

IN THE FINANCIAL REMEDIES COURT  
SITTING AT THE CENTRAL FAMILY COURT

Date: 10 JANUARY 2023  
Neutral Citation Number: [2023] EWFC 6

**Before :**

**HER HONOUR JUDGE MADELEINE REARDON**

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**Between :**

**DP**

**Applicant**

**- and -**

**EP**

**Respondent**

**(Conduct; Economic Abuse; Needs)**

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Ms Harris for the applicant  
Mr Lewis for the respondent

Hearing dates: 28 – 30 September 2022, 14 October 2022, 14 November 2022  
Costs decision: 10 January 2023

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**JUDGMENT**  
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## **HER HONOUR JUDGE MADELEINE REARDON :**

### **Introduction**

1. This is my judgment at the conclusion of a final hearing in financial remedy proceedings.
2. The applicant wife is a property consultant. She is 49. The respondent husband is a builder. He is 59. They married in 1994 and separated in 2018. Between them they have three children, all now adults.
3. For convenience I intend to refer to “the marriage,” and to the parties as “H” and “W”, notwithstanding the background which, as I shall explain, is a little unusual.
4. The proceedings began conventionally in 2019 with a petition for divorce, upon which decree nisi was granted in March 2020. Subsequently it transpired that at the date of the parties’ marriage W was married to another man. This led to an application by H to rescind the decree, expert evidence from the country where W’s first marriage had taken place, separate litigation in that country; and ultimately, in June 2022, an agreement that W would not defend H’s application for a nullity order. In the meantime the financial remedy proceedings suffered a considerable amount of delay.
5. It is a significant feature of the case and of the background that H is (or has been until quite recently<sup>1</sup>) functionally illiterate. For the majority of his adult life, therefore, he has had to rely on others to support him with many aspects of day to day life which most people take for granted. It is not disputed that for the duration of the parties’ cohabiting relationship it was W who undertook that role.
6. I should make it clear that H’s illiteracy has not prevented him from building up a successful career, and that the income he has generated has contributed to the parties’ ability to provide a comfortable lifestyle for themselves and their children.

### **The proceedings**

7. W’s application for a financial remedy order was issued in November 2019. It became apparent during the course of this hearing that because the focus of the parties for much of the past three years had been on the complex and hotly-contested matrimonial proceedings, most of the preparation for this hearing had been shoehorned into the window between the hearing on 9.6.22, when those proceedings were compromised, and this hearing in late September. H’s side of the case was particularly difficult to prepare in such a limited timeframe because of the challenges he faces in getting to grips with the issues without being able to read any of the documentation for himself.
8. The hearing was listed with a time estimate of three days. On the morning of the third day, when I was expecting to hear submissions, the parties informed me that H’s legal team had discovered, on reviewing some of W’s bank statements, that there was a significant discrepancy between what those statements purported to show and W’s written and oral evidence. After hearing submissions I determined that notwithstanding the fact that this discrepancy could and should have been spotted

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<sup>1</sup> H has been taking lessons in reading and writing over the past couple of years. There is some dispute about his current level of literacy but it is accepted that over the relevant period (ie throughout the parties’ relationship) he could neither read nor write.

by H's legal advisors well before the hearing, fairness demanded that the evidence be re-opened and the issue in question explored. H's vulnerabilities, and the fact that he would not have been able to spot the discrepancy himself, played a significant part in that decision.

9. The need to recall W on this issue meant that I was unable to complete the hearing within its listed time slot, and this judgment has had to be reserved.

### Summary of the issues

10. From one perspective this case could be described, and has been by W, as a straightforward "needs" case. The identified capital assets are relatively modest, totalling something in the region of £1.46m. Those funds will inevitably be required to re-house both parties.
11. Moreover, the parties' children are adults, both parties are working, and neither has any particular health or social disadvantage. In other words, there is little to choose between them in terms of need. So this ought to be a case, all else being equal, where the "needs" and "sharing" principles are aligned and point unerringly towards an equal division of capital and a clean break.
12. H disagrees. His case is that throughout the relationship W was leading what he describes as a "double life". He believes that, having knowingly entered into a bigamous marriage with him, W conceived a plan to defraud him and ultimately to leave him, having enriched herself at his expense. In addition to making allegations of sexual infidelity, which do not directly concern this court (I record for completeness that W makes similar allegations against him), H says that throughout the marriage W was siphoning off joint funds and using them to accrue assets that he knew nothing about. He says that his illiteracy permitted W to act in this way, and that she exploited his vulnerability in this regard.
13. H is therefore running:
  - a. An "add-back" case (that certain funds which H says W has either recklessly or deliberately dissipated from the parties' resources should be added back into the matrimonial pot before distribution);
  - b. A case that it is more likely than not that W has undisclosed assets, derived from the funds which he says she has diverted and hidden over the course of the relationship;
  - c. A "conduct" case (ie that W's conduct in and of itself is something that it would be inequitable to disregard under MCA 1973, s 25(2)(g)); to supplement his argument on this point, H says that W's conduct amounted to economic abuse within the definition contained in the Domestic Abuse Act 2021, s 1(4).
14. These aspects of H's case inevitably overlap. They lead H to propose that out of the available and identifiable assets, he should receive (on his figures<sup>2</sup>) £919,898 and W £528,885, resulting in a capital division in his favour of 63%:37%.
15. W denies H's allegations entirely. In her Form E she alleged that H had perpetrated emotional abuse towards her during the marriage, although she is not running a "conduct" case within these proceedings. She says that because of H's behaviour towards her, in particular during a period when she was unwell abroad in 2008/2009, she considered the marriage to be over many years before the separation. She accepts that from time to time during the parties' relationship she undertook financial transactions which she did not inform H about, but says that this was because the parties managed

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<sup>2</sup> There are some differences between the parties on computation, most significantly as to the value of a jointly-owned property in Dubai.

their finances independently, and that H also engaged in financial ventures without informing her (although she does not specify what these were).

16. W's case, broadly speaking, is that the matrimonial pot should be divided equally. In fact, because she agrees that the parties should each retain their business assets and she should bear some of her own debt, her proposal results in a 55%:45% division of the assets in H's favour. On her figures she would leave the marriage with £663,920 and H with £795,330.
17. The parties agree that neither should pay spousal maintenance to the other, and there should be a clean break.

## **Background**

18. H is a national of [country A] who has lived in the UK since the late 1970s. W is from [country B], and has lived in the UK since 1990. The parties met in the early 1990s when both were working for the same employer. They cohabited from 1992 and married on 5 February 1994. It is agreed that at the outset of the marriage neither had much in the way of assets, and therefore that the entirety of the asset base was accrued during the course of the relationship.
19. At a hearing before Recorder Chandler KC on 9.6.22 it was determined by consent that the marriage was void *ab initio* because at the time it took place W was married to someone else. I am conscious that the factual background to this is highly contentious, and that no findings have been made because the matter was compromised. What does not seem to be disputed is that W's marriage took place when she was just 16, after she had been made pregnant by a man significantly older than her. She separated from her husband after just over a year of marriage, when she and her family moved to the UK. The marriage was annulled in [country B] in 2021.
20. Between them the parties had three children: H's daughter from a previous relationship, W's daughter from her marriage in [country B], and a third daughter born to both parties in 1995. All were treated as children of the marriage. They are now all well into adulthood and fully independent.
21. The parties gave very different accounts of the nature of their relationship. H says that although there were some difficulties from time to time, the parties remained in a cohabiting and meaningful relationship until 2018. W says that from early in the marriage she considered that the difficulties were insuperable and that she informed H of this in 2009; thereafter, she says, although they continued to share a home they were effectively separated and no longer considered themselves a couple.
22. The parties separated in November 2018. H has remained living in the former family home, a two-bedroom flat in North London. W is currently living in a property jointly owned by the parties that was previously their family home.

