



OUTER HOUSE, COURT OF SESSION

[2023] CSOH 48

F66/18

OPINION OF LADY CARMICHAEL

In the cause

X

Pursuer and Minuter

against

Z

Defender and Respondent

Pursuer and Minuter: Brabender KC; Turcan Connell
Defender and Respondent: Malcolm KC; Brodies LLP

30 March 2023

Background

[1] In the minute and answers in this case, the parties seek orders relative to school fees for three of their children, whom I will call James, Euan and Diana. James is 17 years of age. Euan is 15 years of age, and Diana is 12. All three currently attend independent boarding schools. They are the youngest three of the parties' six children. All five of the parties' children who have so far proceeded to secondary education have attended first a preparatory school, and then a boarding school for secondary education.

[2] The parties, Ms X and Mr Z, separated in June 2018 and divorced on 17 February 2020. They reached agreement as to the financial consequences of their divorce and

ancillary matters including liability for payment of school fees by Minute of Agreement dated 5 February 2020 which was registered in the Books of Council and Session on 7 February 2020. The minuter, Ms X, is 57 years of age. The respondent, Mr Z, is 65 years of age.

[3] They agreed that Mr Z would be solely responsible for all future school fees and invoiced extras and education costs of four of their children (including an older sibling, Karen, with whom this process is not concerned, but who featured in the evidence) as yet unpaid at 5 February 2020 and to be incurred while James was enrolled at school A (a boarding school), Euan was enrolled at school B or C (a preparatory school and a boarding school respectively), and Diana was enrolled at school B (a preparatory school), or incurred by the children's attendance at any other school where the parties agree he or she be enrolled.

[4] Before their divorce, the parties agreed that James would attend school A and that Euan would attend school C. At the time of their divorce, Diana attended school B. At the time of divorce it was in the contemplation of the parties that their children would attend independent schools, and that their secondary education would be at boarding schools. The standard of living for the children that the parties envisaged at the time of their agreement is a potentially relevant consideration: *H v H* 2004 Fam LR 30, paragraph 44.

[5] The parties have not communicated directly with each other for a number of years. Communications are conducted by their respective brothers. Mr P is Ms X's brother, and Mr Q is Mr Z's brother. Lord Brailsford had approved their involvement as intermediaries in the parties' divorce in relation to contact issues.

James

[6] James attended school A until in or about May 2021 when he was asked to leave following a particular incident. If James had not left school A, he would have been expelled. James's housemaster at the school had expressed concern about his academic achievement before the incident. Mr Z paid the school fees, invoiced extras and education costs for James's attendance at school A. James has dyslexia. His earlier education involved difficulties which gave rise to his changing preparatory school on three occasions.

[7] James started at school D in September 2021. Mr Z repaid to Ms X the school fees incurred by James's attendance at school D for the period between September 2021 and December 2021. He did not make payment of any invoiced extras and education costs of James at school D for the period between September 2021 and December 2021. James continues to attend school D. Since January 2022, Mr Z has not paid any of the school fees, invoiced extras or education costs for James's attendance at school D.

[8] Ms X paid James's school fees and invoiced extras for the spring term of 2022. The invoice was for £14,287.38. She paid also for the summer term, and the invoice was for £14,124.45.

Euan

[9] Euan attends school C. Mr Z paid the school fees, invoiced extras and education costs up to the end of the summer term in 2022. The fees have not been paid for the autumn 2022 term. The parties applied for a bursary for Euan, but were unsuccessful.

Diana

[10] Diana attended school B until December 2021. Mr Z paid the school fees, invoiced extras and education costs. Since the start of the school term in January 2022, Diana has attended school E. Since January 2022, Mr Z has not paid any of the school fees, invoiced extras or education costs associated with her attendance at school E.

[11] Ms X paid Diana's school fees and invoiced extras for the spring and summer terms of 2022, with the invoices amounting to, respectively, £14,182.80 and £14,277.42.

Issues

[12] Ms X is asking for orders finding Mr Z liable to meet the whole of the fees for James's attendance at school D between 3 December 2021 and 4 July 2022, and half of those fees from 4 July 2022. She seeks similar orders in respect of Diana's attendance at school E. She seeks an order finding Mr Z liable to meet one half of the fees for Euan's attendance at school C. Mr Z is asking for the Minute of Agreement to be varied so as to reduce his obligation to pay Euan's fees to nil.

[13] Mr Z says that his financial circumstances have changed and that he can no longer afford to pay school fees for the children. He sold shares in 2020 in order to satisfy Ms X's financial claims in the divorce, and his share income diminished as a result. In 2022 he was convicted of certain offences and resigned from the position from which he derived his income. He says he is unemployable as a result of the conviction, and that he has no employed or self-employed income.

[14] He also says that he was not consulted about the changes of school for either James or Diana. He was not consulted about what school James should attend after he left school A, and that he was not given any information to permit him to determine what

school James should attend. He had expected Diana to remain at school B, which is a preparatory school, until session 2023/4. He says that Ms X unilaterally withdrew Diana from school B, and that the fees at school E are significantly higher than those at school B (£43,000 per year, rather than £10,000).

[15] Mr Z pleads that the baseline fees at school D are marginally lower than those at school A, but that the fees for additional learning support at school D range from £2,250 to £6,765 per year, and that the fees for that service at school A are £2,400. Mr Z says that he was not consulted about the process for finding a school for James when James was asked to leave school A. Ms X pleads that James has been diagnosed by a psychiatrist as having attention deficit hyperactivity disorder, generalised anxiety, and adverse childhood experiences with features of a trauma presentation, and that he has been prescribed particular treatments. She says the psychiatrist recommended that James be enrolled at school D. Mr Z says he was not consulted about the need for, or the terms on which, James was referred to a psychiatrist, and that he was not given the opportunity to consider alternative assessments or to meet the psychiatrist.

