence I accept, says that she did not see him in the apartment. If he visited there it was infrequent.

14. In 2007 she moved to CG and had a 2 bedroom flat there until 2014. It was in the same year, 2007, that H moved from North London to Hove. He had met a woman by the name of Lynne and he went to stay in her property and once again commenced an affair.

15. It is plain that he was a visitor from time to time to CG. It is W's case that he stayed there only very occasionally for a night or two. It is his case that he was a very frequent visitor coming and going when it suited the pair of them.

16. I did not find either party to be a reliable witness. Both had difficulty in answering questions, instead preferring to give long accounts unrelated to the question. W's grasp of dates and detail was often minimal, and H's evidence was often hesitant. Apart from the parties and Ms S I heard from W's mother and two witnesses for H. I did not find that these three witnesses advanced the case.

17. I am satisfied that H did attend at the flat considerably more often than she said, but less often than he said. I record that it is agreed that H did not ever have his own key to the flat and on his own case only had a key if he was let into the flat by W and then given a spare key for the duration of his stay.

18. In this context it is relevant to note also that H accepts that he never had a key to SG or to CS, the property to which W moved in 2014.

19. In October 2008 H wrote to W an email saying:

"I had to get away from you even by phone …

I care about you and I worry about you. I am not in love with you but I do love you.

I will no longer accept the way you treat me. I am not your toy or puppet.

You are so controlling towards me, and probably to most people".

And much later in the same long email he said this:

"I truly and genuinely thought you cared about me in your peculiar way, but I now see that this was a façade to keep going until you get what you want … your British citizenship. …

I hope you will see the error of your ways".

20. Whatever the expressed state of their relationship, it is clear that the parties remained emotionally entangled. In 2008 the wife took legal advice, as did H the following year. I have not been told what the nature of her advice was but after seeing a solicitor H wrote to W on 5th August 2009 a letter which contains the following:

"I am claiming benefits and housing benefits while I am still married to a woman who now owns a flat in CG, has had builders and interior designers working on that flat for months, and also apparently gambles thousands of pounds every week.

In fact the solicitor informed me that not only could I be prosecuted but you could be prosecuted as well.

I have not disclosed the fact that I am married to an extremely wealthy woman to the DSS and you have full knowledge of the fact that I am receiving benefits and housing benefits and have allowed that situation to exist without any concerns for either my future well-being or indeed how this also affects your situation. It has been this way for over three years already. What you don't seem to understand is that you also want the benefits of being a British citizen …

He then went on to set out 2 options as follows:

i) We remain married. However, with the understanding that I cannot live with you as our needs are conflicting. I need the peace of a rural location to reduce the stress in my life to be able to paint and you need the high society lifestyle that you already have in London. But I need guaranteed security in the form of a property that is my base and that is in my name, so that I can gain an income from, by renting out rooms.

ii) Alternatively for me to be a legal British citizen and to remain on benefits supported by the government, you would leave me no other option than to divorce you. However, if this is the case my solicitor has said you would then have to disclose all of your assets to the British court and this would then need to be sworn under affidavit. If you fail to do that you will be heavily penalised by the court

with the risk of imprisonment. Obviously this would mean that my claim as your spouse for a divorce settlement, considering the amount of time we have actually been married and the fact that I also curtailed my careers by your demands, could end up with you paying a considerable amount and possibly half of your assets, which is a lot more than what I am asking for, basically needing and at the very least am entitled to. In my case it would mean a heavy divorce settlement from you and you still not getting your British citizenship for a lot longer and with further costs. Plus the DSS would demand a recuperating payment for the time I've been on income support whilst we have been married and you have not been supporting me as my wife.

… I have loved you and still do, but just want you to recognise what are my rights."

21. The letter concluded "I have done this sincerely and also with your best interest at heart".

22. Discussions took place between the parties and on 9th November 2009 H's solicitors, who he had instructed, wrote to W "in connection with the regrettable break down of your marriage". The letter continued:

"Our client has stressed he would like to resolve all the outstanding issues between the two of you as amicably and with as little acrimony as possible. We understand from him that despite the breakdown of your marriage the two of you still continue to enjoy a good relationship…

As far as financial matters are concerned our client is hopeful of reaching a settlement without having to resort to court proceedings … We understand that you are reluctant to get divorced at this point in time and if there is an agreement then it will not be necessary for our client to take any proceedings immediately."