## **The law**

### *The fact-finding process*

23. Factual disputes are resolved by the financial remedies court on the balance of probabilities. The burden of proving that an allegation is true lies with the party making the allegation. Findings must be based on evidence, including inferences that can properly be drawn from the evidence, and not on

suspicion or speculation. The law operates a binary system and may only find either that something happened or that it did not happen: *Re B* [2008] UKHL 35.

24. Lies told by a party or witness may legitimately affect the view the court takes of their credibility. However, in circumstances where a witness has lied, the court must take care to give specific consideration to how the witness's lack of credibility should be factored in when determining an issue of fact. In particular, the court should consider whether the lie was deliberate (ie it did not arise from confusion or mistake); whether it related to a significant issue; and whether there is anything else, for example shame, misplaced loyalty, fear or distress, which could explain the lie: *R v Lucas* [1981] QB 720; *Re A, B and C (Children)* [2021] EWCA Civ 451.

#### *The s 25 discretionary exercise*

25. The court's exercise of its discretion to make financial remedy orders is governed by the factors set out in MCA 1973, s 25 and by case law. The authorities have established that the ultimate aim of the court is to achieve an outcome which is fair: *White v White* [2000] 2 FLR 981.
26. In determining where fairness lies in a particular case, the court will have regard to the principles of needs, sharing and (more rarely, and not applicable in the present case) compensation: *Miller v Miller; McFarlane v McFarlane* [2006] 1 FLR 1186. Most cases will be resolved by a focus on each party's needs. If there is a surplus of resources over needs, the sharing principle will be engaged. In cases such as this one, where the entirety of the asset base has accumulated as a result of the parties' efforts during the marriage, it is likely that an application of the sharing principle will result in an equal division of the assets.

#### *Conduct*

27. One of the s 25 factors, to which the court must have regard in an appropriate case, is s 25(g): "the conduct of each of the parties, if that conduct is such that it would in the opinion of the court be inequitable to disregard it".
28. S 25(g) has generated a significant amount of case-law. A "course correction" was imposed by the House of Lords in *Miller v Miller; MacFarlane v MacFarlane* [2006] UKHL 24, Lord Nicholls observing a tendency in some cases to have regard, as part of all the circumstances of the case, to behaviour that would not meet the statutory definition. Lord Mance used the word "egregious" to describe the sort of conduct that in his view would cross the s 25(g) threshold. Shortly after *Miller; MacFarlane*, in *S v S (Non-Matrimonial Property: Conduct)* [2006] EWHC 2793, the term "gasp factor" was coined as a test for what in a much older case<sup>3</sup> had been described as "the sort of conduct which would cause the ordinary mortal to throw up his hands and say '...surely that woman is not going to get a full award.'"
29. In *G v G* [2002] 2 FLR 1143 Coleridge J observed that "contribution" is in fact a species of conduct, s 25(g) "conduct" referring to negative behaviour and s 25(f) "contribution" to positive. Baroness Hale drew the two concepts together in *Miller; MacFarlane* [para 146]:

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<sup>3</sup> *W v W* [1976] Fam 107

“Only if there is such a disparity in [the parties’] respective contributions to the welfare of the family that it would be inequitable to disregard it should this be taken into account in determining their shares.”

30. In *OG v AG* [2020] EWFC 52 at paragraphs 24 – 39 Mostyn J identified four scenarios in which conduct may be considered in financial remedy cases. The following summary is taken from the FLR headnote:

“Conduct is relevant in financial remedy cases in four distinct situations. First there is gross and obvious meted out by one party against the other. This will only be taken into account in very rare circumstances and will only be reflected where there is a financial consequence to its impact. This can extend to economic misconduct. If one party economically oppresses the other for selfish or malicious reasons then, provided the high standard of ‘inequitable to disregard’ is met, it may be reflected in the substantive award. Secondly, there is the ‘add-back’ jurisprudence, which arises where one party has wantonly and recklessly dissipated assets which would otherwise have formed part of the divisible matrimonial property. Thirdly, there is litigation misconduct. Where proved, this should be severely penalised in costs, although it is very difficult to conceive of any circumstances where litigation misconduct should affect the substantive division. Fourthly, there is the evidential technique of drawing inferences as to the existence of assets from a party’s conduct in failing to give full and frank disclosure. The taking account of such conduct was part of the process of computation rather than distribution. Normally the court would be able to make the necessary assessment of the approximate scale of the non-visible assets.

31. Logically, those four species of conduct will usually not be taken in that order. In most cases it will be necessary to determine allegations of non-visible assets and add-back arguments first, as part of the process of computation of the assets. The consideration of whether there is “gross and obvious” conduct which it would be inequitable for the court to disregard will then follow as part of the s 25 discretionary exercise (at which point the court will also need to have regard, if there has been an add-back, to the fact that the assets added back are no longer available to meet needs). Any litigation conduct will be taken into account at the end of the process, when determining issues of costs.
32. As to conduct generally, Mostyn J observed [para 72]:

“Conduct should only be taken into account not only where it is inequitable to disregard but only where its impact is financially measurable. It is unprincipled for the court to stick a finger in the air and arbitrarily to fine a party for what it regards as immoral conduct.”

33. In *OG v AG*, the husband had reduced the value of the family business by setting up a competitor. Mostyn J’s response to that was to ensure that the husband bore the burden of the loss in value. He rejected the wife’s arguments for a further departure from equality in her favour on general conduct grounds.
34. Recent cases where it appears that conduct without a financially measurable consequence has impacted on the distribution exercise are rare, but exist. In *K v L* [2010] EWCA Civ 125 the husband had been imprisoned for offences of sexual assault of the wife’s grandchildren. Wilson LJ, as he then was, refused him permission to appeal a decision of Moylan J (as he then was) which had awarded him a minimal sum to meet his needs out of the wife’s substantial resources. There were other factors

that justified the low award in that case, but Wilson LJ nevertheless observed at the end of his judgment that:

“on any view [the husband’s] treatment of [the wife’s] family was... so appalling and its legacy of misery has been so profound as plainly to have entitled the judge to reach what, in their absence, might well, notwithstanding the source of the wife’s wealth and even his promise in 1993, have been an appealable determination.”

#### *The Domestic Abuse Act 2021*

35. The Domestic Abuse Act 2021 created statutory definitions of specific forms of abusive behaviour. “Economic abuse” is defined as follows:

1(4) “Economic abuse” means any behaviour that has a substantial adverse effect on B’s ability to –  
(a) acquire, use or maintain money or other property, or  
(b) obtain goods or services.

36. DAA 2021, s 1(4) came into force on 1 October 2021.

#### *Add-backs*

37. In limited circumstances, the court may add back into the asset schedule funds that have been lost as a result of financial misconduct by one party, and to treat that party as though the funds were still available to them. The financial misconduct required for such an approach must be something out of the ordinary and there must be “clear evidence of dissipation (in which there is a wanton element)”: *Vaughan v Vaughan* [2007] EWCA Civ 1085. The threshold is high. In *MAP v MFP (Financial Remedies: Add-back)* [2015] EWHC 627, [2016] 1 FLR 70 the husband’s conduct in spending significant money on cocaine and prostitutes was held to be “irresponsible”, but a feature of his addictive personality and therefore not deliberate or “wanton”, and the funds were not added back.

38. Even if funds are notionally added back into the asset schedule on the dissipating party’s side, the court must remember that this exercise does not re-create the money or bring assets back into the pot, and should therefore tread cautiously: *BP v KP and NI* [2013] 1 FLR 1310.

#### **The evidence**

39. The evidence in the bundle consists of the parties’ financial disclosure, their narrative witness statements, expert valuation and taxation reports and some limited documents from the matrimonial proceedings. The documentary evidence in this case is relatively extensive, necessarily so in light of the allegations made by H, and has been of great assistance to me in determining the truth of those allegations.

40. I heard oral evidence from a Dubai-based real estate agent, Mr E, instructed as a single joint expert to report on the value of a property owned by the parties in Dubai. His evidence was clear and helpful; I will deal with it later when I come to valuing the assets.
41. The only other live witnesses were the parties themselves.