[16] Ms X alleges that Mr Z suggested alternative schools for James, but did little or nothing to investigate the practicality of his attending them.

[17] Ms X is not employed and has no income from earnings. She has been funding the costs of educating James, Euan and Diana since January 2022. She says that her capital resources are limited and that she should not be required to deplete them further.

The fees

[18] The most recent vouched fees for a single term (including extras) are £14,124.45 for James, £15,748.99 for Euan, and £14,277.42 for Diana. That is equivalent to an annual figure of £132,452.58.

The evidence

Ms X

[19] Ms X is an artist and trained psychotherapist. She is not presently engaged in paid work. She lives in a substantial property in Edinburgh which has nine bedrooms and seven bathrooms (although three of the bedrooms and presumably at least one of the bathrooms are in a self-contained basement flat which forms part of the property). She considered selling it in spring 2021 at which time it had a pre-market guide price of £3m, although she said in evidence that that figure was excessive. She acknowledged it was worth between £2.5m and £3m. There is no debt secured over the property. She planned to sell the property in order to move to the south of England. She wanted to move to England because life during “times of Covid” was “incredibly tough”. She had had to “dump” Diana in order to travel to England to remove sick children from schools in England. She had received no support in those situations from Mr Z’s family. She wanted to go to England where she would have support. She removed Diana from school B in December 2021. She knew that Mr Z was not happy to pay the fees for school E, and that he thought it was not the right time for Diana to move schools. She did not think Mr Z had any idea what Diana thought or felt. Diana had been troubled by gossip at school about her family’s circumstances, and in particular about her father.

[20] It had been a struggle to place James anywhere after he left school A. Ms X contacted Ampleforth College, Milton Abbey School and West Buckland School, all of which declined to offer a place. Mr Z was notified what James wanted, and was told that she and James were going to have a look at school D. Mr Z had not suggested alternatives. She had heard through Euan that Mr Z proposed that James attend a day school in Edinburgh. She was worried that if she did not take action James was going to be out of school at a crucial time. She accepted that things had been done quickly, but that had been in the context of an unplanned change of school. She was afraid that James would not be at school at all. He was in the middle of a GCSE course and his world had been torn apart. At the time James's relationship with Mr Z had broken down, and Euan was the only child of the marriage who was speaking to Mr Z. Her choice of school for James was not connected to her wish to live in the south of England. She had initially made unsuccessful inquiries with schools in the north of England.

[21] Ms X visited school D on 3 August 2021. The school required reports from school A, and to communicate with Educate Private and James's psychiatrist. James's mental state was very poor. He was so distressed about the situation with school that he attempted to take his own life. When the police attended, the first thing he said was, "Don't tell my dad". He was terrified of his father. He made the same request of the psychiatrist at hospital. Ms X had complied with James's wishes. James's confidence diminished each time a school rejected him, which was what caused her to use Educate Private to find a school, with suitable pastoral care, that would take him.

[22] Dr Evans, a psychiatrist who treated James privately, had looked at the website for school D and observed that they were "big on pastoral care". Dr Evans had said it would be good for James to be near Ms X's brothers. Ms X had made inquiries of

Edinburgh Academy, George Heriot's School and Stewart's Melville College. All advised her that it would be a bad idea for James to change to the SQA examination syllabus when he was halfway through the GCSE syllabus. James did not want to attend Glenalmond or Gordonstoun as he was worried he would encounter people from his preparatory school. She contacted Glenalmond. The person to whom she spoke said he had not heard the name "Z" for a while. James did not want to live with his mother and attend a private tutorial college, as he felt that would be socially isolating.

[23] Mr Z had wanted to take James to a natural healer and receive non pharmacological interventions for his mental health problems. Ms X thought he wanted a second psychiatric assessment of James because he saw things that he did not like in Dr Evans's report. He perceived it as critical of him and his behaviour in the past, and wanted that "corrected". School D was the first school to accept James. Dr Evans had advised that it would not be in James's best interests to subject him to further assessments as Mr Z had requested, and that the risks and benefits of further assessments required careful consideration.

[24] Ms X's only consistent stream of income had been child maintenance of £1,872.72 per month paid by Mr Z. He stopped paying for a period from June 2022 to September 2022. In August 2022 the Child Maintenance Service ("CMS") advised Ms X that an assessment had been made and that Mr Z was liable to pay £482 per week. Shortly after that, the CMS advised her that Mr Z had requested a mandatory reconsideration of the assessment, and then that the reconsideration had been refused.

[25] Ms X has lodgers from time to time. When resident they pay £800 per month in rent. Her evidence was that her current account was topped up from capital in her private reserve account. The credit balance in the private reserve account derived from the capital sum she received on divorce. The most recently vouched balance on that

account was £571,458.41. The most recently vouched balance in her current account was £10,000. She has a credit balance of £19,501.42 on a Royal Bank of Scotland select account. She has a debit balance of £3,579.64 on a credit card. She also had premium bonds worth £9,660 and a unit trust worth £14,789.94. Her capital was diminishing, as she required to meet her living expenses from it and had also been paying school fees as detailed above.

Richard Murray

[26] Mr Murray's evidence was in the form of an affidavit. He was not cross-examined. He is Ms X's financial advisor. He provided information in relation to Ms X's pension entitlements. She has a crystallised account in the sum of £331,376.43 and an uncrystallised account of £15,193. She could draw a tax free lump sum of £3,798.25 if needed. Mr Murray would not advise her to draw income from these pensions.