23. On 1 December 2009 W replied having taken legal advice. Her letter, drafted by her solicitors, included

"I was extremely distressed to read that (H) regards our marriage as broken down and has even contemplated the possibility of divorce proceedings.

(We) speak daily by telephone and have recently spent a great deal of time discussing what might form a reasonable basis for an agreement between us which would provide him with financial independence… (We) have now reached what we both believe to be an "in principle" agreement.

You will also be aware that despite the fact that we live separate and apart (we) see each other on a regular basis and continue to have genuine feelings of affection for each other as well as respecting each other's wish to live separate and apart. That said, we socialise together on a regular basis and remain firmly committed to each other."

24. I am not sure that I have a full run of correspondence but it is clear that W then formally instructed solicitors who entered into discussion with H's solicitors. On 1st June 2010 H's solicitors wrote as follows:

"My apologies for the lapse of time in coming back to you on this matter I understand from my client that our respective clients have been speaking to each other with a view to reaching a final settlement" (emphasis added).

The letter went on to set out the terms that H proposed which were;

i) A lump sum of £240,000 to cover his housing needs;

ii) A lump sum of £50,000 in addition;

iii) A contribution to cover his costs of counselling and other treatment;

iv) He would undertake not to go to CG except with her consent;

"My client would be willing to accept the above in full and final settlement (emphasis added) but this is on a strict understanding that he does in fact manage to secure the flat in question" (which he was trying to purchase).

The reference to the award being in full and final settlement appears for the first time in this letter.

25. The negotiations dragged on slowly but it is clear that neither party was keen on a divorce. Notwithstanding, H's solicitors continually sought to pressurise W by threatening divorce if the agreement was not reached speedily. It may be that W recognised this was an empty threat. H says that divorce was not what he wanted and that he simply followed advice. I accept that each party remained fond of the other. So far as W was concerned, she was also anxious to secure her British citizenship and it plainly would have been simplified if she remained married.

26. On 21st July 2010 H's solicitors sought to chivvy W's solicitors to produce an agreement pointing out that H had agreed the terms of settlement "in good faith and without insisting on full and frank disclosure of your client's income and capital".

27. The letter goes on to say that if progress was not made

"Our client will issue divorce proceedings and will be applying in the course of the divorce proceedings for ancillary relief. Obviously we will be referring to the terms of the agreement in our application for ancillary relief but we will also be insisting on full disclosure by your client of her financial circumstances".

28. On 23rd August 2010 W's solicitors sent the draft separation agreement. On 26th August 2010 H's solicitors wrote as follows:

"As you know I cannot advise my client to sign the agreement in its current format as it provides him with no security of payment …

I understand that the date of the parties' marriage was 17th April 2000. The parties separated in 2004 when my client returned to England. Your client remained in Austria I believe. Your client subsequently came over to England in 2006 but I understand that they did not live together. My client is not able to provide a specific date of separation in 2004."

This is plainly a significant piece of correspondence.

29. The deed of separation was eventually signed on 7th February 2011. It contains the following material passages:

"B. (W and H) have lived separate and apart and in separate households and in circumstances which they agree to be permanent since 2004 ("the date of separation").

D. (W and H) have each taken separate and independent legal advice on the provisions contained in this agreement.

It is therefore mutually agreed by the parties that:

1. (W and H) will continue to live separately and apart and in separate households.

2. (W and H) acknowledge that the financial arrangements contained in this agreement are accepted in full and final satisfaction of all claims which each may be entitled to make for themselves against the other's income, capital, property or pension howsoever arising under the present or future laws of any jurisdiction including all or any rights that either party might otherwise have or arising from the application of the community or property law of any jurisdiction.

The agreement went on to recite that W would provide a sum of up to £245,000 for H to purchase a property of his choice and would pay a further lump sum of £35,000.

30. Thus it was in May 2011 that H bought the downstairs flat 20 BR, Hove.

31. The agreement was initially drafted by W's solicitors. It was the subject of negotiation between the parties' legal teams. The wife says to me that she wanted to pay H whatever it was that it took to get rid of him and the husband said that he was only concerned to get himself a home and an income and off benefits "within the marriage".