#### *W's evidence*

42. W was not a satisfactory witness. Her evidence was internally inconsistent: on a number of significant issues, the various accounts she has given over the course of these proceedings in her Form E, Replies to Questionnaire, s 25 statement and oral evidence were impossible to reconcile. Her evidence was inconsistent with unchallenged documentary evidence on a number of significant points.
43. During the course of submissions Ms Harris suggested that because counsel had not formally been invited, in line with the suggestion of Macur LJ in paragraph 58 of *Re A, B and C*, to set out the conclusions the court would be invited to draw in respect of credibility, it was not open to me to give myself a *R v Lucas* direction. As a general proposition I do not accept that; but in any case this is not a scenario where the court, faced with an identifiable lie, is required to consider what effect that lie should have on the assessment of W's evidence on other issues. Rather it seems to me that W has given so many different accounts at different times that there is no consistent thread running through her evidence, and it is difficult to see how I could give any real weight, in the absence of corroboration or inherent likelihood, to any one of her explanations over another.
44. In contrast to H, W is well educated and has no difficulties with literacy. She has considerable professional experience in property sales and investment, is financially literate and aware, and has a network of contacts in the property industry with whom she has entered into some quite sophisticated property transactions.
45. In my judgement W's competence and abilities have two consequences. First, they make it less likely that the inconsistencies in W's evidence can be explained by confusion, misunderstanding or mistake. Secondly, they mean that within the parties' relationship the balance of power, certainly as far as financial issues were concerned, was substantially in W's favour.

#### *H's evidence*

46. The evaluation of H's evidence was complicated by the fact that he had not prepared his written evidence himself and, as it turned out, his s 25 statement contained a number of passages, and exhibited documentation, with which H himself was largely unfamiliar. H was very open about this and cannot, in my judgement, be personally criticised for it: throughout his life it has been a given that he has relied on others to read documents to him and, when necessary, to enter into correspondence on his behalf.
47. The President's Memorandum: Witness Statements of 10.11.21 made it clear that the purpose of a witness statement is to "tell the parties and the court what evidence a party intends to rely on at a final hearing" [para 4]; they "must only contain evidence from the maker of the statement" [para 5]; and they "must be expressed in the first person using the witness's own words" [para 6]. H's s 25 statement did not comply with the guidance in that Memorandum. It would, in my judgement, have been much better if H's witness statement had been confined to matters about which he did have



direct knowledge, and the remaining evidence had been produced by whoever had in fact obtained it: presumably his legal team, or in some instances, I believe, his son-in-law who H says has assisted him throughout this litigation.

48. In the end, however, it has not been necessary for me to rely to any significant extent on H's own evidence, oral or written. The only issue on which H himself was able to give direct evidence was the question of the nature of the parties' relationship and the way in which they conducted their financial affairs. On that issue, as will become apparent, I preferred H's evidence to W's, as being overall more consistent with the documentation and inherently more likely. H truly believes, I am satisfied, that W has betrayed him. In his mind at least this was a genuine and subsisting marriage, regardless of its difficulties, right up until the parties separated in 2018. He viewed the parties' financial resources, in particular, as fully mingled: while he knew that W had her own earnings just as he had his, he assumed that she was managing their joint assets for the benefit of both of them and trusted her entirely to do so. Given his illiteracy he had little other option.
49. H feels a particularly strong sense of betrayal as a result of his discovery that his marriage was bigamous. This issue, for obvious reasons, was not explored in evidence at this hearing but it did seem to me, with knowledge only of the bare facts, that W's age at the time and the circumstances in which she found herself were potentially mitigating factors. It occurred to me that H's anger at W about this might have led him to assume the worst of her, perhaps unreasonably, when it came to reviewing her financial conduct. There is a risk, in my judgement, that H's anger has coloured his evidence and so I have been particularly careful, when considering W's financial conduct, to take an objective view.

## **Findings**

50. H's overarching case is that W has deliberately defrauded him by removing and/ or dissipating assets over the course of the relationship, and as a result he is significantly worse off than he would otherwise have been.
51. In order to determine this issue it has been necessary to examine five allegations of financial misconduct made by H against W. H makes it clear in his evidence that he believes these transactions to be representative of a wider pattern of similar behaviour on W's part. He has made further allegations over the course of the proceedings on which, for reasons of proportionality, findings are not sought.
52. Before turning to H's five "sample" allegations I make the preliminary finding, on the basis of the evidence of both parties and the documentary evidence, that there was no clear financial separation between the parties at any time before their physical separation in 2018. They held (and continue to hold) four properties in their joint names, and they operated a number of joint bank accounts through some of which, as is obvious on the face of the statements, they conducted a variety of household transactions. Whatever the state of their intimate or emotional relationship, they mingled their finances and remained a partnership throughout the 25 plus years of their cohabitation.
53. W said in evidence that the joint accounts simply funded the mortgages and expenses on the joint investment properties, and that otherwise the parties kept their finances separate. I do not accept that. Although I have not conducted a detailed analysis of the parties' bank statements, only a small selection of which have been included in the bundle, I am satisfied on the evidence I have read and heard that H at least treated his income as joint funds available to the household and to both parties.

Although he maintained a business bank account he regularly transferred funds from it into the joint account, and assumed that W was doing the same.

54. In reviewing the relevant transactions it has been important to keep in mind the impact that H's illiteracy had on his ability to keep himself apprised of the detail of the parties' finances. It would be easy to underestimate the challenges faced by someone in H's position, challenges which became increasingly apparent over the course of H's oral evidence. H's illiteracy placed, in my judgement, a significant burden of trust on W. Even if W is right to say that from 2009 onwards she started emotionally to disengage from the marriage and no longer viewed herself and H as a couple, she does not dispute that H continued to trust her to act on his behalf on financial issues, and to manage both the jointly-held assets and also some resources in his sole name. Mr Lewis pointed out, rightly in my view, that if W did view herself as separated, that only increased the duty on her to deal fairly with all the parties' finances, and to ensure that the dominant position she held as a result of H's illiteracy was not exploited.
55. I turn to the findings sought by H.

#### *W's purchase of Flat 1*

56. In 2007/8 W purchased a property ("Flat 1"), jointly with a man called Mr F, who was at the time one of her colleagues at a national estate agency. It is accepted by W that she did not tell H about this purchase.
57. Having considered the documentary evidence, some of which emerged during the course of the hearing, I consider that there is at least a possibility that, as W says, the funds used to purchase her share in the property were derived originally from a redundancy payment she received in 2005. W relies heavily, therefore, on an argument that these funds were not "joint" but her own money, and hers to do as she liked with without reference to H. I will return to this point.
58. H found out about the existence of the property in 2018 when he found a bank statement for one of the parties' joint bank accounts with an address on it (Flat 1) that he did not know (H was able at that time to recognise his own written name and address). He confronted W, who told him that this was a property she was looking after for a landlord. H, with the assistance of his brother-in-law, undertook a property search and discovered that W had been a joint owner of the property until 2018, when it was transferred into Mr F's sole name. W now accepts that she co-owned Flat 1 with Mr F until January 2018 when, she says, he bought her out for £82,213.
59. The bank statement which H discovered in 2018 belonged to an HSBC Jersey bank account in the parties' joint names. The original address for that account was the family home. Between May 2013 and May 2014 (statements were issued annually) W changed the address to Flat 1. W's case at this hearing was that the reason she changed the address was that there were building works at the family home and she and H had moved out. H denies that the parties moved out during the building works, and in any event W's account is inherently unlikely: the bank statements were issued annually, but the building works took only a few months.
60. Flat 1 was an investment property and W accepts it was rented out. H seeks no specific finding in respect of the quantum of rental income W received over the period of ownership, and I agree it is not proportionate to investigate this issue further.
61. I return to W's argument that the funds used to purchase Flat 1 were her own funds, to do as she liked with. It is possible to imagine circumstances in which one spouse might quite legitimately conduct a

transaction of this nature without any reference to the other. Within a marriage a couple may operate entirely independently in financial terms. There are plenty of relationships in which one party, by agreement, looks after all of the finances on behalf of the couple and the other is content not to be kept informed. Where the assets are very substantial (not the case here) it may be more likely that the purchase and sale of a single property will take place without any discussion between the spouses about it.