Mr Z

[27] Mr Z worked as a partner in a firm until July 2022. In June 2022 he was convicted of two charges of assaulting Ms X and two charges of breach of the peace. In evidence he continued to maintain his innocence. He had resigned from the firm, but it had been made clear to him by the senior partner that unless he did so he would be asked to leave. It was unlikely he would have been certified as a fit and proper person by the Financial Conduct Authority in the light of his convictions.

[28] I do not repeat Mr Z's evidence about his income or about his shareholding and A points where that duplicates the unchallenged evidence of Mr White and Mr Black, set out below. He estimated the value of his A points at £150,000.

[29] Before divorce his intention had been, after retirement, to pay school fees from dividends on his shareholding in CD Ltd, sold down over 5 years. He had, however, sold half of his holding to pay a capital sum on divorce, and legal expenses associated with his divorce, criminal proceedings against him and an action at Ms X's instance for damages for personal injury. After selling part of his shareholding his gross income declined from £917,360 in 2018 to £540,705 in 2020. He had had an arrangement to borrow funds for the capital sum for a friend. When the friend became aware of the criminal proceedings he became less willing to offer an open ended loan, and Mr Z had required to sell his holding to repay his friend.

[30] Mr Z owns a farm. He produced a report by Savills from 2018, valuing it at £1.2m. It is subject to a standard security in favour of Weatherbys Bank in respect of borrowing of £736,733.60. He lives with his partner on the farm. There are two one-bedroom properties for holiday rental on the farm, and Mr Z and his partner were developing a steading which would provide a two bedroom property for holiday rental. The development would add to the capital value of the farm.

[31] He runs a loss-making sole trader business from the farm. There are properties on the farm which are let out for holiday rental. Mr Z's evidence was that his fiancée ran the letting business, and that the rental income was therefore paid to her and accounted for through her tax returns. He produced a table showing income and expenditure in relation to the bothy and the loft for the years 2018 to 2020. The table for 2020 disclosed an apparent profit of £12,587.56. His oral evidence was that even after development of the third property the profit before tax would not exceed about £17,000 per year.

[32] He provided explanations in relation to a number of transactions on his current account. The most substantial are three outgoings between March and June 2022,

totalling approximately £61,700. They are two payments to joiners, and a third for the purchase of a second-hand Kubota digger (£34,500). They all relate to the development of the steading. Mr Z said that he had spent about £60,000 on the development, excluding the purchase of the digger. On 19 July 2022 Mr Z sold his Land Rover Discovery to raise funds for cash flow and legal fees.

[33] In March 2022 he purchased the reservoir adjacent to the farm to prevent other parties from developing it. He paid £107,000 for it, which he funded by drawing additional borrowing from Weatherbys Bank. The sum forms part of the figure for secured lending already referred to, although the reservoir itself is not subject to a standard security.

[34] Mr Z relied on vouching dating from his divorce in relation to his pension, in the sum of £480,000. He said he had been unable to obtain a current valuation from his pension provider, Mercers. He had no explanation as to why a value of £1.5m had been ascribed to the pension in the Weatherbys paperwork relating to the lending for the reservoir. Mr Z receives around £16,000 gross per year from the pension which has been in payment since 2016. He has £10,000 in shares in Crieff Hydro, which he described as “very illiquid”. He had credit balances totalling approximately £33,500 in various bank accounts. He had an ISA worth £3,856.87.

[35] He estimated his capital resources as being in the region of £2.2m.

[36] He sought reconsideration of, and then appealed, an assessment by the Child Maintenance Service in respect of his liability to pay child support.

[37] Mr Z has written novels in the past. He said that he had been preoccupied with legal proceedings in recent years so as to be unable to write. He had miscellaneous dividends from shares and book royalties of about £1,500 gross per year.

[38] Mr Z produced a list of legal fees relating to the parties' divorce, the present proceedings, to the criminal proceedings against him, and to an action for personal injuries at Ms X's instance totalling £151,159.79. The greater part of that expenditure related to the criminal proceedings.

[39] Mr Z produced also an email from his accountant dated 21 July 2022 and what bore to be a tax calculation for the year ending 5 April 2021 showing total tax and NIC due of £226,787.09. The email contained a suggestion that Mr Z had underpaid tax, and that a substantial sum should be paid to reduce the amount outstanding. Mr Z's accountant did not give evidence. Mr Z was unable to explain what tax may have been paid on his behalf by his former firm. He was unable to say what the true level of his current liability to HMRC was as at the date of the proof. Part of the liability mentioned was in respect of a payment on account for the tax year 2021/22.

[40] Mr Z produced a schedule of income and expenditure showing an estimated monthly expenditure of £25,193, excluding school fees for the three children with whom this process is concerned. Under deduction of legal fees, of figures of £150 for travel for Euan to and from school C and £660 for Karen's rent, which Mr Z was no longer paying, his outgoings still amounted to £11,383 with net monthly income of about £6,387.

[41] Mr Z said that he had never seen the inaccurate entries in Weatherbys file to which further reference is made in the section of this opinion dealing with Mr Gourlay's evidence. Although criminal proceedings were pending at the time when Mr Z bought the reservoir, he did not believe he could be found guilty, although he knew that that was a "possibility".

[42] Mr Z had only "got wind of the plan" for James to attend school D in very late August 2021. His view was that James would have benefited most from staying at

home and attending a day school in Edinburgh or Dundee, or attending at state school. Mr Z's family was at least half Scottish and he did not want the model of "an English public school boy". He thought Ms X regarded independent day schools and state schools as "slumming it".