32. He says, and I think probably rightly, that their relationship continued after the signing of the agreement as it had in the couple of years before. They both had some affection for the other. In their different ways, each had a degree of dependence on the other.

33. The husband says that he never contemplated divorce happening and that notwithstanding what was going on between the lawyers he assumed their relationship would just continue as it had before. So far as the wife was concerned she was keen to get her British citizenship through and there did not seem to either of them to be any particular reason why they should move from their previous state to one of being a divorced couple.

34. In 2012 W applied to lift the restriction imposed on her in Austria which stopped her travelling to that country. H helped her draft the letter in support. It describes amongst other things how "we were then able to move in December 2007 to 16

CG" and how H "when he is not working on his paintings from his studio in East Sussex we spend the rest of the time together in London". On any basis this was not accurate. I do not think that I get any guidance as to the truth of the matters that I have to decide from this document. It was plainly designed by the pair of them to suit the specific purpose for which the letter was written.

35. In 2013 H had fallen into dispute with the owners of the upstairs flat in the Hove property. They claimed that substantial damage had been caused to their flat in the course of building works that he had carried out. Legal proceedings were threatened.

36. W decided to come to the rescue. She says that she knew that H would simply ask her for money and she decided to buy the upstairs flat which the owners wanted to sell. She says that it was a good investment and she was able to get it at a good price. This relieved H of his threat of litigation. Soon afterwards they became co-owners of the freehold of 20 BR. In this context it is right to record that W had in fact paid to H rather more than the agreement required. In particular, she had helped him by paying for the construction of a small Japanese garden in the premises.

37. I have seen photographs of part of his flat which shows that the garage had been extended and converted to provide a tasteful artist's studio with sitting area, a bedroom up a spiral staircase to a sleeping platform, and a small galley cooking area and bathroom. Thus it was that the husband could reside there, letting out the 3 rooms in the flat to provide himself with an income.

38. In 2013 H sought additional money in order to finish off building works at his flat. He took out a small mortgage and then approached W for a further £11,000 which was the subject of a loan agreement.

39. W's flat in Hove required substantial works. H facilitated them and had a key to the flat so that he could let in the builders. W never had a key to H's flat.

40. H has produced extracts from a diary. He says that these show that he spent about 75 days during the year of 2012 with W and a lesser amount of time in 2013. W says it was very much less than that. I suspect, as before, that the truth lies closer to H's figure than W's suggestion of it being just a few days, but I note that even on H's schedule about half of the time was said by him to be in Monaco. His visits to London seemed to be relatively less frequent or extended.

41. Between 2015 - 2016 H spent much of the year in the Monaco flat although he also travelled to England. W during this period was apparently dividing her time between London, Monaco and other countries to which she travelled.

42. By summer 2016 the bonds of affection and friendship between the parties were plainly becoming strained. H formed a relationship with Sabine. On 10th September 2016 H managed to persuade the concierge of CS to admit him to W's flat in her absence from where he removed items. She says he removed items that belonged to her and he denies it. On 14th September 2016 he wrote a furious letter which contains these words:

"Everything in my life has always been on your terms and if it served you. My life and wishes have been regarded as second to your life as if I was just an accessory to your life, to what you want and your demands. You cannot see how selfish you have been and how unequal our marriage has been and I think you never will.

I have tried to tell you several times now that I am not satisfied with our relationship and you just express that as ungratitude … it certainly has not been a relationship of mutual respect as a husband and wife … I did try to explain it to you that I was unhappy in our marriage a few weeks ago. You don't seem to understand. … I am not asking for a divorce. But what I do want is a separation and to no longer be considered as one of your possessions and have my life back without your demands and control.

I do love you but it has not been a healthy relationship … I love the boys Lucca and Lui and value every minute I am with them.

I am leaving. I don't know where yet but I don't want any contact with you over the next few weeks … They (Lucca and Lui) are like little children and still need me in their lives as much as I need them and I would love to continue having them in my life and look after them but you've made it that I cannot see them with equal rights, in the same way as you have made everything in our marriage."

