Neutral Citation Number: [2023] EWFC 229 (Fam)

Case No: ZZ22D00703

IN THE FAMILY COURT
SITTING AT
THE ROYAL COURTS OF JUSTICE

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/12/2023

Before :

SIR JONATHAN COHEN

- -

Between :

BL

Applicant

- and –

OR

Respondent

- -

Jonathan Southgate KC (instructed by **Hughes Fowler Carruthers**) for the **Applicant wife**
Stephen Trowell KC (instructed by **Osbornes**) for the **Respondent husband**

Hearing dates: 4 – 7 December 2023

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Approved Judgment

This judgment was handed down at 14.30pm on 7 December 2023 by circulation to the parties or their representatives by e-mail and by subsequent release to the National Archives.

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SIR JONATHAN 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.

SIR JONATHAN COHEN:

1. I am dealing with the wife's ("W) application for financial remedy orders following the breakdown of her marriage to her husband ("H").

Background

2. W is aged 63 and H is aged 67. This is a second marriage for each of them. At the time of the marriage in September 2012 W was then 52 and H was 56. They had been friends for many years and the parties and their former spouses often socialised with one another. Each party has two grown-up children.

3. W and H started their relationship in 2000. By that time each was either going through a divorce or had already been divorced. It was at H's instigation that W instructed for her divorce the same solicitor as he had instructed.

4. Although the parties did not marry until 2012, they spent a lot of time together as a couple from 2000. It is however agreed that there was no pre-marital cohabitation that could be properly described as relevant to the issues that I have to determine. H remained based in his former matrimonial home in Hampstead and W was based in her flat in St John's Wood, overlooking Regent's Park.

5. The parties became engaged in 2009 but as a result of family illness the wedding was delayed until 2012.

6. H was a wealthy man, and it was important to him that there should be a pre-nuptial agreement (PNA) so that he could preserve his assets. The core issues of law that I have to determine are:

    i) The effect and weight to be given to the PNA; and

    ii) The impact upon the award that W receives of her giving to her daughters during the marriage her main asset, namely the St John's Wood flat and her failure to enforce a large order for costs and interest payable to her by her former husband.

The PNA

7. The PNA was made by deed dated 7 September 2012. That was exactly 3 weeks before the date of the celebration of the marriage. The agreement was in a familiar form and contained the following provisions which are particularly material:

    "H. [H and W] each acknowledge that they are entering into this Agreement of their own free will and without any undue influence or duress whether from the other or any third party and not in reliance on any collateral promise or representation.

    I. [H and W] have each received separate and independent legal advice upon the matters referred to in this Agreement prior to its execution and are both fully aware of the rights and responsibilities he or she may be acquiring or surrendering pursuant to this Agreement. [H] has been advised by [a partner] of Messrs Gordon Dadds of 80 Brook Street, London W l K 5DD and [W] by [a partner] of Messrs Alexiou Fisher Philipps of l 06-108 Wigmore Street, London WIU 3LR.

J. [H and W] have fully and frankly disclosed to each other their means which are set out in summary form in Schedules 2 and 3 to this Agreement and also their other relevant circumstances.

M. This Deed is intended to bind the parties wherever they may be resident or domiciled and wherever they may be resident at the time of permanent breakdown of the marriage.

N. The matrimonial home shall be defined as any property which is the family residence and which is agreed by the parties to be the matrimonial home in writing and in a document signed by both parties from time to time. Such document will set out the respective shares of the parties in such property in the event of it being in joint names. Such property can either be the Separate Property of one party or owned by the parties jointly. There shall be only one matrimonial home at any one time and the parties need not have their main residence at such property.

2. Prior Agreement

[H and W] have entered into no prior Agreement with each other.

3. Separate Property 3.1 'Separate Property' means in respect of each party:

(e) the matrimonial home of [H and W] shall be Separate Property insofar as any share thereof derives from Separate Property, and for the avoidance of doubt all the present property of H, which includes 6 IA and Flat 5 / 25 OS, shall remain his Separate Property, unless otherwise agreed in writing and signed by both parties, although in due course any matrimonial home may become Joint Property on the terms set out in paragraph N hereof;

3.2 [H and W] agree that neither party shall make a claim against the other's Separate Property save where such a claim is made to enforce the terms of this Agreement.

7. General provisions

7.1 This Agreement, with its Schedules constitutes the entire Agreement and understanding between [H and W]. There are or have been no representations, promises, covenants or undertakings, whether written or oral, other than those expressly set out in this Agreement.