[43] His evidence was that he approached Glenalmond School, and that although Glenalmond took a reference from school A, "[Ms X] wouldn't have it". He produced an email exchange with a Dr Alderson at Glenalmond running from 29 August to 22 September 2021. In an email dated 20 September 2021 Dr Alderson indicated that it would be necessary for James to complete a standard assessment and to have an interview, and that if those were satisfactory the school would look to proceed to an offer.

[44] Mr Z made inquiries with the High School of Dundee. In oral evidence he acknowledged that he had received responses similar to those described by Ms X, in relation to the examination syllabuses at the schools. Dundee High School followed the Scottish syllabus. Even schools pursuing the GCSE syllabus did so in relation to differing examination boards. He telephoned several tutoring colleges, but did not mention them to Ms X through their respective brothers, as they were "not runners". He felt he could not arrange anything for James because he could not ascertain James's wishes. That was because contact with James was "blocked by his mother and her solicitors".

[45] He regarded the decision to send James to school D as a "fait accompli" by August 2021. The school was a long way from Mr Z's home. Mr Z had no input into Dr Evans's assessment. He was not given an opportunity to consider what alternatives there might be for James. He felt that Ms X had alienated James from him.

[46] The alienation of his children from him by the agency of Ms X was the greatest evil in his life. He was unable to visit Diana, as she had been removed at a week's notice

and moved 460 miles from home. He said he would not pay for schools that he did not believe in. He was cut out of the process of James's rehabilitation. He would not pay for things about which Ms X did not consult him. He believed that Ms X coached some of the children to give untruthful evidence against him in the criminal proceedings.

[47] James had passed all his GCSE examinations apart from English literature. He described that as a tremendous result, as James was not a conventional learner. He was thrilled that James had done so well.

[48] Mr Z accepted that when Diana was 9 years of age he had registered her name with school E, and that it was a good school.

[49] In re-examination he said that even if he had had the money to pay school fees for Diana, he would have wanted discussion and reassurance that it was the right move for her. Had he believed that it was right, he might have sold his Land Rover not to buy a digger, but to pay for school fees.

[50] Again in re-examination he was asked about his provision of financial support for Karen. He had paid her accommodation costs in her first year. She had asked him to pay them during her second year. He had not done so. He explained that the procurator fiscal depute in the criminal proceedings had moved for a non-harassment order in relation to Karen. Mr Z had offered an undertaking not to contact Karen unless she contacted him, and the sheriff had accepted that undertaking. Mr Z referred, sarcastically, to Karen as "Dear Karen". When asked to provide funds for her he had reminded her of the terms of the Minute of Agreement. He was obliged only to provide funds where those were not met by bursary, grant or loan. He had therefore sent Karen a link to a list of charitable organisations that might be able to assist her.

Mr Q

[51] Mr Q gave oral evidence. His oral evidence, however, added little to the content of the correspondence in which he was involved with Mr P, and with Ms X's solicitors. Mr P and Mr Q corresponded with each other, and Ms X's solicitors corresponded with Q. My impression was that both men had tried in good faith to act as a channel for communications between the parties, and to promote potential compromise between them.

[52] On 10 May 2021 Mr Q wrote to Mr P. He explained that school E was much more expensive than school B, and that Mr Z could not afford to pay the fees for school E. He raised a question as to whether the move of school was in Diana's best interests. He wrote that Mr Z was prepared to contribute £20,000 over the following 2 years to Diana's schooling if Ms X nevertheless insisted on moving Diana to school E.

[53] Mr P responded on 13 May 2021. He referred to an underlying assumption on Mr Z's part that Ms X should put her life on hold and stay in Edinburgh "against her wishes". He wrote that he "really appreciated that [Mr Z] [had] made clear] that he [was] ready to agree the move to [school E]". He proposed that the fees for school E should be split between the parties. There then followed a discussion between Mr P and Mr Q. On 23 May Mr P wrote to Mr Q narrating that Ms X was offering to pay the difference between the fees for school B and the fees for school E. Mr Z was to pay the full amount of the fees for school E from September 2023.

[54] On 30 July 2021 Ms X's solicitors wrote to Mr Q intimating that James and Ms X were visiting school D on 4 August. On 19 August they wrote to Q asking for Mr Z's agreement to James's being enrolled in school D.

[55] Mr Q wrote to Ms X's solicitors on 20 August. He complained that they had not communicated between 30 July and 19 August and that Mr Z had, therefore, had no opportunity to visit school D. School D had told Mr Z that he could not visit before 31 August because of the holiday period. He requested any professional opinion that school D was right for James. Ms X's solicitors responded on 26 August. They provided a letter from the director of Educate Private with a table of all the schools considered for James, communications with those schools and the outcomes. They provided also an opinion from Dr Evans. They indicated that the deadline for accepting the place at school D was 3 September. There followed an exchange of emails in which Mr Q expressed his dissatisfaction with the level of communication from Ms X's solicitors, the quality of Dr Evans' analysis and a lack of consideration of Scottish schools or private tutors. Mr Q also wrote that Mr Z wanted a second psychiatrist to assess James, and that he wanted to take James to a natural healer to establish whether he might have non-pharmacological treatment, rather than medication prescribed by Dr Evans.

Duncan Gourlay

[56] Mr Gourlay provided two affidavits and gave oral evidence. He is a director of the Private Bank of Weatherbys. It provides banking facilities, including a loan facility, to Mr Z. The loan is secured over Mr Z's farm. Mr Gourlay's evidence was that it was very unlikely that Weatherbys would extend further lending to Mr Z in his current circumstances. Weatherbys expected the existing borrowing to be repaid when Mr Z received funds on disposal of his shareholding.