62. What matters, in my judgement, is not the legal ownership of the assets but the parties' expectations as to how their financial affairs would be handled and what information would be shared. In this case, I am satisfied both that H did not expect W to engage in a transaction as significant as a property purchase without informing him that she was doing so, and that W knew that H would view this as a breach of trust.

#### *The X Development investment*

63. W's bank statements show funds of £82,214 received from Mr Fin January 2018. W says that these were the funds paid to her for her share in the Flat 1 property. It is her case that in April 2018 she invested £60,000 from these sale proceeds into a property investment with X Development UK Ltd ("X Development"), a property development company. The money went towards securing an option to purchase a site in the Midlands. Originally W said that a planning application made by X Development was unsuccessful; by the time of this hearing it was her case that the developer chose not to put in a planning application or to purchase the site, and the funds were lost.
64. H (or, more accurately, his legal team) has produced publicly-available documentation showing that on 1.5.18 a different developer, put in a planning application for the same Midlands site. That application was granted in December 2018.
65. W has not been able to produce any documentation in support of her investment other than a one-page letter "to whom it may concern" purportedly written by a director of X Development, Mr G. This letter contains only a bare outline of the circumstances surrounding the option to purchase. W's evidence is that she knew Mr G through working with him previously on other property development projects. W says that the documentation in relation to this investment was left in a file at the family home; if that is correct, and her account is accurate, I can think of no reason why she could not have asked the developer to provide her with further copies. The weight I give to the X Development letter, in the absence of a witness statement from Mr G or any supporting documentation, is limited.
66. As well as the payment of £82,214 in January 2018 W's bank statements also show a further payment from Mr F of £27,500 in May of the same year. W's explanation for that payment has varied. Initially she said it was a loan advanced by Mr F because her income had dropped and she was struggling to meet her outgoings. Later in her oral evidence she said that Mr F gave her the funds, with a view to them both making a further investment in the X Development option deal.
67. It is fair to say that W's case on this issue is opaque. She said that she had not looked into the option deal proposed by X Development before investing the £60,000; H makes the valid point that even a cursory enquiry would surely have exposed the fact that a planning application by the other developer was imminent. W said simply that she had been "naïve". She could not explain why she had thrown away £60,000 on what was at best a highly speculative investment, at the same time as being so short of funds that she needed to borrow £27,500; or, if her second explanation was true, why Mr F would

provide her with further funds to invest in the option deal after the rival planning application by the other developer had gone in.

68. H puts his case in the alternative. He says that either W deliberately removed the sum of £60,000 from the assets to put the funds out of his reach, in which case I should find that they remain available to her; or she has been so reckless in committing the funds to the option to purchase, without any enquiry into the security of her investment, that her conduct amounts to “wanton dissipation” and the funds should be added back in to the asset schedule on her side on that basis.
69. In my view, it is inherently improbable that W threw away these funds on a speculative property investment. She is not, in my judgement, naïve. She is very familiar with commercial property development. Her account of these transactions has been inconsistent and none of her explanations make sense. I remind myself that even on her own case W told H nothing about these events, which took place over the final months of the marriage before the parties separated in late 2018.
70. The most likely explanation, in my judgement, is that W removed the sum of £60,000 from the assets in a deliberate effort to put them out of H’s reach.

#### *The HSBC Jersey joint account*

71. This is the parties’ joint bank account, the statements for which W diverted to her Flat 1 address in 2013/ 2014. Originally the account held the proceeds of sale of a property which was inherited by H from a friend in 2005, and sold for £347,000 in 2009. After the separation in 2018 H says he was shocked to discover that there was only about £30,000 left in the account.
72. H accepts that some of the funds from his inheritance were used to purchase two properties in the parties’ joint names, the family home and an investment property in Dubai. He says however that W has removed further funds from the account without his knowledge or consent. He has identified in particular a transfer of £30,000 out of the account in 2013 which was sent to an account in [country B].
73. W says that this money was transferred to her mother, to help her pay legal expenses in [country B], and that H was aware of this at the time. H denies this. I have no hesitation in preferring H’s account. The £30,000 transfer appears on the first bank statement issued after the address was changed by W to Flat 1. I have already rejected W’s explanation for the change of address. I find that W diverted the bank statements to eliminate the risk of H accidentally finding out about the transfer.
74. It has not been proportionate to conduct a tracing exercise to establish how the full amount of H’s inheritance was spent, particularly in circumstances where H accepts that some of the funds were used to purchase joint assets. My finding is limited to the transfer of £30,000 to [country B] in 2013. This was, in my judgment, a deliberate diversion of funds by W in circumstances where H, had he known, would not have consented.
75. Nor is it possible, or necessary, for me to make a finding as to the ultimate destination or use of the funds. H is not seeking to add them back into the asset pot in light of the time that has elapsed since they were removed. His case, which I accept, is that W’s conduct amounted to a serious breach of trust. Whether or not that should sound in terms of the ultimate division of assets is an issue I will return to later in this judgment.

### *Rent from Dubai*

76. In 2008 the parties bought, off-plan, a villa in Dubai. The development was delayed and the purchase did not complete until 2012. Since then the property has mostly been tenanted. There is not and never has been any mortgage on the property, although there are some expenses attached to it.
77. H's case is that he assumed throughout the marriage that the rent on the Dubai property was accumulating in a joint bank account in Dubai. He said in his oral evidence, "I thought we had all this money in Dubai... I'm not one really for retiring but I thought I could take things easy when I got to 60."
78. In fact, the rent from Dubai was never paid into a joint account. In November 2021, during the course of the proceedings, she agreed that going forwards the rent would be paid into a joint account. That has not happened and I found W's reasons for that unconvincing, although I accept that W has retained the rent received at least since the start of the proceedings and that this appears on the asset schedule in an account in her sole name.
79. More significantly, and again this is now not disputed, the sums currently held in W's sole name in Dubai amount to considerably less than the total rent received over the period that the property has been owned by the parties. In particular, the rent paid between November 2016 and March 2019 cannot be traced to any account in the name of either party. Considerable efforts have been expended during these proceedings on establishing what rent has been received and where it has gone.
80. W's account as to the destination of these funds shifted significantly even over the course of her oral evidence. It was this issue that necessitated her recall to give further evidence, after an examination of her bank statements established that the account she originally gave could not be true. I have done my best to reconcile W's different accounts with each other, and with the documentary evidence, but have been unable to do so.
81. W's final case, as outlined in submissions, was that her sister, who was managing the Dubai property from 2015 onwards under a Power of Attorney, had retained a large proportion of the rent for her own use. This was an expansion of her case as originally set out in Form E, in which W said that her sister had used the first two years' rent (2012-2014) for her own benefit<sup>4</sup>. W's revised proposal, put forward after the conclusion of the evidence, was that she would pay H 50% of any funds she is able to recover from her sister in the future.
82. During the course of these proceedings W has asserted at different times that the rent has been consistently paid into her own bank account since 2014; that the rent could not be paid into her account because it was dormant, and so was paid to her sister as her agent; and that she and H jointly agreed that her sister, who was struggling financially, could keep the rent and use it for her own benefit. She could not explain why, having discovered in early 2015 (on her case) that her sister had been retaining the rent for her own benefit without the parties' consent, she then executed a Power of Attorney enabling her sister not only to manage the property but to receive the rent into her own account. The suggestion that she (and H) had agreed to let W's sister and her husband use the rent paid in 2017/2018 for their own benefit (a suggestion which emerged for the first time in recall) was inconsistent with her assertion, a little later on, that her sister had retained these funds untouched in her own account in Dubai.

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<sup>4</sup> It is W's case that her sister has repaid these funds in part during the course of these proceedings, and that the sums repaid are currently held in cash in a safety deposit box in Dubai.