7.4 [H and W] hereby specifically and expressly acknowledge, declare, accept and agree that he and she, respectively:

(a) have carefully read each provision of this Agreement (including the Schedules) prior to its execution;

(b) have each retained separate legal advisers to advise him or her in respect of this Agreement and to assist him or her in the negotiation of this Agreement as referred to in recital I;

(c) have had all the provisions, related questions and implications satisfactorily explained to him/her and have been fully advised as to its terms and effect by his/her respective separate legal advisers;

(d) is fully informed as to:

(1) the facts relating to the subject matter of this Agreement,

(2) the assets, Property and financial obligations of each party, and (3) the rights and obligations of both of them;

(e) have been provided with disclosure of the property and financial obligations of the other party to his or her mutual satisfaction."

8. By schedule 1 of the agreement it was provided that on the permanent breakdown of the marriage between 7-10 years of its separation W would receive £650k index linked plus four payments of £12.5k described as "rehabiliatory periodical payments". The sum value of this provision to W when paid, as it has been, by H was £738,341.

9. H's assets are set out on a closely typed template which show an aggregate of £48m net, mainly in his business assets. He gave the value of his home at just under £8m.

10. W's assets totalled £2.2m of which £1.36m was comprised of her St John's Wood flat and £545k was the value of the costs orders made against her former husband but which had not been paid; the balance was largely in various savings accounts.

11. Each party produced a statement signed by well-known solicitors confirming that she/he had received advice about the effect of the agreement, the wisdom of it and whether the provisions were fair and reasonable.

12. W argues that it was always intended that H would sell his home so that they could set out on their new life together in a new joint property. H accepts that W was not happy living in what had been his former matrimonial home but that he was only prepared to move if a new property was bought on the terms set out in the PNA, which would have required W to pay her way. In consequence, the couple lived in H's former matrimonial home and never purchased elsewhere. I do not regard this issue as one that is relevant to the outcome.

13. In 2013 W's former husband died suddenly, aged 56. His estate was not straightforward, but for the purposes of this trial it was broadly agreed that about £2.5m, perhaps less tax, became payable to his two daughters who were the beneficiaries of his will. This included the still unpaid costs order in favour of W.

14. Towards the end of 2014 W, worried about her health, was tested for HPV. The report that came back was that she was negative for the two most common high-risk types of HPV, but was positive for other HPV. Following an examination on 31 March 2015 a biopsy took place to investigate two breast lumps. About 3 weeks later the welcome news came that they were benign.

15. W says that the effect of the death of her former husband and her own health anxieties meant that she felt that she needed to think carefully about the future. She says that she told her husband that they needed to look at their priorities which were to sort out their health, sort out their wills and make sure that they had properly provided for their respective children.

16. I agree with Mr Trowell KC that W's health worry cannot have been the impetus for the transaction as the timing does not fit.

17. W says that she had always made it clear that her flat, which I shall abbreviate to VC, would go to her girls. She took advice from her accountants who recommended solicitors whom she believes she met on several occasions and on 25 March 2015 she transferred VC as a gift to her daughters. She says that this was an unconditional transfer and she retained no rights in the property and that from that date onwards the rental income (the property being rented out), went to her daughters.

18. It is clear that W did not tell H of the intended transfer at any stage before its completion. She says that it was to be inferred from her repeatedly telling him that the property was going to her daughters and by her discussion following her first husband's death that it was important to look after the next generation.

19. W's case on this issue has not been consistent. At one stage it was her written case that H had known of the possibility of the transaction in 2014. She now says that she did not tell him in advance because he was away so much and it was necessary to inform him at the right time. The opportunity, she says, never arose until after the event.

20. I do not accept her evidence on this and I far prefer H's evidence which was to the effect that he only discovered when HMRC commenced an investigation into his tax affairs which necessarily brought in W. He says that it was when W had to reply to a HMRC requirement for information about various matters for which H's involvement was necessary, and which included details of the transfer, that he discovered from W's draft reply to HMRC in late February 2017 that W had disposed of VC.