[57] Mr Z's secured borrowing amounted to £736,733. Weatherbys provided lending to permit Mr Z to purchase the reservoir in March 2022. There was no standard security over the reservoir.

[58] There are a number of inaccuracies in the information in the Weatherbys file, and on the basis of which the loan facility was provided. It narrates that Mr Z was still married to Ms X and that he has three children with her, and two with his first wife. In fact he has six children with Ms X, four with his first wife, and a further child, born in January 2021, by his current partner. It indicates, incorrectly that Mr Z still has an interest in the home that Ms X occupies, and a property in London which was sold in 2019 in the context of the divorce proceedings. It suggests that Mr Z has a SIPP worth £1.5m.

Mr White

[59] Mr White is an in-house solicitor with the firm of which Mr Z was until recently a member. He gave evidence by two affidavits and was not cross-examined. It is a limited liability partnership ("LLP"). Subject to there being available sufficient profits in the LLP, the terms of the LLP agreement and law, practice and guidance relevant to the industry, Mr Z was entitled to base drawings of £175,000 each year, paid monthly, under deduction of tax at such rates as the management committee determined. The drawings were advances on profits, and as such could give rise to a need to repay money to the LLP at the end of the financial year. If all members achieved their base drawings, he would be entitled to an additional profit share (referred to as a variable discretionary award), again subject to deduction of tax. He might also receive a share of surplus profits.

[60] Mr Z holds 3,561 A points, which are an equity-like instrument in the LLP which have an entitlement to a quarterly distribution and a potential capital value over time.

He paid £100,000 for them in 2016. He also has 285,642 shares in CD Ltd. He formerly had 544,151, but sold some on divorce. CD Ltd is a private company. It was formed as a vehicle for the acquisition of the certain businesses and assets in 2010, and transferred those to the LLP. Shares in CD Ltd generally change hands when members leave and join. Mr Z was given special dispensation to sell shares to assist him on divorce at a time when demand for shares outstripped supply. Mr White believed that it would be unlikely for a similar request to be accommodated again, as the demand for shares was lower than the supply, as senior personnel reached retirement.

[61] On termination of membership of the LLP, a member was entitled to 3 months' base drawings - £43,750. The member would not be deprived of his shares, but there was no certainty that he would receive capital value for them. He would continue to receive quarterly dividends so long as he held the shares. The LLP had a call option but the member/shareholder had no put option, and so could be left holding the shares indefinitely. If the call option were exercised, the member would receive value.

Unvested A points would be forfeited for nil value. Mr Z's A points were vested A points, in respect of which there were both put and call options. When Mr Z resigned on 4 July 2022, the LLP exercised its call option regarding the A points, and were expected to acquire them before the end of 2022. Mr White was unable to comment on the price of those.

Mr Black

[62] Mr Black is the chief financial officer with the LLP. His evidence also is contained in two affidavits, and he was not cross-examined. His evidence about the structuring of Mr Z's remuneration as a member, and in relation to the consequence of that

membership's ending is consistent with that of Mr White. He explained, further, that surplus or unallocated profit was distributed to members based on how many equity points they held.

[63] He provided additional detail as to the sums involved from 2018 until Mr Z's resignation. In all years his gross base drawings were £175,000. In 2018 he received a discretionary award of £300,000 and an equity point allocation of £145,184 gross. His A point income was £28,893, and his dividends from the CD Ltd shares were £266,783 gross. The LLP withheld tax of £222,592 in respect of the additional profit share.

[64] In 2019 (7/71/2) the discretionary award was £285,000, the allocation from equity points was £12,008, A point income was £25,939 and CD Ltd dividends were £234,709 (all gross). The LLP withheld tax of £148,504 in respect of the additional profit share.

[65] In 2019 the estimated put value of the A points was £188,591. That is the only year for which a put value has been supplied, as opposed to an illustrative annual income.

[66] In 2020 (7/72/2), the discretionary award was £195,000, the allocation from equity points was £8,600, A point income was £21,499, and the CD Ltd dividends were £124,572.

[67] In 2021 (7/73/2) his variable discretionary award was £215,000 gross (£123,152 net), his equity point additional profit share was £29,896 gross, and his A point income was £24,659 gross. The gross dividends from the CD Ltd shares amounted to £113,687. He received his additional profit share net of tax on 31 March 2022.

[68] The estimated value of Mr Z's remaining shares in CD Ltd is £1,039,737. The most recent "illustrative annual income" related to his A points is £25,346.

[69] When Mr Z resigned, the LLP released to him his tax reserve of £78,892.02, which was a reserve kept for him for meeting tax on payments made gross over the preceding year. It is normally paid directly by the LLP to HMRC.

The law

[70] The Family Law (Scotland) Act 1985 makes provision in relation to aliment. An obligation of aliment is owed by a father or mother to his or her child. It is an obligation to provide such support as is reasonable in the circumstances, having regard to the matters which a court is required or entitled to have regard under section 4. A child is a person under the age of 18, or over the age of 18 and under the age of 25 who is reasonably and appropriately undergoing instruction at an educational establishment: section 1(1)(c), (2) and (5). The court has power to order the making of alimentary payments in respect of educational expenses, and to backdate an award: section 3(1)(b) and (c).

[71] In determining the amount of aliment to award, the court shall have regard to the needs and resources of parties, the earning capacities of the parties, and generally to all the circumstances of the case. Where two or more parties owe an obligation of aliment, there shall be no order of liability, but the court, in deciding how much, if any, aliment to award against any of those persons, shall have regard, among the other circumstances of the case, to the obligation of aliment owed by any other person. In having regard generally to all the circumstances of the case, the court may, if it thinks fit, take account of any support, financial or otherwise, given by the defender to any person whom he maintains as a dependent in his household, whether or not the defender owes an obligation of aliment to that person. It shall not take account of any conduct of a party unless it would be manifestly inequitable to leave it out of account: section 4(1)-(3). Resources means present and foreseeable resources: section 27(1).