83. In my judgement these inconsistencies go well beyond what might be explained by confusion or faulty recollection. The only reasonable explanation, in my view, is that W has changed her story on each occasion as the flaws in a previous account have become apparent, and that none of the accounts she has given has been the truth. There is no supporting evidence from W's sister, save for a handwritten note which is said by W to represent the outcome of an accounting exercise conducted by her, but which is impossible to reconcile with any of the figures produced during the evidence.
84. I find that as far as H was aware, all of the rent on the Dubai property was paid into a joint bank account in Dubai, and the only sums paid out were for the expenses on the property. He did not know the exact sums involved but his understanding, which W did nothing to correct, was that substantial funds had accrued over the period when the property had been rented out, and that these funds were available to fund his (and W's) retirement.
85. I accept H's evidence that he had no idea that the rental income was being received by W's sister, either for her own benefit or as agent for the parties. The 2015 Power of Attorney was signed by both parties; this document came to light after the hearing had concluded, and so neither party was cross-examined on it, but in any case H's illiteracy would have meant that he was unlikely to have understood its meaning.
86. I find that W, possibly with the assistance of her sister, has diverted funds from the Dubai rental income with the specific intention to remove them from H's reach.
87. The Dubai property was rented from 2012 onwards. The annual rental income has fluctuated between AED90,000 and AED150,000; equivalent to about £18,000 - £30,000. There has never been a mortgage secured on the property; there have been some expenses, all of which have been paid out of W's Dubai account. I intend to include as expenses, and therefore disregard, various cash withdrawals and hotel expenditure by W from the account, although I accept that H did not know that this money was being spent from the Dubai rental income and would have been shocked if he had found out. H accepts that I should also disregard sums spent by W from the account on legal fees and tax payments.
88. Doing the best I can, and adopting a cautious approach by resolving uncertainties in W's favour, I find that the "missing" funds amount to at least £100,000. That figure includes the rent from November 2016 – March 2019 (a conservative estimate for which, now that some of the tenancy agreements have been located, is £20,000 per year), plus the proportion of the rent from 2012 – 2014 which W accepts is still owed to the parties by her sister (on W's figures, AED217,000 = approximately £50,000). It does not include any of the funds held in W's name in Dubai.

#### *W's attempt to sell Flat 2*

89. "Flat 2" is a property in East London bought by the parties in their joint names in 2008. H says that in 2014 and 2015 W tried to sell the property without his knowledge, but was ultimately unable to do so because the conveyancing solicitors would not proceed without direct confirmation of their instructions from H and completion by him of their Know Your Client ("KYC") procedures.
90. W says that the parties agreed in 2014 that they would list the property for sale in order to test the market and establish its value. On her case there was never any intention to sell and the property was taken off the market once two offers had been received.
91. A curious feature of the evidence on this issue is that many of the emails sent to the conveyancers over the relevant period were sent from H's email account. H's case is that he found out about the attempted sale after the parties separated, when he asked his son-in-law to help him read through

“his” emails. W accepts that she sent the emails from H’s account, although she says that she did so on his behalf and with his knowledge.

92. I have no hesitation in preferring H’s account, which is entirely supported by the documentary evidence. Over the period from August 2014 to February 2015 two successive offers were accepted on the property and conveyancing solicitors were instructed to progress the sale. Each fell through after the sale stalled due to delays on the seller’s side. The emails show increasingly strenuous attempts by the conveyancer to obtain the KYC documentation from H in order to progress the sale. They include a particularly telling exchange where the conveyancer explains that the buyer is threatening to pull out and in response W gives one excuse after another for the delay, including the fact that H has been travelling in Ireland, and then tells the conveyancers that the documentation is in the post.
93. It is impossible to reconcile these emails with the suggestion that the parties were simply trying to test the market. That purpose had been achieved once the first offer was made.
94. A further indication that H was unaware of the attempted sale is the fact that W gave her Flat 1 address, an address that H at the time had no access to, as the vendor’s correspondence address.
95. I am in no doubt that this was a deliberate effort on W’s part to sell a jointly-held property without H’s knowledge or consent, in circumstances where she must have known that H’s consent would not be forthcoming. The only possible explanation for W’s actions is that she was hoping to retain the sale proceeds and use them for her own benefit.
96. In the end W’s attempts were unsuccessful because the conveyancers’ KYC procedures held firm. There were, therefore, no financial consequences. This finding is relevant because it contributes to the overall picture of W’s financial conduct during the marriage. Taking into account H’s vulnerabilities in particular, this was a gross breach of his trust.

#### *Summary of the “conduct” findings*

97. My findings on the allegations demonstrate a pattern of behaviour on W’s part. On repeated occasions, and over a period of several years, W sought to remove assets from the family “pot” and to place them where H would not be able to access them.
98. Some of W’s conduct did not have direct and clearly quantifiable financial consequences; some did. I remind myself that while H has not formally sought findings in respect of a number of depleted funds which he refers to in his evidence, he has made it clear throughout these proceedings that it is his case that W has over the course of the marriage removed “tens of thousands” of pounds from his own and joint bank accounts. It has not been possible during this hearing to making precise findings beyond those set out above. However in my view it is more likely than not that the findings I have made on H’s sample allegations do not represent the entirety of the funds which W has removed over the years, and that the sum of the parties’ assets is less now than it would have been if W had not acted in the way she did.
99. H is deeply suspicious that W may have further undisclosed resources. My finding that she has made deliberate and sustained efforts to remove funds from his reach provides support for that suspicion. However although W may have had the sole benefit of the funds she has removed over the course of the marriage, it would in my view be going too far to make a positive finding (other than in respect of the X Development investment and part of the Dubai rent) that they remain available to her now, and I do not make that finding.

### The financial resources available to the parties (“computation”)

100. I intend to summarise the assets by category, determining where necessary the disputes as to value. Following that I will consider what adjustment, if any, needs to be made to the asset schedule in the light of the findings I have made on H’s allegations.

#### *Properties*

101. There are three jointly-owned properties whose value is not in dispute. They are:

	Value (£)	Equity (£) <sup>5</sup>
The FMH	795,000	467,749
W’s current home	570,833	249,910
Flat 2 Tenanted	291,666	75,334

102. The total equity in these three properties is £792,993.

103. The parties’ joint property in Dubai is subject to a dispute as to value. W says it is worth AED2.25m which produces equity, after costs of sale and CGT, of £440,500. H says the property’s value is AED2.45m, giving equity of £557,174<sup>6</sup>.

104. The dispute, ultimately, turns on the interpretation of the expert evidence. During his oral evidence Mr E was cross-examined on various issues potentially affecting the valuation of the property, including its location within the development and proximity to power lines. His answers were clear, well-reasoned, and obviously grounded in his considerable experience within this particular property market.

105. Mr E valued the property at AED2.25m on an immediate sale subject to the existing tenancy; or AED2.45m if sold with vacant possession. He was clear in his oral evidence that under Dubai law the tenants were entitled to a minimum of 365 days’ notice. After the hearing the current tenancy agreement was located and it was established that the current lease is due to end in December 2022. With my permission a further written question was put to Mr E, who confirmed that notwithstanding the terms of the tenancy agreement, 365 days’ notice from the landlord is required in order to terminate the tenancy.

106. I accept Mr E’s evidence. I recognise that he is not a qualified lawyer, and that this particular tenancy agreement was not put to him in cross-examination. However he has considerable experience in handling property sales and rental agreements in the development where the parties’ property is located, and it seems unlikely to me that he would be wrong about this issue, which must arise very frequently. I also consider, without wishing to stray too far into the realms of Dubai housing law, that there is some support for Mr E’s view in the terms of the tenancy agreement itself, which makes it clear that the termination of the lease is dependent on notice being given as required by Dubai law.

107. It follows that I prefer W’s figure of £440,500 for the equity in this property.

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<sup>5</sup> Net of mortgages, sale costs and CGT

<sup>6</sup> There has been considerable currency fluctuation in recent weeks. For simplicity I have retained the figures in the parties’ ES2.