I should explain that Lucca and Lui are miniature greyhounds acquired in 2015 and to whom the parties are plainly devoted.

43. On 22nd September 2016 Payne Hicks Beach wrote to H having been consulted by W in relation to their matrimonial affairs. The letter amongst other matters complained about H's removal of property from CS and said that W had caused the locks to be changed so that he no longer had access to her Hove flat.

44. Payne Hicks Beach (Property Department) wrote again on 7th December 2016 complaining that his flat was being used by him for multiple residents rather than of one family only and that the garage/studio was being used as a separate planning unit. This was plainly not an attractive letter in the context of the agreement that had previously been made that the flat was going to be used to rent out to provide the husband with an income while he lived in the converted garage. It was no doubt written on instructions but could not have been written if the author had been properly instructed by W or had seen the relevant documents.

45. From H's response it is clear that what had led to this correspondence about the use of the Hove flat was the fact that he had Sabine living there with him and that was intensely irritating to W. On 14th January 2017 H objected to the fact that W had put cameras on the wall which enabled her to see into his premises infringing on his privacy. He demanded that it stop but more importantly he said this:

"We have been legally separated for 5 years and under the Deed of Separation that we signed, we have no further claims on each other".

He said exactly the same thing in another letter on 7th February 2017. This was repeated in a text message on 30th July 2017.

46. On 21st August 2017 H issued divorce proceedings and these were followed up by his application for financial remedy orders and on 23rd April 2019 a decree nisi was made.

47. For the purposes of completeness, it is right that I should record that since 2017 H has been living with Sabine in her home or abroad. His studio flat in Hove is now unoccupied.

48. The length of the marriage – discussion

This is the first issue for me to determine. I have already mentioned that throughout the marriage H has never had a key to W's properties except for the upstairs flat at Hove. W has never had a key to his flat. The time that they have spent together has always been limited.

49. H says that he and W could not live together. His health and his art work required him to be out of London and away from the busy social world in which she operated. He said he was happy when he was with her and happy when he was away. But, he says they often spent festivals and anniversaries together as well as some time in London and in Monaco. W puts the time that they were together at a far lower frequency.

50. At paragraph 68 of IX v IY [2018] EWHC 3053 (Fam), Mr Justice Williams said this:

What the court must be looking to identify is a time at which the relationship had acquired sufficient mutuality of commitment to equate to marriage. Of course in very many cases, possibly most cases, this will be very obviously marked by the parties' cohabitating, possibly in conjunction with the purchase of a property. However, in other cases, and this may be one of them, it is not easy to identify. The mere fact that parties begin to spend time in each other's homes does not of itself, it seems to me, equate to marriage. In situations such as this the court must look to an accumulation of markers of marriage which eventually will take the relationship over the threshold into a quasi-marital relationship which may then either be added to the marriage to establish a longer marriage or becomes a weightier factor as one of the circumstances of the case.

51. That analysis can be applied to an attempt to define the date of the end of the marriage as much to its commencement.

52. It is a truism that marriages come in all different shapes and sizes. What may be important to one couple may be trivial to another.

53. On behalf of H it is argued that date should be fixed at September 2016; W says that it was no later than 2004.

54. In some rare cases the definition of when parties separated can be extremely difficult. This is one such case. In most cases it is clear when one, if not both

parties, to a marriage emotionally and physically disconnect from it. What is so unusual about this case is that the emotional and to some extent the physical, connection endured long after 2004, the last time at which I can find that the parties lived together. They remained in an unusual relationship.

55. Although the parties were as a matter of law married, I cannot define the period after 2004 as a period in which a marital partnership endured. They were apart far more than they were together. Their sexual relationship had concluded by 2004 but, more significantly, H was engaged in sexual relationships elsewhere. H always had his own home from 2005 onwards and from 2011 it was a property that he himself had selected and purchased. Neither was able to enter the property where the other lived without permission. He received no financial support from W for the bulk of the year. They each paid their own ways when they were apart and when they were together W paid for them both. I regard all these as important indicators to when the marital partnership ended.

56. It is clear from the correspondence that I have seen that at different times each of them continued to assert the existence of the marriage. Neither of them wanted a divorce and if W had not taken umbrage at the presence of Sabine in the flat below hers it might well have been that proceedings would never have taken place. Each of them at different stages of their evidence expressed commitment to the other. W put it this way: "I could not drop him he was like a bad bad child. I felt protective of him".