[72] The need of the child must be assessed in relation to the individual child.

[73] Where a person who owes an obligation of aliment to another person has entered into an agreement to pay aliment to or for the benefit of the other person, on a material change of circumstances application may be made to the court by or on behalf of either person for variation of the amount payable under the agreement or for termination of the agreement: section 7(2).

[74] The power of the court to make a maintenance order as defined in section 8(11) of the Child Support Act 1991 if the child is receiving instruction at an educational establishment and the order is made solely for the purposes of requiring the person making or securing the making of periodic payments fixed by the order to meet some or all of the expenses incurred in connection with the provision of the instruction: section 8(7) of the 1991 Act. There is no dispute as to the competency of the orders sought in this case.

Decision

[75] In relation to Euan the question is to what extent I should vary the Minute of Agreement. He remains at one of the schools that parties agreed he should attend, and in relation to which Mr Z was to pay the fees. Mr Z seeks variation to nil, and Ms X seeks variation to the extent that each party should pay half the fees.

[76] Neither James nor Diana is at one of the schools specified in the Minute of Agreement. There is no agreement between the parties that they should be enrolled in those schools.

[77] Mr Z was not an impressive witness. I formed the impression that, quite apart from any change in his financial circumstances, Mr Z did not wish to pay to support James's education at school D because he had not been able to exercise his parental rights

so far as the choice of school was concerned. He took a similar view in relation to Diana's attendance at school E. There were points at which Mr Z was deliberately discourteous to senior counsel for Ms X. He criticised her use of grammar and syntax in framing some of her questions, rather than simply answering them. At one point, in the course of an answer he said to her, ironically, "Far be it from me to touch upon [the subject of the question] with someone as learned as you". He harboured a sense of resentment that the parties' children, other than Euan, had little contact with him, and that seemed to colour his attitude to providing them with financial support. I regarded his attitude to contributing to Karen's expenses, and the tone in which he spoke about her, as telling. I formed the impression that Mr Z had regarded the changes of school for James and Diana as presenting a potential opportunity to reduce his level of financial support for their education.

[78] There is, however, no doubt that his financial circumstances have changed since the Minute of Agreement. That change of circumstances is relevant to his conclusion for variation of the Minute of Agreement so far as Euan's fees are concerned.

[79] Mr Z's income diminished following the sale of some of his shares in 2020. Since 4 July 2022 he has had convictions for assault and breach of the peace. He is aged 65.

He has lost his income from his activity as a partner in the firm. I accept on the balance of probabilities that some forms of employment and self-employment remain open to him.

It is, however, highly unlikely that any income he is able to earn will be at a level comparable to his earnings as a partner in the firm, given his age and recent record of convictions.

The period to 4 July 2022

[80] After Mr Z sold shares in April 2020 the dividends available to him decreased by more than £100,000 per year. In the two following years, however, his gross income was substantially in excess of £500,000 gross. On his own evidence his gross income in 2020 from all sources was £540,705 and in 2021 £574,678. This was during a period in which Ms X had no income.

[81] Notwithstanding the imminence of a criminal trial, Mr Z chose to spend, on his own evidence, about £94,500 on developing his heritable property. Nearly £62,000 of that was incurred in the period March to June 2022. He chose also to incur further borrowing of £107,000 in March 2022 to buy a reservoir.

James - 3 December 2021 to 4 July 2022

[82] Ms X was faced with a very difficult situation in the summer of 2021 so far as James was concerned. The circumstances which caused him to be asked to leave school A were such that it was not easy to place him at another independent school. I accept Ms X's evidence that she approached five independent boarding schools, including three named in her affidavits, and that they refused to accept James having seen his reports.

[83] I accept also her oral evidence that she approached at least two independent day schools in Edinburgh, namely George Heriot's School and The Edinburgh Academy, and that she was advised that it would be difficult for James to change from the English GCSE syllabus to the Scottish National 5 syllabus. The responses that Mr Z received from the High School of Dundee and Glenalmond regarding difficulties with differing examination syllabuses were similar in character.

[84] Against that background it was reasonable for Ms X to enlist the services of Educate Private, a consultancy with experience in placing students in independent schools. It is notable that the combined efforts of Ms X, Mr Z and a private agency resulted in one offer of a place for James.

[85] I accept that, whatever the nature and quality of the relationship between him and James at the time, Mr Z was genuinely concerned in summer 2021 as to what educational provision would be in James's best interest, and also that the information available to Mr Z at that time was limited. Mr Z was, however, on notice from May 2021 that James's education at school A could not continue, and that his education would have to take place elsewhere. There is little to indicate that he made any active inquiries that were likely to be helpful in identifying a school for James. On 30 July 2021 Ms X's solicitors, wrote to Mr Q about the visit to school D in early August 2021. There was no response from Mr Q until 20 August. The only documentary evidence of any activity on Mr Z's part is in relation to unsuccessful inquiries with Glenalmond in September 2021.

[86] I also accept Ms X's evidence that James did not want his father to know about the difficulties that he was experiencing. Given James's age in the summer of 2021, it is understandable that she should have respected his wishes in that regard. It is understandable and reasonable that she should have sought and followed professional advice from Dr Evans as to the potential effects of further psychological assessment on James.