108. The total equity in all properties is therefore **£1,233,493**.

*Bank accounts and investments*

109. H's funds total **£81,563**. I have adjusted the figure from the ES2 to reflect a payment towards legal fees made by H shortly before the hearing; I agree it would be unjust not to do so when the legal fees debt shown on the ES2 has been reduced by the same amount.

110. W's funds total **£28,136**.

111. The joint funds total **£46,317**.

*Cash*

112. W holds the equivalent of **£26,829** in cash in a safety deposit box in Dubai.

113. W says that H is holding additional funds in cash at the FMH. First, she says that when the parties separated in 2018 there was £31,000 in cash in a safe at the home. She seeks an account of this from H. H denies that; he agrees that from time to time in the past the parties had kept significant cash sums in the house, but says that at the point of separation there were no cash sums there and has given an explanation for how the sums previously held were spent. On this issue the burden of proof is on W and, given my assessment of her credibility generally, it is not possible to base a finding on her evidence alone. I do not find that these sums are available to H.

114. Secondly, W says that H retains £28,000 which (it is accepted) he was holding in cash for his daughter and son-in-law following the sale of their business in 2020. H says that he paid the funds back to them from his bank account (these transfers are documented), and that he used the cash primarily to pay for legal and other costs in [country B] over the period when the parties were engaged in litigation both there and in this jurisdiction in relation to their marriage. H has produced receipts for money transfers totalling £5,000; he says that the remaining funds were spent in the same manner but he no longer has any documentation.

115. Again, W carries the burden of proof. H's account is not implausible: the information I have picked up about the matrimonial litigation suggests that both parties were heavily invested in gathering evidence to support their respective cases. I do not find that H has retained any part of the £28,000.

*Business assets*

116. H trades as a limited company but has no employees or significant expenses. There is £65,349 in his business bank account on which tax will be due if the funds are withdrawn by way of a dividend. W suggests that the tax should be ignored but the basis of that argument is not explained. After tax the funds available to H total **£44,761**.

117. W also conducts her business through two limited companies. After tax the balance in her business accounts is **£4,925**.

### *Liabilities*

118. I have adjusted the ES2 as follows:
- a. To remove a prospective liability originality asserted by W for repairs to her home (not now pursued; the property has been valued in its current condition);
  - b. To remove W's January 2023 tax liability, which I have taken into account under business assets above.
119. In submissions on behalf of W I was asked to include a further £5,000 of debt on W's side on the basis that her costs had increased as a result of the extended time estimate for the hearing. I have not done so on the basis that I assume H's costs will also have increased.
120. H's liabilities total **£-12,500**. W's are **£-121,328**. The majority of the debt on both sides is attributable to legal fees.

### *Chattels*

121. W seeks to attribute a monetary value to some chattels including H's watch, furniture and her own designer clothes and handbags which were left in the FMH. I intend to exclude all chattels from the ES2. They should be divided in specie; unless there is a good reason to do otherwise I will include as part of my order a provision that H must return to W her clothes and other personal possessions (including her computer) which were left in the FMH when the parties separated in 2018.

### *Pensions*

122. W has three defined contribution pensions with a total value of **£18,040**. H has no pension provision.

### *Adjustments to the asset schedule referable to my findings against W*

123. It is necessary now to consider whether there should be any adjustment to the asset schedule in the light of the findings I have made in respect of W's financial conduct. I remind myself that while it is permissible to draw inferences from the evidence, I must not speculate. It is only if I am satisfied that an asset is available to W that I should make a finding. The burden of proof remains on H.
124. I start with the X Development investment. I have found that in 2018 W diverted £60,000 from the family's assets in a deliberate attempt to remove these funds from H's reach. I did not consider W's case that she had lost the funds in a risky investment to be credible.
125. It is not possible to trace these funds, which disappeared from view once they left W's bank account. It does not matter whether they are being held on her behalf or whether they have found their way back to her via another account or investment. I am satisfied on the balance of probabilities that they remain available to her: if the funds had been spent, W would have been able to produce evidence of this. I therefore include the sum of **£60,000** on W's side of the asset schedule.
126. I turn to the missing Dubai rent. I have found that at least £100,000 is missing from the rental payments that were received over the period from 2012, when the property was first let, until 2019. It is necessary now to determine whether those funds remain available to W.

127. The funds went missing over a period which commenced 10 years ago and lasted for seven years. This increases the likelihood that over that period some of the funds were spent; as does the fact that the majority of the funds appear to have passed through the hands of W's sister. I have rejected W's evidence that H and W agreed to allow W's sister to have the use of the funds, but that does not necessarily mean that they remain intact and available to W.
128. I take into account W's established propensity throughout the marriage, and particularly in the period leading up to the separation in 2018, to remove assets from the matrimonial pot in a deliberate attempt to defraud H. That makes it more likely that W's sister is holding some of the rent, especially that received towards the end of the relevant period, on W's behalf.
129. To the extent that any of the rent has been spent by W's sister (or indeed W) and is no longer available, it seems to me that this is a situation which has come about as a result of gross negligence on W's part, the seriousness of which is exacerbated by the fact that in acting in this way she was exploiting H's vulnerability and breaching his trust. H had trusted W to manage the Dubai property in such a way as would preserve the rental income for their joint future; she not only failed to do that, but knowingly deceived H, with the result that it was not until after these proceedings had commenced that he discovered that the funds he had relied on to support his retirement had gone.
130. W's own proposal at the conclusion of the hearing was that she would agree to pay H 50% of any funds recovered from her sister in future. Implicit in that is an acceptance that the money is owed.
131. I intend to treat these funds as follows:
- a. I make a positive finding on the balance of probabilities that W's sister is holding a minimum sum of **£25,000** on W's behalf which will be made available to her immediately following the hearing. That sum is broadly equivalent to the last year of rent paid before the separation, during a period when W was making concerted efforts to remove matrimonial funds from H's reach.
  - b. As to the balance (**£75,000**), I intend to add these funds back into the matrimonial pot on W's side pursuant to the principles set out in *Vaughan* and refined in *MAP v MFP* and *Rapp v Sarre*. In my view, W's conduct, even if negligent rather than deliberate, was so serious that the high threshold established by those cases is met.
132. I recognise that when it comes to the distribution exercise I will need to take into account the fact that I have not made a finding that the entirety of the missing rental income remains available to W, and therefore that these funds may in fact not be available to meet her needs.
133. The other findings I have made against W do not affect the asset schedule. They will fall to be considered under the heading of "conduct" below.

*The revised asset schedule*

134. On the basis of the findings I have made, the parties' assets total **£1,510,236**, broken down as follows.

	<b>H</b>	<b>W</b>	<b>Joint</b>
Properties			1,233,493
Bank accounts and investments	81,563	28,136	46,317
Cash (Dubai)		26,829	

Business assets	44,761	4,925	
Liabilities	-12,500	-121,328	
Pensions		18,040	
X Development investment		60,000	
Dubai rent held for W		25,000	
Dubai rent add-back		75,000	
Totals	<b>113,824</b>	<b>116,602</b>	<b>1,279,810</b>

### The s 25 factors

135. I intend to refer only to those factors which are relevant in the circumstances of this case.

#### *Income and earning capacity*

136. It is agreed that there should be a clean break in this case. The assessment of each party's realistic earning capacity remains relevant to their mortgage-raising capacity and therefore their ability to re-house.

137. H is now 60. He is still working but the physical nature of his work means that he will need to wind down within the foreseeable future. At present he is earning about £50,000 gross pa (£33,000 net), but he accepted in evidence that his recent earnings have been depressed by the demands of this litigation and that in the past he has earned closer to £90,000 gross pa (although he told me that "those days have gone"). I consider there is scope for some increase in H's current earnings, perhaps to £60,000 - £70,000 gross, although the period for which he can earn at that level is likely to be limited.

