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Neutral Citation Number: [2024] EWFC 125

Case No: 1668436900815595

IN THE FAMILY COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 7 June 2024

Before :

MR JUSTICE PEEL

Between :

**AH
- and -
BH**

Applicant

Respondent

Nichola Gray KC (instructed by **Kingsley Napley LLP**) for the **Applicant**
Michael Glaser KC (instructed by **Burgess Mee Family Law**) for the **Respondent**

Hearing dates: 15-19 April 2024

Approved Judgment

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MR JUSTICE PEEL

This judgment was handed down remotely at 10.30am on 7 June 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Mr Justice Peel :

Introduction

1. The assets in these financial remedies proceedings are, as I find, about £50 million, almost all in the name of the husband (“H”). The wife (“W”) has very modest resources of about £291,000. The period of cohabitation and marriage lasted about 5 ½ years. There are two children, for whom W is and will remain the primary carer. The principal issue before me is the interplay between (i) the terms of a pre-marital agreement (“PMA”) which purports to limit severely W’s financial remedies claims in her own rights and (ii) the financial needs of W and the children.
2. The parties’ open positions at trial are:
 - i) H offers:
 - a) The FMH to be sold, and W to receive 40% (about £1.9m) to purchase a property on a Schedule 1 type basis i.e to revert to H at the end of the children’s tertiary education. That sum is inclusive of moving costs and SDLT.
 - b) H to pay W £818,025, lump sum provision to which she is entitled under the terms of the PMA.
 - c) H to pay nursery and school fees.
 - d) H to pay child maintenance in the total sum of £60,000pa (£30,000pa per child) until February 2025, then £36,000pa (£18,000pa per child) until the younger child reaches secondary school, and thereafter in accordance with a CMS assessment.
 - e) Clean break.
 - ii) W seeks:
 - a) Transfer of the FMH (valued at £5m gross) to her, to be sold upon the children finishing tertiary education at which point W would receive 50% outright, and H would receive the balance.
 - b) £1,867,522 by way of income fund for her, calculated as £250,000pa for 10 years, reduced by estimated earning capacity, and to be offset by £200,000 from her own capital resources.
 - c) £60,000pa child maintenance (£30,000pa per child).
 - d) H to pay nursery and school fees.
 - e) Clean break.

The background

3. W is 40 years old. She was born and brought up in country A. H is also 40. He was born and brought up in country B.
4. W has sacroiliac joint dysfunction and anterior pelvic pain, caused by difficult childbirth. In addition, she has mental health issues and has been attending weekly psychotherapy since September 2022. H also has mental health issues and is receiving therapy.
5. In 2007 H, then about 24 years old, set up a business with a partner. The main operations of the business are in country B, although it has a presence in a number of jurisdictions including the United Kingdom.
6. In March 2015, the parties met in London. H was living in capital city B, and W in London. W had just handed in notice from her asset management job. In late 2015, she returned to capital city A where she enrolled on a university postgraduate course and worked in the health and wellbeing sector. She bought a flat in capital city A in her sole name, using the proceeds of her London property.
7. In February or March 2016, the parties' relationship began, by when H was living in London. W moved back to London in early 2017 to live with H, and thereafter worked 3-4 days per week until 2020, when their first child was born, in the health and wellbeing sector.
8. At the beginning of April 2018 (the precise date was not clear), the parties signed a PMA, and in April 2018 they married.
9. Pursuant to contractual terms signed shortly before the marriage, H realised €13m net from his business. That capital sum sustained the family through the marriage, along with H's salary.
10. The family home in North London was bought by H in his sole name in 2018 for £2.79m, funded entirely by H's resources. W sold her flat in capital city A. In December 2019, they moved into the FMH after carrying out approximately £1m of renovations, to which W contributed, I am satisfied, about £100,000 from the sale proceeds of her flat in capital city A. The sale of her flat also generated a stamp duty rebate for H on the purchase of the FMH in the sum of about £84,000. W played a significant role in overseeing the refurbishment project; H said in evidence that W "put in an amazing amount of work".
11. The parties have two sons now aged 4 and 2.
12. In September 2022, they separated. H moved into rented accommodation, and in October 2023 bought a property in North London for £2,002,223 (inclusive of purchase costs). He did not inform W or her solicitors of the purchase until after the event even though her Form A had been issued some 9 months previously, on 27 January 2023. This was clearly in breach of his obligation to provide W with frank disclosure of his financial circumstances and intentions; it was an inexcusable failing on his part, and it should not have happened.