[87] I am satisfied that I should find Mr Z liable to meet the whole of James's school fees, invoiced extras and education costs for the period between 3 December 2021 and 4 July 2022. The cost of attending school D is not materially different from the cost that was involved in his attending school A. James was unable to remain at school A for

reasons outside the control of either party. He needed to receive education. Attendance at school is the means by which most children in the United Kingdom receive their education, and it was the means by which James had previously received his. Ms X, with professional assistance, found a school which accepted him. School D is, like school A, a boarding school located in England. It was reasonable to try to place in him in an establishment of that sort rather than to try to have him educated at a day school in Scotland or by attending a tutoring college in Scotland. Ms X cannot reasonably be criticised for having taken the action she did to find a school for James, or in making the arrangements that she did for him to attend school D. James's education at school D is going well. He has performed well in his GCSE examinations, as Mr Z acknowledged. His placement is in accordance with his needs. I am satisfied that requiring Mr Z to provide financial support for James's attendance at school D in the period to 4 July 2022 is reasonable having regard to Mr Z's resources during that period.

Euan

[88] I am not satisfied that Mr Z's resources had diminished to such an extent that it is appropriate to vary the Minute of Agreement so far as the provision for him up to 4 July 2022 is concerned, and decline to vary the Minute of Agreement.

Diana – 3 December 2021 to 4 July 2022

[89] I am not satisfied that I should make an order requiring Mr Z to pay all of Diana's fees in relation to school E. Ms X decided unilaterally to move Diana from school B to school E. There is no suggestion that school B was unsuitable for Diana, or that her education there was in any respect unsatisfactory. The only suggestion of any difficulty

was Diana's concern about playground gossip. Schools routinely require to deal with matters of that sort that arise between children, and to counsel children about appropriate and kind interpersonal behaviour. There was no pressing reason to move Diana to school E. All of the parties' other children completed their preparatory education at school B. Even absent any question about Mr Z's resources, I would not have regarded the payment of fees for school E as constituting support that in all the circumstances was reasonable. Mr Z did not agree that Diana should move school. The correspondence between P and Q cannot reasonably be read as suggesting that he did. He offered a contribution in the event that Ms X "insisted" on moving Diana. He did not accept that the move of school for Diana was in her best interests at the time it took place. He did, however, contemplate that she might well attend school E when she was older, as he registered her name with the school some years ago.

[90] The decision to move Diana was motivated substantially by considerations of Ms X's own convenience, because she wanted to move her residence away from Scotland and nearer to school E. She has not actually done so. I accept, for what it is worth, that Diana wanted to go to school E. At the time when she moved school, she was aged 11 years. Her wishes, in the context of an additional annual cost in the region of £30,000, do not mean that that cost should be regarded as reasonable support.

[91] In relation to the period up to 4 July 2022 I am prepared to find Mr Z liable to pay the fees for school E only to the extent of the fees, invoiced extras and education costs that would have been payable for Diana's attendance at school B. Those costs, for school B, represent reasonable support so far as Diana's education is concerned. I am satisfied that that provision is reasonable having regard to the resources available to Mr Z at the material time.

Period from 4 July 2022

[92] Half of the school fees at current rates is over £66,226.29 per year (£5,518.86 per month).

[93] Ms X has no income other than that derived from rental of part of her home. She has heritable property that is worth on her own evidence not less than £2.5m and is not subject to any secured lending. It is a large property, and provides accommodation which is more extensive than that required by a parent with three school age children. She has a substantial but diminishing sum of capital in the bank. All of her school age children are at boarding school. She has other savings and investments of relatively modest value. Having accepted Mr Murray's evidence I have left her pension funds out of account as a current or foreseeable resource. I am satisfied on the balance of probabilities that she could secure some form of paid employment or self-employment if she chose to do so. I am not able on the available evidence to make a finding as to the likely level of the income she would derive from that economic activity.

[94] Mr Z retains his dividend income from the CD Ltd shares. In the last 2 years, on the holding of 285,642 shares, his gross income from those was £124,572 and £113,687. He can expect around £25,000 gross from his A points, so long as he holds them. There was evidence that the LLP would exercise the call option, but no evidence as to precisely when they would do so, or how much they would pay for them, although it was thought to be likely that the LLP would acquire them within about a year. It is the unchallenged evidence of Mr White that Mr Z paid £100,000 to acquire the points. In 2019 they were valued at £188,591. Mr Z estimated their value at £150,000. On his own account he had about £35,000 in the bank, and an ISA of modest value.

[95] Mr Z has pension income of £16,000 gross each year. He estimated annual gross royalties and other income at £1,500.

[96] There is no up to date vouching as to the income derived from the holiday letting accommodation. It is rental income from heritable property owned by Mr Z, but paid to his partner. Mr Z's estimate of pre-tax profit from the holiday lettings, including the steading, was about £17,000. It is on the face of things surprising that he should have made such a significant investment in developing the steading for such a modest return. On his estimation, and taking into account the 2020 figures for the other two properties, the gross annual profit from the steading will only be in the region of £5,000.

[97] Looking to the future, leaving out of account income from the holiday properties, Mr Z will receive, gross, about £119,129 (the average of the dividends from the CD Ltd shares in 2020 and 2021). His own estimate was that his dividends would fall to £108,000 per year, but the basis for that estimate is unclear. He will receive £16,000 as pension, £25,000 from the A points while he holds them, and £1,500 from royalties and other sources. That produces a total of £161,629. When his A points are acquired by the LLP, that figure will fall to £136,629 gross. I was not provided with any detailed calculations of the tax payable on those gross figures. On a very broad basis, assuming an effective overall rate of 40%, as Mr Z himself did, the respective net figures are about £97,000 and £82,000 (£8,083 and £6,833 monthly).