21. I accept H's evidence on this. I do so because:

    i) I cannot accept that W did not have the opportunity to inform H in advance of the proposed transaction. She had instructed accountants and solicitors. If the marriage was happy, as both say it was, there could be no reason not to tell him in advance;

    ii) The changes in W's case are concerning;

    iii) In her oral evidence for the first time W said that she had found an old diary which confirmed that H was away playing golf in the far East in March 2015 and therefore she must have told him soon after his return several weeks after the transaction. There had been no mention of this before;

    iv) This transaction amounted to W parting with the bulk of her assets. It was not a transaction that took place overnight. A valuation had to be arranged for the purposes of the transfer and the various professionals instructed. It could not have been undertaken without considerable forethought. On her case, there was no reason not to tell him of the transaction well in advance of its completion.

22. Although I accept that H was not told until early 2017, I do not understand why it was that W kept him in ignorance. She says that when she did tell him his reaction was simply that she should have told him in advance as he would have been able to assist

her in saving CGT. H denies any such reaction and I accept that. W has not put before the court any information what if any CGT she paid.

23. My conclusion is that the likely reason for keeping him in ignorance was that she did not consider that it was any of H's business. H is not a man to be taken lightly. His evidence showed him to be particular and strong-willed. I suspect that W did not want him involved in what was a family transaction between her and her daughters. She described it as inheritance tax planning. I accept that she was rattled by the death of her first husband and wanted to make provision for her daughters.

24. She said that she gave no thought to the PNA at the time of the transfer. The marriage was happy. I have no reason not to accept this evidence. I likewise accept her evidence that W never said to H that she retained control of the flat after she gave it to her daughters.

25. In November 2020 H was sentenced to 3 years in prison for the offence of cheating the Public Revenue. This conviction arose out of the way that H had conducted the tax affairs of his business. He was released on licence in December 2021 having served 13 months of his sentence.

26. The marriage broke down in early 2022 and a decree nisi was pronounced on 20 January 2023. It has not yet been made final. The parties remain living under the same roof in Hampstead.

27. H is on any account a wealthy man. His business has been marketed and indicative offers received. Exactly what H will receive is uncertain because the tax payable is so speculative. I have been given a bracket of £16-£73m net. I suspect that it is very unlikely to be at the lower end of the estimate. His other personal assets total some £20m.

28. At an earlier stage in these proceedings W was seeking an award of £9.2m on what she described as a full needs basis. H has accepted that this is a sum that he is able to pay, albeit that he says that it would be far too much for W to receive in the circumstances. H, having run what is colloquially called the millionaires defence, has therefore not been obliged to make significant discovery. His assets include the matrimonial home which he has put as now worth £9-£11m. It is a very substantial property which is in good condition. It amounts to about 8,000 sq. ft. It has the benefit of staff accommodation in which there is a live-in housekeeper.

29. The argument in this case has revolved around the two traditional assessments of what comprises a reasonable housing fund and what comprises a reasonable capitalised income fund.

30. The parties strongly disagree as to the impact of the PNA upon the assessment of W's needs.

<u>The parties' open positions</u>

W

31. She seeks an order of £5.6m. She says that she has factored in to her claim the impact of the PNA by the reduction from £9.2m to £6m which she has then further reduced by £400k to reflect the fact that she has recently managed successfully to defend a claim against a property in Malta which she owns. The value of that property is some £400k and she has other assets totalling £155k.

32. H was obliged to and has paid W the sum of £738,341 under the terms of the PNA. That sum has largely been expended upon her costs of these proceedings, namely £447k.

33. She puts her housing need at between £3-£3.5m plus the costs of purchase and she seeks a Duxbury award of £3m which she calculates as producing an income of £175k pa.

34. She says that the sums that she is claiming are very much reduced from what she would have received if there had been no PNA, namely a housing fund of £4.7m and an amortised Duxbury award of £4.55m reflecting her budget of £260k pa - hence the figure of £9.2m seen at paragraph 31 above.

H

35. H offers to pay the sum of £4m. This is in addition to the £738,341 he has already paid.

36. H has provided housing particulars in the bracket between £1.65-£1.8m plus SDLT and other purchase costs, so as to produce a figure of £2m all in for W's housing. It is his case that if any provision is made above the sum that he offers, then it should be on a basis that the entire sum will be held on trust for him or his sons to be repaid on W's death.

37. He argues that a Duxbury figure of some £2m would enable W to live at the rate of approximately £125k pa. He does not discount this by her own assets of £555k but says that this sum should be regarded as available for her to meet the costs of furnishing and doing any necessary works to her new home and to meet various other expenses. If however my total exceeds £4m, he says that I should adjust the figure downwards by the amount of her available resources.