138. H has produced an illustration of his mortgage capacity from a mortgage broker which suggests that he could borrow a maximum of £98,780 over 12 years. That illustration was based on an estimated income of about £23,000, which is lower than my assessment, but assumed that H would work until the age of 72. I will accept the figure of £98,780 as H's maximum mortgage capacity, on the basis that he is likely to need to repay it at a higher rate over a shorter term.

139. W is 49. Her earning capacity is agreed at £60,967 gross pa. She is younger than H and her job is less physically demanding. She is therefore likely to be able to maintain her earnings at a similar level for longer. She has produced evidence of a mortgage capacity of £180,000, which is not challenged. I note that one of the assumptions underlying the illustration is that W's substantial credit card and litigation loan debt will not be paid off; if the outcome of these proceedings is that those debts are paid, there may some scope for increase.

#### *Standard of living and needs*

140. For the last 10 years of the marriage the parties lived in the FMH, a two-bedroom garden flat in North London. They were able to afford holidays and to support their children. According to her Form E W had a collection of designer items. Their standard of living was comfortable, but not luxurious.

141. I consider the parties to have very similar housing needs. For reference, the FMH is valued at £795,000; it has a garden and a summerhouse, and was the family home when the parties' daughters were still living with them. Both parties accept that they could downsize and still meet their needs.
142. I do not give much weight to the fact that W sometimes has her young granddaughter to stay; H also has two children and may well have grandchildren in future. Ideally in my view each party should have a two-bedroom flat in a reasonable area of North London, but if necessary the needs of each could be met in a one-bedroom property.
143. Having considered the property particulars produced by both parties I consider that the needs of each could be met with a minimum housing fund of £550,000 (plus stamp duty). This would purchase a reasonably sized one-bedroom garden flat, in good condition, in the area of the FMH. In order to purchase a suitable two-bedroom flat in the same area a minimum housing fund of £650,000 (plus stamp duty) would be required.

#### *Contributions and conduct*

144. The parties were in a cohabiting relationship for 25 years. During that time they raised three children. Both have clearly formed and retained strong relationships with their children as adults. Whatever the state of their own emotional relationship, I am satisfied that both made a full contribution to the children's care and upbringing.
145. In financial terms, however, the parties' contributions were very different. H made a full financial contribution and his earnings went towards maintaining the family and building up the parties' capital assets. In contrast, I have found that between 2007 and 2018 W acted at times negligently and in breach of her duty of care to H, and at times fraudulently. While H was working to build up the parties' joint resources in the expectation that they would have a shared pot to rely on in retirement, W was diverting funds from that pot with the deliberate aim of putting them out of H's reach.
146. The process of examining these allegations has highlighted patterns of behaviour on W's part. Over the course of the marriage she bought, sold and attempted to sell substantial assets, while deliberately concealing her actions from H because she knew he would not consent. As I have already observed, the seriousness of her conduct is heightened by the fact that H had trusted her with the entirety of their joint financial resources, in circumstances where his illiteracy meant that he had no way of monitoring her actions.
147. In my view, W's conduct falls within the definition of economic abuse contained in DAA 2021. In the longer term, if not on a day to day basis, W's conduct has had a substantial adverse effect on H's ability to access and use his own money. The most obvious example is the Dubai rent, which H believed for many years to be accumulating in a joint account as a retirement fund. I appreciate that there are some forms of economic abuse, for example those that involve the coercive restriction of the other party's day-to-day expenditure, that may be more familiar, and therefore more easily recognised as abusive. However W's conduct in this case involved the exploitation of a dominant position, which is the essence of all forms of abusive behaviour; and the fact that H was unaware of W's behaviour at the time, and that it did not directly impact on his daily life during the marriage, has only made his subsequent discovery of it more shocking. I am in no doubt that H feels a profound sense of betrayal, and that the harm caused by W's actions has extended well beyond the financial detriment they have caused.

148. The provisions of DAA 2021 are quite new and their role in financial remedy cases is yet to be established. Undoubtedly not all cases involving economic abuse will have the “gasp factor” required by MCA 1973, s25(g). In concluding that this one does, I draw on my range of experience of the behaviours exhibited by spouses towards each other, within their financial relationships and otherwise. In my view the features which take this case out of the ordinary include H’s illiteracy and W’s exploitation of his consequent vulnerability; the deliberate nature of the deception perpetrated by W; and the fact that the behaviour was sustained over a considerable time period.
149. For these reasons, I consider that W’s conduct as a whole has been such that it would be inequitable to disregard it. In the final section of this judgment I will consider how that conduct should be reflected in a jurisdiction whose scope is limited to the distribution of financial assets, and whose exercise is governed by a variety of factors drawn from statute and case law.

### **Outcome (“distribution”)**

150. I have made most of the findings sought by H, although I have rejected his position on one significant issue, namely the valuation of the Dubai property. H’s argument for an unequal division of the assets is based on a broad assessment of what he says is fair overall in the light of W’s conduct, and he has not sought to link his proposals to any particular finding. In my judgement that approach requires some refining, particularly now that I have adjusted the asset schedule to reflect the findings I have made.
151. An equal division of the assets, as I have found them to be, would result in each party receiving £755,118. I remind myself that of W’s share, £75,000 is represented by the Dubai addback, and may not in reality be available to her to rehouse herself immediately.
152. I am required now to ask myself whether, in all the circumstances of the case, this outcome is fair. In the absence of any conduct findings, it would be. In most cases where all the assets have accrued over the course of a 25-year relationship, and provided that both parties’ needs are met, an equal division of capital is almost inevitable.
153. I have already expressed the view, *in principle*, that W’s conduct in this marriage has been such that it would be inequitable to disregard it; that the “gasp factor” is present. I return to Mostyn J’s observation in *OG v AG* that in order to sound in the ultimate distribution, s 25(g) conduct must have “financially measurable” consequences. In that case, having addressed those consequences, Mostyn J did not make any further adjustment to the division of assets in response to H’s conduct, because to do so would have penalised him twice for the same behaviour, or as Mostyn J put it, “arbitrarily to fine” him.
154. In this case, my findings in respect of the X Development investment and the Dubai rent have been reflected in the adjusted asset schedule and can play no part in the distribution exercise. However my findings about W’s conduct go well beyond these two particular instances of it. I have made a general finding of similar behaviour on W’s part over many years that is likely to have depleted the family assets, although it is not possible to quantify the extent of the depletion.
155. In my view, too narrow an interpretation of s 25(g) would render the provision nugatory. It is difficult to imagine a scenario in which consequences which are truly financially measurable have not already been taken into account under either s 25(a) (resources) or s 25(b) (needs). In *OG v AG*, the husband’s conduct reduced the value of a family asset. In *H v H (Financial Relief: Attempted Murder as Conduct)* [2006] 1 FLR 990 the husband’s assault on the wife left her unable to work.

156. It seems to me therefore that there must be some scope for conduct which has had consequences to be reflected in the ultimate division of assets, even where those consequences are not financially measurable. In this case, there has been a negative impact on H's overall financial position, even if it is impossible to determine what that has been.
157. Whether *in fact* it is fair to make any adjustment from equality, and what weight I ultimately give to s 25(g), will depend on my assessment of the other s 25 factors, in particular needs.
158. It is often observed that needs are "elastic". The term means different things in different cases. Even if the standard of living during the marriage is used as a benchmark, there may be scope for considerable flexibility in the assessment. Sometimes it is possible to replicate the matrimonial standard of living, but more often it is not. In most cases therefore there is a needs bracket, which starts at a minimal level where extras and luxuries previously enjoyed have to be given up, and extends upwards to the point where it becomes obvious that there is a surplus of resource.
159. Although I have found there is nothing to choose between the parties in terms of their needs, other than the difference in their mortgage capacity, in my view my findings in respect of conduct justify W's award falling towards the lower end of the bracket. In other words, my decision will mean that her needs will still be met, but at a more modest level than would have been the outcome in the absence of the conduct findings. The principles of "needs" and "sharing" will still take centre stage, but instead of absolute equality, which is where those principles would otherwise lead me, there will be a small shift in H's favour.
160. In my judgement, a fair outcome in this case is represented by a percentage split of **53:47** in H's favour. This will be achieved if the assets are divided as set out in the table below. It results in H receiving **£801,823** and W (notionally) £708,413. Allowing for the fact that the £75,000 "addback" funds are no longer available, this will leave her in reality with **£633,413**<sup>7</sup> which, even without recourse to her mortgage capacity, will enable her to meet her housing needs. H may, depending on the choices each party makes in respect of a mortgage, be able to re-house at a slightly higher level.
161. The shift away from equality in H's favour does not involve double-counting, because I have already adjusted the asset schedule to reflect those aspects of W's conduct that have had direct financial consequences. This is intended as a further limited adjustment in respect of W's conduct generally, because in my view the adjustments made to the asset schedule in respect of non-visible assets and add-back do not in this case give sufficient weight to MCA 1973, s25(g). It is, however, a modest departure and one that certainly does not depress W's award below the bottom of her "needs" bracket.