57. H described himself as loving her but not being in love with W. Dr S, his treating psychiatrist, reported in 2013 that "he says they are fond of one another but they do not have a conventional relationship" and in 2016 "H is despondent and in something of a bind. He has a girlfriend who isn't too happy about his relationship with his wife. He doesn't divorce W because he can't seem to get away from her. He is trying to behave independently but he may be much more tied up with her than he wants to admit. He does care for her hugely and hates the idea of change."

58. W's ambivalent relationship with him can be seen by the fact that she purchased the flat above his in 2013, albeit that the evidence does not suggest that she spent much time there save when there were building works to her London flat, and that she took such umbrage at Sabine being in his flat in late 2016 to the extent that she had erected CCTV. In a phrase that I found apt H said, we had a "toxic co-dependent relationship".

59. I conclude on this issue that the parties did indeed separate in 2004. It is of course what they instructed solicitors to say in the Deed.

60. Thereafter they only ever spent the minority of their time together; they always had separate homes to which the other did not regularly have access and met only when it suited them. But, there remained a clear emotional involvement between them and neither of them, in truth had really moved on emotionally before 2016.

61. I therefore regard it as inappropriate to exclude from all further consideration the whole of the period after 2004. Whether in fact this will have any impact on the financial outcome of the case is another matter altogether.

62. Marital acquest

I can deal with this briefly and do so now before turning to the most difficult part of the case. There is no evidence of any marital acquest during the period up to 2004 or indeed afterwards. W has throughout been dependent upon her family.

63. He says that she was involved in business but that he never knew anything about it other than that in some way it was connected with her family. He does not suggest that she has done anything to increase her wealth during the marriage but instead presents her as a gambler and socialite.

64. In her form E, W says that she benefited "from a business partnership between my mother and her Swiss based partners". She said that from time to time she located and negotiated property investments on their behalf and receives funds from her business partners as and when she needs money. She describes the payments as being irregular and entirely discretionary. There is no evidence to contradict this.

65. I am of course aware that I must not be guilty of gender discrimination. I do not apply different standards to a male claimant and a female claimant. But, I regard H's description as him being the "home maker" while W was the "breadwinner" as risible. His suggestion that he dealt with the domestic side of their life together is simply not sustainable.

66. The impact of the separation agreement

H makes a full-frontal attack on the agreement and says that it is vitiated ab initio by:

i) Threats/duress; and/or

ii) Undue influence/pressure; and/or

iii) Abuse of dominant position.

In the alternative, H argues that it would be unfair to hold him to agreement because

i) The parties did not in fact separate (as the agreement contemplated);

ii) Holding H to the agreement would leave him in a predicament of real need.

67. My starting point in considering the law is the following paragraphs from Radmacher v Granatino [2010] 2FLR 1900:

Factors detracting from the weight to be accorded to the agreement

68. If an ante-nuptial agreement, or indeed a post-nuptial agreement, is to carry full weight, both the husband and wife must enter into it of their own free will, without undue influence or pressure, and informed of its implications. The third

and fifth of the six safeguards proposed in the consultation document (see para 5 above) were designed to ensure this. Baron J applied these safeguards, found that they were not satisfied, and accorded the agreement reduced weight for this reason. The Court of Appeal did not consider that the circumstances in which the agreement was reached diminished the weight to be attached to it. In so far as the safeguards were not strictly satisfied, this was not material on the particular facts of this case.

69. The safeguards in the consultation document are designed to apply regardless of the circumstances of the particular case, in order to ensure, inter alia, that in all cases ante-nuptial contracts will not be binding unless they are freely concluded and properly informed. It is necessary to have black and white rules of this kind if agreements are otherwise to be binding. There is no need for them, however, in the current state of the law. The safeguards in the consultation document are likely to be highly relevant, but we consider that the Court of Appeal was correct in principle to ask whether there was any material lack of disclosure, information or advice. Sound legal advice is obviously desirable, for this will ensure that a party understands the implications of the agreement, and full disclosure of any assets owned by the other party may be necessary to ensure this. But if it is clear that a party is fully aware of the implications of an ante-nuptial agreement and indifferent to detailed particulars of the other party's assets, there is no need to accord the agreement reduced weight because he or she is unaware of those particulars. What is important is that each party should have all the information that is material to his or her decision, and that each party should intend that the agreement should govern the financial consequences of the marriage coming to an end.