Property particulars

38. It will readily be seen that there was a substantial gap between H's top figure of £1.8m and W's bottom figure of £3m. I asked the parties to fill this gap and I was presented with some further particulars, all of which fall within the bracket of £2.5-£2.65m. When I queried this, I was told that there was little on the market. Thus it is that I have H's particulars in the bracket of £1.65-£1.8m; W's at £3m-£3.5m and 5 sets of particulars all in the small bracket in the middle.

39. H's particulars are mainly at the north end of St John's Wood as it approaches Swiss Cottage or in Maida Vale, while W's particulars are in prime St John's Wood. Those in the middle are mainly in good parts of St John's Wood but offer less than what W seeks.

40. It is common ground that W's needs are properly met by the provision of a 3 bedroom flat.

The law

41. It is unnecessary to set out the law at length as it has been clearly laid down in Granatino v Radmacher [2010] UKSC 42:

"Fairness

75 White v White [2001] 1 AC 596 and McFarlane v McFarlane [2006] 2 AC 618 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 v MacLeod [2010] 1 AC 298:

"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."

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.

Non-matrimonial property

79 Often parties to a marriage will be motivated in concluding a nuptial Agreement by a wish to make provision for existing property owned by one or other, or property that one or other anticipates receiving from a third party. The House of Lords in White v White [2001] 1 AC 596 and McFarlane v McFarlane [2006] 2 AC 618 drew a distinction between such property and matrimonial property accumulated in the course of the marriage. That distinction is particularly significant where the parties make express agreement as to the disposal of such property in the event of the termination of the marriage. There is nothing inherently unfair in such an agreement and there may be good objective justification for it, such as obligations towards existing family members. As Rix LJ put it, at para 73:

"if the parties to a prospective marriage have something important to agree with one another, then it is often much better, and more honest, for that agreement to be made at the outset, before the marriage, rather than left to become a source of disappointment or acrimony within marriage."

Future circumstances

80 Where the ante-nuptial agreement attempts to address the contingencies, unknown and often unforeseen, of the couple's future relationship there is more scope for what happens to them over the years to make it unfair to hold them to their agreement. The circumstances of the parties often change over time in ways or to an extent which either cannot be or simply was not envisaged. The longer the marriage has lasted, the more likely it is that this will be the case. Once again we quote from the judgment of Rix LJ, at para 73:

"... I have in mind (and in this respect there is no real difference between an agreement made just before or just after a marriage) that a pre-nuptial agreement is intended to look forward over the whole period of a marriage to the possibility of its ultimate failure and divorce: and thus it is potentially a longer lasting agreement than almost any other (apart from a lease, and those are becoming shorter and subject to optional break clauses). Over the potential many decades of a marriage it is impossible to cater for the myriad different circumstances which may await its parties. Thorpe LJ has mentioned the very relevant case of a second marriage between mature adults perhaps each with children of their own by their first marriages. However, equally or more typical will be the marriage of young persons, perhaps not yet adults, for whom the future is an entirely open book. If in such a case a pre-nuptial agreement should provide for no recovery by each spouse from the other in the event of divorce, and the marriage should see the formation of a fortune which each spouse had played an equal role in their different ways in creating, but the fortune was in the hands for the most part of one spouse rather than the other, would it be right to give the same weight to their early agreement as in another perhaps very different example?"

The answer to this question is, in the individual case, likely to be "no".

81 Of the three strands identified in White v White [2001] 1 AC 596 and McFarlane v McFarlane [2006] 2 AC 618, 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."

The impact of the PNA

42. The parties in their different ways both mount arguments that I regard as unsustainable.

43. H in my judgment is right to say that W's alienation of her home is a material factor. If she chooses to give away what would have been an entirely reasonable home for her, she cannot expect it to be without consequences. She has the autonomy to do with her assets as she wishes, but that exercise carries consequences.

44. W's needs still have to be met but the self-directed loss of VC means that she has to accept that (i) her needs might be met at a lower level than if she had retained the property and (ii) consideration has to be given to the purchase of her new home being subject to H having an interest in it. Precisely what form the interest takes is to be determined but for these purposes I shall call it a charge or an interest.