[98] When the LLP acquires the A points Mr Z will receive a capital payment which is likely to be in the range £150,000 to £188,000. On Mr White's unchallenged evidence, that has either already happened, or will happen in the very near future. There is no evidence to indicate when Mr Z will be able to dispose of his shareholding. It has a value in excess of £1m.

[99] The true level of Mr Z's current debt to HMRC is difficult to ascertain. Mr Z chose not to produce an affidavit or oral evidence from his accountant, and did not produce a detailed up-to-date account of his outstanding obligations to pay tax. I accept that he is likely to owe HMRC money. The figures mentioned in the email and calculation said to come from his accountant are figures produced in the context of self-assessment, and include payments on account. They are unlikely to represent an accurate calculation of his actual liability. The most recent tax return produced was for the year ending 5 April 2021. I note that in relation to the year preceding his resignation the LLP paid him out his tax reserve, which would otherwise have been paid directly to HMRC to meet his tax liability in respect of his additional profit share.

[100] Mr Z's schedule of monthly expenditure is mostly unvouched. It is not easy to match items in it with the current account statements produced. It contains monthly figures totalling nearly £1,400 for oil and electricity, monthly figures of £400 for each of roof repairs, car maintenance, and petrol. There is a monthly figure of £291 for "applicant repairs/replacement". It includes the cost of a gardener and a handyman with a monthly total cost of £800. I have left out of account for present purposes the figures for legal fees, as I am not satisfied that these will be an ongoing expense. The personal injuries proceedings are presently sisted. I do not know whether or to what extent they will be pursued, or whether or to what extent they will be defended. On the evidence as it was at proof, Mr Z's liability for child maintenance was £1,928 every 4 weeks, although that was the subject of an appeal. Excluding child maintenance, legal expenses, Euan's travel and Karen's rent, Mr Z's schedule of outgoings totalled £9,510. Even discounting that by 25% overall to take account, broadly, of the lack of vouching and the high and unexplained figures for some of the items produces a figure of £7,132.50, to which child

maintenance then has to be added back. It is immediately apparent that Mr Z cannot meet the children's school fees out of his taxed income. If the estimated gross profit figure for the holiday lettings were to be taken into account, that would amount to a little more than the fees of one child for one term.

[101] It is unlikely that Mr Z will obtain further borrowing from his bank unless he obtains a source of income. I accept that borrowing is not a current or foreseeable source of funds for Mr Z. It is doubtful that his bank would have loaned him the money that it did in March 2022 had they been aware that his employment was potentially precarious because of the criminal proceedings that were then pending. Weatherbys papers contained a number of inaccuracies that would have caused them to think that Mr Z's financial position was more secure than it truly was at the time that they extended further lending for the purchase of the reservoir. I accept that Mr Z was not asked to verify what was a mixture of out of date and inaccurate information about his circumstances. I accept that he was not aware of how Weatherbys had recorded his circumstances until he saw their papers produced in the present process.

[102] Although Mr Z has capital resources, they are, largely, not easily realisable. His pension fund is a source of income. He has a shareholding of substantial value, but there is no evidence as to when he will be able to realise it. I regard the payment for his A points as a current or foreseeable resource. Conservatively, and on his own estimate, that is a sum of £150,000. If he were to sell the farm and reservoir together, he could realise at least £570,267 after paying secured borrowings, and taking account of the value of the reservoir. On his own analysis that sum should be higher, as he considers that he has enhanced the value of the property by the developments he has carried out. If he were to sell the farm, he, his partner and his youngest child would require to find and

pay for another home. I do not regard the proceeds of sale of the farm as a present or foreseeable resource for the purpose of paying school fees. The reservoir is in a different category, in that it can be sold without the proceeds necessarily being applied to the secured loan. It is worth around £107,000.

[103] It would be desirable for the children to stay in their current schools. It is rarely desirable to disrupt the schooling of any child where that can be avoided. Diana would, however, not have attended school E or another similar boarding school until the autumn term of 2023, but for the unilateral decision of Ms X. I regard payment of her fees and other costs to the extent of those that would have been associated with attending school B before the autumn term of 2023 as reasonable support in the circumstances. I am satisfied that Diana would from the autumn term of 2023 have been likely to have attended a school broadly comparable to the one she is now attending. That was in the contemplation of parties when they separated. Mr Z registered interest in her attendance at school E when she was 9 years old.

[104] Both parents owe the children an obligation of aliment. Neither can pay school fees from income. As matters currently stand, if the children are to remain in their current schools, the fees will have to come from capital resources. Both parents are in a position to engage in economic activity to produce some income, but neither is currently doing so. It is necessary to approach matters on a fairly broad basis having regard to the resources of both the parties. Considering Mr Z's current and foreseeable capital resources in the context of the respective current and foreseeable capital resources of the parties, I find Mr Z liable to pay one sixth of the school fees, invoiced extras and education costs of Euan for school C and James for school D from 4 July 2022. So far as Euan is concerned, that involves a variation of the Minute of Agreement. So far as Diana

is concerned, I find Mr Z liable to pay one sixth of the school fees, invoiced extras and education costs for her attendance at school E until the end of the summer term in 2023 only to the extent of the costs that would have been incurred in relation to her attendance at school B. Thereafter I find him liable to pay one sixth of the fees, extras and costs for Diana's attendance at school E.

[105] On issuing my opinion to parties on 30 March 2023 I pronounced an interlocutor putting the case out by order for discussion of:

- (a) the precise terms of the interlocutor so far as relating to Diana's school fees;
- (b) expenses;
- (c) any further anonymisation that might be required, and the potential for all or part of this opinion to be published on the Scotcourts website.

This opinion incorporates the agreed suggestions of parties regarding further anonymisation.