70. It is, of course, important that each party should intend that the agreement should be effective. In the past it may not have been right to infer from the fact of the conclusion of the agreement that the parties intended it to take effect, for they may have been advised that such agreements were void under English law and likely to carry little or no weight. That will no longer be the case. As we have shown the courts have recently been according weight, sometimes even decisive weight, to ante-nuptial agreements and this judgment will confirm that they are right to do so. Thus in future it will be natural to infer that parties who enter into an ante-nuptial agreement to which English law is likely to be applied intend that effect should be given to it.

71. In relation to the circumstances attending the making of the nuptial agreement, this comment of Ormrod LJ in Edgar v Edgar at p 1417, although made about a separation agreement, is pertinent:

"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."

The first question will be whether any of the standard vitiating factors: duress, fraud or misrepresentation, is present. Even if the agreement does not have contractual force, those factors will negate any effect the agreement might otherwise have. But unconscionable conduct such as undue pressure (falling short of duress) will also be likely to eliminate the weight to be attached to the

agreement, and other unworthy conduct, such as exploitation of a dominant position to secure an unfair advantage, would reduce or eliminate it.

72. 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. The circumstances of the parties at the time of the agreement will be relevant. Those will include such matters as their age and maturity, whether either or both had been married or been in long-term relationships before. For such couples their experience of previous relationships may explain the terms of the agreement, and may also show what they foresaw when they entered into the agreement. What may not be easily foreseeable for less mature couples may well be in contemplation of more mature couples. Another important factor may be whether the marriage would have gone ahead without an agreement, or without the terms which had been agreed. This may cut either way.

73. If the terms of the agreement are unfair from the start, this will reduce its weight, although this question will be subsumed in practice in the question of whether the agreement operates unfairly having regard to the circumstances prevailing at the time of the breakdown of the marriage.

Factors enhancing the weight to be accorded to the agreement; the foreign element …

Fairness

75. White v White and Miller v Miller establish that the overriding criterion to be applied in ancillary relief proceedings is that of fairness and identify the three strands of need, compensation and sharing that are relevant to the question of what is fair. If an ante-nuptial agreement deals with those matters in a way that the court might adopt absent such an agreement, there is no problem about giving effect to the agreement. The problem arises where the agreement makes provisions that conflict with what the court would otherwise consider to be the requirements of fairness. The fact of the agreement is capable of altering what is fair. It is an important factor to be weighed in the balance. We would advance the following proposition, to be applied in the case of both ante- and post-nuptial agreements, in preference to that suggested by the Board in MacLeod:

"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."

76. That leaves outstanding the difficult question of the circumstances in which it will not be fair to hold the parties to their agreement. This will necessarily depend upon the facts of the particular case, and it would not be desirable to lay down rules that would fetter the flexibility that the court requires to reach a fair result. There is, however, some guidance that we believe that it is safe to give directed to the situation where there are no tainting circumstances attending the conclusion of the agreement. …

Autonomy

78. The reason why the court should give weight to a nuptial agreement is that there should be respect for individual autonomy. The court should accord respect to the decision of a married couple as to the manner in which their financial affairs should be regulated. It would be paternalistic and patronising to override their agreement simply on the basis that the court knows best. This is particularly true where the parties' agreement addresses existing circumstances and not merely the contingencies of an uncertain future. ...

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

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

83. So far as concerns the general approach of the court to ante-nuptial agreements, Wilson LJ at para 130 endorsed the following comments of Baron J at first instance

"111. I am certain that English courts are now much more ready to attribute the appropriate (and, in the right case, decisive) weight to an agreement as part of 'all the circumstances of case' [within the meaning of section 25(1) of the Act of 1973] ...

119. Upon divorce, when a party is seeking quantification of a claim for financial relief, it is the court that determines the result after applying the Act. The court grants the award and formulates the order with the parties' agreement being but one factor in the process and perhaps, in the right case, it being the most compelling factor ..."