45. I refer to HD v WB [2023] EWFC 2 at paragraphs 54-55 where Peel J says:

> 54. Thus, in the right case, a minimal award to meet basic needs may be appropriate, but it must depend on all the factors including the PNA, resources, length of marriage, contributions and lifestyle. The courts have shown themselves to be flexible on these matters, consistent with the discretionary exercise. By way of examples of meeting needs, and respecting the limitations intended by a PNA, courts have been willing to make housing provision on a trust basis, rather than outright. That was the solution in Radmacher itself, WW v HW (supra) and Luckwell v Limata [2014] 2 FLR 168, whereas in Ipecki v McConnell (supra) and AH v PH [2013] EWHC 3873 the housing provision was made outright. The term of such a trust basis has generally been for life, but sometimes with a step down in quantum at the conclusion of the children's tertiary education; in Radmacher itself, occupancy of a property for life was not in fact coupled with a step down.
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> 55. As for an income fund, by definition (unlike housing) that is usually a dwindling sum because monies are spent on living expenses. Courts have not shied away from a capitalised maintenance sum. To reflect a PNA, that sum can be limited by the level of maintenance (the multiplicand) or the length of term (the multiplier). Thus, in Radmacher the capitalised maintenance sum was intended to last to the end of the children's minority but not beyond. By contrast, in KA v MA (supra) the capitalised fund was on a whole life basis.

46. It will thus be seen that the court has a wide discretion as to what is appropriate on the facts of any given case.

47. Guidance is also to be found in the judgment of King LJ in Brack v Brack [2018] EWCA Civ 2862):

> 103. In my judgment, in the ordinary course of events, where there is a valid prenuptial agreement, the terms of which amount to the wife having contracted out of a division of the assets based on sharing, a court is likely to regard fairness as demanding that she receives a settlement that is limited to that which provides for her needs. But whilst such an outcome may be considered to be more likely than not, that does not prescribe the outcome in every case. Even where there is an effective prenuptial agreement, the court remains under an obligation to take into account all the factors found in s25(2) MCA 1973, together with a proper consideration of all the circumstances, the first consideration being the welfare of any children. Such an approach may, albeit unusually, lead the court in its search for a fair outcome, to make an order which, contrary to the terms of an agreement, provides a settlement for the wife in excess of

her needs. It should also be recognised that even in a case where the court considers a needs-based approach to be fair, the court will as in *KA v MA,* retain a degree of latitude when it comes to deciding on the level of generosity or frugality which should appropriately be brought to the assessment of those needs.

48. I reject W's submissions that in considering the matter, what W did with VC was irrelevant. Mr Southgate KC contends that unless what W did in handing over the property is pleaded as conduct which would be inequitable to disregard or unless H succeeds in showing that this was wanton dissipation which would lead to an addback, it cannot be taken into account in the assessment of her needs.

49. I regard these arguments as unsustainable. Handing over her flat, done without H's consent or knowledge, is plainly a material circumstance. That it has not been pleaded as conduct or wanton dissipation leading to an addback is immaterial. It is an important part of the factual scene in measuring what is a fair way of meeting W's needs. To ignore it in the circumstances of the PNA would plainly lead to unfairness.

Housing

50. There is a significant measure of disagreement between the parties as to how I should treat W's housing needs in the circumstances where she owned a flat in St John's Wood, her chosen location, which says H would be perfectly adequate for her own occupation had she not chosen to give it away.

51. It is instructive to look at the value of the flat. When transferred to the children in 2015 it was given an estimated value of either £2.6m (according to the Office Copy Entries) or £2.7m (according to a somewhat ambiguous email sent by W's daughter in which this figure is given without it being clear whether it refers to 2015 or 2017). Its value may not have changed significantly since then.

52. Within the bundle with which I have been provided is a set of particulars for a similar sized flat in the same block. This was being marketed with a reduced price of £1.75m in 2022. It is likely to have been of lesser value to the flat that W owned, being on the ground floor and next to the porter's desk. Photographs show that it appears to be old fashioned in appearance. I note the service charge is just under £11k pa, which is a useful guide to her future need.

53. H says that W should live in Maida Vale, where she could rehouse comfortably for £1.8m without having to spend any significant sum on refurbishment.

54. I regard W's wish to live in St John's Wood as being reasonable. It was where she was living before the marriage. It is close to her daughters and to her many friends. It is the centre of many of her activities.

55. I accept H's argument that she could rehouse at a cheaper price in the near neighbourhood in Swiss Cottage, Maida Vale or elsewhere. In my judgment there is a trade off between size, condition and location. If W wishes to live in the more expensive environs of St John's Wood, she must accept that her home is likely to be either smaller or in less modern condition than she will achieve elsewhere, and it will come subject to a charge.