### **Structure of the award and net effect table**

162. There are no significant differences between the parties in terms of how the division of assets should be effected. They agree that the properties they currently occupy should be transferred into the appropriate party's sole name, and the other two properties should be sold. W seeks an immediate payment from the sale of Flat 2 to repay her litigation loan; that does not seem unreasonable given the interest rate on that debt.

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<sup>7</sup> I recognise that this figure includes £18,040 in pension assets which W will not be able to access for the next few years. That is a gap that W could easily bridge with a mortgage, if necessary.

163. If the assets are sold or transferred in accordance with the table below, this will achieve the capital division which I have determined is fair. The parties are of course free to agree an alternative mechanism for dividing the assets.

	<b>H</b>	<b>W</b>
FMH	467,749	
W's current home		249,910
Flat 2		75,334
Dubai % split 50:50	220,250	220,250
Bank accounts and investments	81,563	28,136
Funds in joint account		46,317
Cash (Dubai)		26,829
Business assets	44,761	4,925
Liabilities	-12,500	-121,328
Pensions		18,040
X Development investment		60,000
Dubai rent held for W		25,000
Dubai rent add-back		75,000
<b>Totals</b>	<b>801,823</b>	<b>708,413</b>
	<b>53%</b>	<b>47%</b>

#### **Status of this judgment and date of the order**

164. For reasons that it is unnecessary to set out in this judgment, although the parties agreed to compromise the matrimonial proceedings in June, and H duly issued a nullity application (albeit later than he had undertaken to do) a conditional order has not yet been made. There is no question of W seeking to defend the nullity application, but nevertheless there is of course no power to make a financial remedies order until the conditional order has been obtained: MCA 1973, s 23. The parties were fully aware of the situation prior to commencement of the hearing and agreed that I should proceed to hear the evidence and reach a decision, and that if a conditional order was not available by the end of the hearing, the order (but not the judgment) should be delayed until the conditional order is granted, pursuant to the approach taken in *McCartney v Mills McCartney* [2008] EWHC 401 and *JP v NP* [2014] EWHC 1101.

165. As far as I am aware the conditional order is still awaited. The order will therefore not be made until it has been granted and this judgment will not take effect until that date.



## Addendum: Costs

166. After my judgment was handed down the parties agreed to make submissions on costs issues in writing, and I agreed to determine those issues on paper. This is my determination.
167. H seeks payment of his costs (totalling £93,416.50) in full, assessed on the indemnity basis. He accepts that there should not be double-counting in respect of any of the findings of substantive “conduct” contained in my judgment. He puts his case on the basis that W’s conduct *within the litigation*, and particularly the dishonest approach taken by W in her written and oral evidence, was such that he ought to recover his costs in full. He says that a full award of costs will not prevent W from re-housing, particularly if her full mortgage capacity is taken into account.
168. W’s case is that there should be no order as to costs. She says that H has not succeeded on all issues (the Dubai property valuation being the most significant exception); a costs award would involve unfair double-counting in respect of the substantive conduct findings; and the impact on W of a costs order, when her existing debt is taken into account, would leave her unable to meet her housing needs.
169. FPR 2010, r.28.3 sets out the approach which the court is required to take. The general rule is that there should be no order as to costs: r.28.3(5). However the court may depart from the general rule where it considers it appropriate to do so because of the conduct of a party in relation to the proceedings: r.28.3(6).
170. Rule 28.3(7) sets out the factors which the court must take into account when considering whether to make an order under r.28.3(6); that is, where it appears that the conduct of the parties may justify a departure from the general rule. The factors are:
- (a) any failure by a party to comply with these rules, any order of the court or any practice direction which the court considers relevant;
  - (b) any open offer to settle made by a party;
  - (c) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;
  - (d) the manner in which a party has pursued or responded to the application or a particular allegation or issue;
  - (e) any other aspect of a party’s conduct in relation to proceedings which the court considers relevant; and
  - (f) the financial effect on the parties of any costs order.
171. The outcome in this case, in financial (rather than percentage) terms, was close to the midpoint of the parties’ open positions. The findings I made in respect of W’s conduct during the marriage shifted the outcome in H’s favour. However this shift was counterbalanced by the fact that I preferred W’s case as to the value of the Dubai property.
172. If the Dubai property valuation had been the sole issue in contention a final hearing might still have been required, but the costs of the litigation overall would have been very much less.
173. I do not agree that a costs award in this case would penalise W twice for the same misconduct. W could have come clean at the start or during the course of the proceedings. If she had given a full and frank explanation of the various transactions about which I have made findings, the detailed forensic examination that has had to take place during the course of the litigation and at this hearing would have been avoided and the costs on both sides would have been significantly reduced.

174. I have considered whether the appropriate basis for any costs award should be the standard or the indemnity basis. H relies on authorities from the civil jurisdiction which suggest that dishonesty within litigation will justify an award of costs that is “outside the norm”. However the starting point or “norm” in family proceedings is not that costs follow the event but that there should be no order as to costs. In *OG v AG* Mostyn J awarded indemnity costs on the basis that the husband had conducted the litigation “abysmally” and in doing so had taken the case “quite out of the ordinary”.
175. It is not entirely clear to me where the line is to be drawn between litigation conduct that has already, by definition, been sufficiently blameworthy to justify a costs award, and conduct which has been so “abysmal” that assessment on the indemnity basis is appropriate. In the present case, I bear in mind that although the underlying issues at the final hearing concerned W’s dishonesty, the reason why that hearing went part-heard, disrupting the court timetable and increasing costs, was the late identification of relevant documents by H’s legal team. In those circumstances, it seems to me that an assessment on the standard basis is appropriate.
176. In my judgement W must bear a substantial part of the costs burden in this case. H lost on the issue of the Dubai valuation but his decision to challenge the expert’s report was not unreasonable and certainly would not justify a costs award in W’s favour. It does however operate to reduce W’s costs liability, because it makes it likely that a final hearing, albeit one more limited in scope, would have been required even if W had made admissions at an early stage.
177. For the same reason, I cannot assume that this case would have settled without the need to issue proceedings at all, and some preliminary work on both sides was therefore necessary.
178. Taking a fairly broad approach, it appears that the majority of H’s legal team’s investigation into W’s transactions was conducted after the parties turned their focus to the financial remedy issues, following the settlement of the matrimonial proceedings before Recorder Chandler KC on 9.6.22. I intend to order W to pay 75% of H’s costs incurred since that date, to be assessed on the standard basis if not agreed.
179. I consider finally the impact of such a costs award on W’s ability to meet her needs. H’s total costs since the FDR (some months prior to June 2022) and up to the conclusion of the final hearing are approximately £60,000. I do not know exactly how much of that was incurred after 9.6.22 but consider that I can safely assume that W’s 75% contribution, after assessment, will not exceed £40,000 and may well be considerably less. There is unlikely to be any significant impact on W’s ability to meet her needs, for the reasons I have given elsewhere in this judgment.