We also would endorse these comments.

68. In considering the alleged vitiating factors it is important to remember that the process leading up to the agreement was one that was initiated by H. I have quoted already from his letter of 5th August 2009 at paragraph 19.

This letter was drafted with the assistance and advice of the solicitor who happened to be the brother-in-law of his then girlfriend Lynne.

69. What emerged when solicitors were instructed were terms precisely along the lines that H himself had sought. H says, no doubt rightly, that in between the solicitors' correspondence there was negotiation going on direct between the parties but that does not get away from the fact that the discussions took place around the very framework that he himself had set.

70. H alleges that W said to him that unless he accepted her terms he would never get anything or find her resources. She denies it. It is not a matter which is ever referred to by H's solicitors in correspondence. It in any event is immaterial because the agreement was what H had sought.

71. The parties gave no disclosure. That was a matter that the correspondence showed was clearly agreed between them. As the passage that I have quoted from paragraph 69 of Radmacher makes clear, that is an option which is open to the parties. It was approved by Lady Justice King in Versteegh v Versteegh [2018] EWCA Civ 1050, where she said:

(58) Lord Philips said legal advice is 'desirable' (but not essential) and that if it is clear to the court that the party understands the implications of the agreement and intended that the agreement should govern the financial consequences in the event of divorce, that is sufficient to give effect to the agreement.

H knew that W was well off; that she did not have to work for her very comfortable living in London and Monaco and came from a wealthy family. He did not need to know more.

72. H said that he did not pay attention to the precise terms of the offer letters. He was pre-occupied with sorting things out and never looked closely at the correspondence that was being sent or the agreement that was being drafted. He just wanted matters sorted "within the marriage". He says that he ignored his solicitors' advice because he was talking to W and just wanted things sorted. He said it was never within his contemplation that there would be a divorce.

73. Mr Mitchell had to concede that H could not argue as a vitiating factor that H had received bad advice. H never himself blamed his solicitors and there has never been any evidence which suggested that his solicitors might have given him bad advice.

74. His repeated protest that he never gave thought to a divorce does not bear examination. I accept that he did not want a divorce at that time but it would require negligence of a high order from his legal advisors if the content of their letters and the agreement was never explained to H so that he was clear that it covered a divorce. On the face of the documents it is plain that this agreement was intended to cover all situations, current and future. There is no evidence of W putting pressure upon H or exploiting a dominant position.

75. Mr Mitchell says to me that I should simply assess the parties by reference to their appearance in the witness box and conclude that W did indeed put pressure on H. But, whilst it is entirely true that W was in some ways an almost larger than life figure given to talking at a great rate, the fact is that the parties were not at this time living together and H had independent legal advice. It has been no part of

his case that the letter he wrote in August 2009 setting out what he wanted was one to which W had made any contribution.

76. Needs

I have been troubled at the presentation of H's needs throughout this period. It was he who fixed upon the provision of a property so that he could gain an income from renting out rooms at what became an agreed figure of £245,000. He ended up with a 2 bedroom flat in Hove, made into 3 bedrooms by using the lounge as a bedroom, with a garage which he has converted to provide him with a studio and very small flat. Self-evidently, the only income that he would have, as his benefits came to an end, would be what he received by way of rental. That puts to one side anything that he might achieve by way of sales of his artwork, which has been minimal.

77. His health was never robust. He had felt rejected from childhood. He had suffered from depression for most of his life and certainly for long before the marriage. For many years he had felt unappreciated and slighted as an artist. He had no employment history that I have been told of and no prospect of earning a living.

78. It seems to me that minimal thought was given to H's income needs in the run-up to the signing of the Deed. W basically gave him what he sought. But why, I ask myself, were his income needs not given greater consideration?

79. How could the provision of a rental income which could only be achieved if he did not live in the premises that were being purchased and instead lived in the converted garage amount to a proper meeting of his needs?

80. In saying that, I do not lose sight of the fact that it was he himself who put forward these very proposals and that he said that he preferred the provision of bricks and mortar to maintenance which he said would give him no security. He said that what he wanted was somewhere he could live, have an income and get on with his painting.