56. I have examined all the particulars and I do not think it helpful or necessary for me to go through each one individually. The properties chosen by H for W's occupation are all in slightly less desirable areas than W has chosen. They all, in her eyes, have some deficiencies: they are closer to Swiss Cottage or Maida Vale; they have mixed but external parking provisions; they face onto busy roads; several are ground floor or basement flats which raise security issues. Several are in good condition internally but have less attractive communal parts.

57. H in closing plumped for the two Maida Vale flats which W could buy for a costs inclusive figure of £2m. They are nice flats but I can understand why W does not want to live in a ground floor or lower ground floor flat and would feel insecure there.

58. W's first round of property particulars consisted of 4 top notch flats with between 1,500-1,800 sq ft of accommodation. They are all of the highest standard.

59. I regard them as being excessive to W's reasonable needs and the one that does quote a service charge states that it is in excess of £21k pa.

60. The two new sets of particulars provided by W at my request are both of substantial flats of around 1,800 sq ft, at £2.6-£2.65m and each described as in need of modernisation. H's additional particulars are all in a very similar bracket of £2.5-£2.6m, but without the need for remedial works.

61. This bracket seems to me to be a reasonable sum bearing in mind that it is also similar to the anticipated current value of VC. I am not inclined to add on a sum for modernisation on the basis that no doubt a reduction can be negotiated from the asking price and/or W can pay for the works herself. If W wishes to choose these locations, she must pay the costs of any necessary works from her capitalised income award or the value of her own assets, to which I shall return. I therefore award a housing sum of up to £2.6m. This will attract SDLT which is added to the award of up to £223k-£300k depending on whether the second property provisions bite. If they do and a rebate is subsequently obtained, that will be paid to H. In choosing the upper end of this small bracket, the appropriateness of a charge is strengthened.

62. It is in my view clear that W's new purchase should be subject to H having a share in the equity in the new property. Having given one home to her children, it cannot be right that W should be provided with another home to pass on to them absolutely upon her demise.

63. I regard H's proposal that if the property costs him less than £2m there should be no charge in his favour, but that if it costs more there should be a charge for the entirety of its value as without logic.

64. The extent of the charge is not straight-forward. I do not think that it should be near to 100%. W will be investing her own time and money in making it a comfortable home, probably by a combination of spending her own money and through improvements done via the service charge.

65. I see the force of the point made by W that it might be that she will need to raise funds on the property if she needs to pay for a carer in her old age. I agree that she must have the ability to substitute an alternative property and that she must be entitled to

occupation for the rest of her life or until she no longer has need of a property as her main residence.

66. I do not accept her argument that it offends the principle of the clean break, although I accept that this might be the case if the equity in her new home was wholly owned by H.

67. The charge should not be for a negligible percentage. The facts of the case would not justify that result.

68. I have selected a property of a higher value than the frugal, and having wavered between 33-50%, I have concluded that the proper percentage interest that H should have is 40%.

69. W will need a fund for furnishing the property. She has provided very recently a list of proposed expenditure on furniture totalling some £197k plus design fee and commission. She will have some chattels, but not very many, to take from the matrimonial home. I regard the list that W has provided as substantially inflated in some respects, but it also excludes many items. I assume the figure of about £150k.

70. I do not take into account in assessing W's needs the sum that she has foregone in respect of the unpaid costs orders in her favour. H accepts that she chased for a decade the payment from her former husband to which she was entitled. Notwithstanding H's assistance, nothing was obtained.

71. It is invidious to say that W should, following the unforeseen death of her children's father, then have sought to recover from the girls the costs award. At the time W was happily married and being well looked after by H. H never suggested to W, and nor would it have been his place to do so, that she should pursue her daughters for repayment. I do not accept that out of the blue upon their father's death one or both of the children said, as H avers, that they would ensure that their mother received the money. If they did, then that was a one-off comment that was never repeated.

Standard of living

72. The standard of living was plainly high. The parties would eat out in expensive restaurants. They would take on average two foreign holidays a year staying in top-notch hotels, albeit that many of these were tagged on to H's business trips. They had live-in staff.

73. In his Form E, H put his expenditure, exclusive of what he was able to put through the business at £178k pa. I accept that this included the payment of mortgage instalments on the home. W says this was significant understatement and I suspect this is correct. The housekeeper, for example, was an employee of H's company and I was left unclear as to how this was treated.

Income need

74. The parties agree that the income provision made in the PNA is not adequate. Even if the £738,341 paid had not been mostly expended on costs, it would never have been likely to have been sufficient to meet W's income needs which it is agreed will need to be covered for the rest of her life expectancy.

75. The bracket in which I am being asked to choose a figure range from £125k pa, requiring a capitalised sum of £1.993m and £175k pa which would require £2.915m

76. I have considered carefully the schedules provided by the parties. They could not be further apart. W claims an income need of £260k pa. H says that the amount that was expended on meeting her needs, stripping out those items that will not apply when she leaves the matrimonial home, totals some £55k.

77. H accepts rightly that the schedule that he has prepared contains certain deficiencies and omissions. He accepts in particular the following:

    i) That nearly all the parties expenditure during the marriage was met directly by him;

    ii) That there were various items of cash purchases which an analysis of the bank statements will not assist in quantifying;

    iii) That the schedule excludes various items including some significant ones such as private medical insurance and car insurance;

    iv) That some of the items are simply unrealistically downrated by H. In particular W points to the service charge of a 3 bedroomed flat, which H has written down to £960 pa. I have already referred to the service charge on VC and his own particulars put forward in response to my request show service charges of approaching £10k. Secondly, H has removed from W's schedule any form of staff costs. There is a live in housekeeper at the family home. When I asked W why she needed a housekeeper, her response was that she had always had one. My view on this is that she has no need of a housekeeper if she is to go into an apartment which has a concierge but that her request for having a daily to come in on two days per week was not unreasonable and I have allocated to that the sum of £20k pa, which is an inclusive figure for all staff costs including any gardening and cleaning;

    v) H has downrated her personal expenditure on major items such as holidays and entertainment to minimal sums.

78. I have looked at W's expenditure headings and have come to the following conclusions:

    Property expenses - £35k, the biggest deduction from W's figure of £51k being the removal of £13k of her requested £24k service charge.

    Utilities - £5k

    Household expenses - £30k, the biggest deduction being £15k of W's £50k for the reduced cost of the housekeeper.

    Car expenses - £10k. I note that W has given her car to one of her daughters but it is available for her when she wishes and she says that she still pays for its maintenance. If I have been over-generous to W in this item, I have compensated elsewhere.

Personal expenses - £30k, the biggest reduction from W's claim of £64k being the removal of £10k of her clothing allowance and a general reduction of costs across the board.

Leisure - £30k, the biggest reduction being £12k on holidays and a general reduction across the board.

79. This produces a total of £140k pa.

80. I do not allow any sum for life insurance or additional sums for the small figures for accountancy and bank charges which can be subsumed within her budget.

81. The parties have provided a schedule from which I have drawn the appropriate figure. Capitalisation of £140k requites payment of £2.269m.

82. I then have to consider what sums W has available to her to put towards her income fund.

83. I regard H's suggestion that I should deduct her assets of £555k if I select a figure for capitalised maintenance of over £2m but ignore it if less than £2m as without logic. Whether the figure is just above or below £2m should not lead to such a dramatic consequence. I do however agree with Mr Trowell KC that there is an attraction in saying that these funds should be left intact for her to use to buy furniture for her new home, pay the small sum (a bit over £10k) required to obtain a full state pension, and meet the incidental expenses of moving.

84. In deciding not to reduce the award by any part of this figure, I also bear in mind that the vast bulk of it represents the small property in Malta which W owns and which I am told needs work being done to it (for which I have not made provision) before it can be sold. I do not know how long it might take to sell. It may not be speedy.

85. The parties have agreed that H should have up to three months to raise the necessary funds and that W should have three months from the date of receipt of her lump sum to move out. Plainly, she must be kept comfortable in the matrimonial home until she vacates. I do not intend to go further than that in this judgment despite the parties' disagreements.

86. The parties have run many other arguments before me. It is clear that there is significant bad feeling between them. This is most unfortunate. I have attempted to limit the ambit of this judgment to what is important to the outcome.

87. My search must be to find a fair solution. I have to apply all the section 25(2) MCA factors in my search for a fair outcome. Fairness is done to the parties by looking at all the circumstances of the case, including the terms that the parties had agreed. What I have provided is intended to provide fairness between them in those circumstances.