81. W's case now, and I have no reason to think that it would have been any different in 2009-2011, is that she could meet whatever award H reasonably sought. Her net assets in her form E are put at only some £3 million but she says that through the largesse of her mother and business partners she should be treated as having resources available of at least £50 million.

82. Overview

To answer the question posed by Baker J (as he then was) in A v B (No 2) [2018] EWFC 45 what would the parties had said if they were asked in 2011 whether either had a claim left against the other, I find that they would have answered in the negative. That is a significant factor but not conclusive.

83. In considering whether the agreement was fair I give great weight also to the fact that the agreement was broadly in the terms that H had sought. I fully accept also that I must take into account what King LJ said at paragraph 78 of Versteegh;

"*Fairness" does not, in my judgment, require a court to ignore the precept upon which the parties have governed their affairs for over 20 years*."

In the context of this case, that takes me to the fact that W has never made income provision for H. But that does not necessarily mean that the need is absent.

84. I have to perform an objective assessment of whether H's needs were met and, if they were not, whether further provision should be made. It is for the court to undertake this exercise in circumstances when one party seeks to claim financial provision and the other relies on an agreement.

85. I am satisfied that his capital needs were met in the sense that he was provided with a flat and a place from which he could work. I am more anxious about income. H says that the net income he receives from rent, his only source of income, after tax and property expenses is about £15,000 pa against an income need of in excess of £50,000. This income can only be achieved by his living in the converted garage/studio.

86. These figures have not been the subject of enquiry in the hearing before me. I have heard next to nothing of H's current circumstances. It was not the way that this hearing was set up.

87. Outcome

These parties have spent nearly £1 million between them on this litigation, a wholly disproportionate sum to what I find is at stake. It is desirable if I can bring matters to an end now. The difficulty that I am faced with is that of H's current financial position.

88. He remains the owner of the property in Hove which has not been valued but which he asserts to be worth about £300,000. He owes his solicitors about £170,000. Pursuant to the order of Mrs Justice Roberts, his property is charged in respect of the sums advanced by W pursuant to a LASPO in the sum of £236,000. His income position is no stronger, as I have explained.

89. He rejected an offer made almost a year ago whereby W offered the sum of £300,000 which in broad terms would then have cleared his costs and provided him with a lump sum of £90,000.

90. Mr Cusworth QC on behalf of W argues that H's need does not flow in any way from the marriage. It flows from his own psychological make up and his inability or unwillingness to make something of his life.

91. W commends the approach of Mr Justice Mostyn in SS v NS [2014] EWHC 4183, where at paragraph 31 he said this:

For my part I find it difficult to see why it is just and reasonable that an ex-husband should have to pay spousal maintenance or enhanced spousal

maintenance by reference to factors which are not causally connected to the marriage, unless one is looking at the issue in a macro-economic utilitarian way and deciding that in such circumstances it is better that the ex-husband picks up the cost of the ex-wife's support rather than the hard-pressed taxpayer. This, again, is a matter of social policy. But I would suggest that in such a case spousal maintenance payment should only be awarded to alleviate significant hardship.

92. So, says W if H did have any entitlement, it was limited purely to the alleviation of significant hardship. That was achieved by the making of the provision in 2011 in the terms that he sought and would have been achieved even more so if W's open offer had been accepted.

93. The bald fact is that without provision H would be bankrupt and therefore without a home or income. Whether this is or is not a fair outcome is not a matter I can adjudicate upon today. I simply do not have sufficient information before me and nor have I received detailed submissions on the issue.

94. A future consideration of whether his needs should be met any further than they have been should be dealt with speedily and without significant further expenditure.

95. I do not want H to be under any illusion that his debts will be likely to be cleared as I have rejected a large part of his case or that an examination of his income needs will necessarily result in a significant maintenance award, which would inevitably be capitalised.

96. I therefore conclude on issues that I am caused to determine:

i) The marriage came to an end in the sense that the parties ceased to be in a marital partnership in 2004, but that the parties remained in an emotional and enmeshed relationship until 2016;

ii) They entered into an agreement in 2011 and that H has no ground for vitiating that agreement save for a potential argument that it did not meet his needs;

iii) There was no marital acquest.

97. The financial consequences of these findings are for another day.