13. H spends time in both London and country B (he told me about one third to 40% of his time is in country B), and he also travels for work.
14. W and the children continue to live at the FMH. Under the terms of a child arrangements order made by consent, the children are with H during term time for 4 nights a fortnight, and for part of the school holidays. H has flagged up that he would like the children to spend more time with him in school holidays, and he may make an application to court if agreement is not reached.
15. In September 2023, the older son started at a local pre prep school. The younger child is at nursery school, and it is intended that he too will move to pre prep education in September 2025.
16. The litigation has followed a reasonably conventional course. In response to W's Form A, H issued a Notice to Show Cause which as a matter of form is before me but is subsumed by the overarching s25 inquiry.
17. At the First Appointment on 12 October 2023, W confirmed, as recorded on the face of the order that:
 - i) She did not assert a vitiating factor such that the PMA should be disregarded.
 - ii) Her claim is based on needs.
18. The parties' combined costs total £595,517 which is perhaps less eye watering than in some cases, but still represents a very large sum now gone forever from the parties' wealth.

The evidence

19. Contrary to the case advanced by counsel for H robustly in cross examination, W was not, in my assessment, dishonest or so motivated by hostile animus to H that it infects her entire case. I thought she did her best to tell the truth. In reality, there was never any real issue on the relevant facts, although W at times fell into speculation or guesswork in relation to some financial matters, for example the cost of holidays taken during the marriage. It was apparent to me that W feels hurt and let down by H who she believes is not willing to support her and the children properly, and (as she sees it) uses the PMA to seek to avoid his responsibilities. In my view, she feels vulnerable and dependent. She has next to no assets of her own, no job, and is tasked with bringing up the children. She has given up her flat in capital city A and committed herself to a marriage which did not endure. All of this has created a considerable degree of anxiety, mixed with anger and frustration.
20. Like W, H seemed to me to be trying to tell the truth. In my view, he is suspicious of W. That was reflected, for example, in his concern that W may make it difficult for him to see the children. I did not think he fully appreciated W's sense of vulnerability and dependency.

Standard of living

21. The parties are in dispute about the standard of living they enjoyed. I would describe it as a comfortable, but not extravagant, lifestyle, commensurate with their wealth.

They lived in a £5m house in London. The children are in private education. They ate out regularly although I think W exaggerated the frequency of trips to the finest London restaurants. They had access until 2019 to H's rented flat in capital city B, and a country house in country B co-owned by H and his business partner. They had regular holidays including to destinations such as Mauritius, the Seychelles, Sri Lanka and Marrakesh (sometimes travelling business class). W has produced a schedule which estimated the total cost of holidays from 2017 to 2022 (which includes the Covid pandemic era) at an average of about £50,000pa. She acknowledged in cross examination that many of the figures were estimated. Although H has had that schedule since January 2024, he did not substantially challenge it in his written evidence. On the first attended day of the trial his counsel attempted to produce a detailed schedule of H's comments on the figures which purport to demonstrate that the overall holiday expenditure was far less than W claimed. I refused to allow that schedule, into the evidence. In any event, as I understood it, no underlying evidence to support H's comments (e.g. hotel bills or credit card statements) was produced. It therefore seemed to me that H's oral evidence on these matters was inevitably deficient to some degree. I am left with uncertainty about the actual cost of the holidays, although a cross reference to actual, disclosed bank statements showed that W's estimates for 2021 and 2022 of about £30,000pa (lower than previous years because of Covid and the birth of the children) were reasonably accurate. What is not in doubt that the holidays did indeed take place, and, certainly in the pre Covid years, on 7 or 8 occasions each year. My sense overall is that the cost of the holidays was not as much as suggested by W, but these sorts of holidays will nevertheless have come at reasonably significant cost.

22. W produced an analysis of bank accounts and credit cards of the parties from which she submits that their total expenditure (joint and personal), excluding school fees, during 2021 and 2022 was:

2021	£310,605
2022	£211,513

There were question marks about one or two entries, but I am satisfied that this broadly represented their financial output in that period. In other words, as a family they spent on average about £250,000pa in those two years. A separate question, to which I will return, is whether that is a sound evidential base for W's income needs going forward, as it includes a number of arguably one-off items.

The PMA

23. W sensibly does not assert that the PMA is in some way undermined by a vitiating factor; it is clear and comprehensive; it was signed (depending on the precise date) about 28 days before the marriage by both parties; it includes unchallenged financial disclosure; each party had independent legal advice; each confirmed that they entered into the PMA freely and voluntarily, without coercion, pressure or duress of any kind; each confirmed that they believed the terms of the PMA to be fair; each acknowledged that the PMA was a pre-condition to their marriage; each confirmed that they fully understood the nature and effect of the PMA.

24. When W signed the PMA, she was financially independent; she had a mortgage-free flat and employment. I am confident that she did not expect or anticipate that the marriage would break down; as she told me “I thought we would be married for life”. I doubt she really thought through the potential consequences in the event of marriage breakdown, particularly if children were born. This is, in my experience, true of one or both parties to many PMAs who sign up in the anticipation that it will never need to be referred to. However, the fact is that she did sign it and she fairly said to me that she does not try to escape its provisions on the basis of some vitiating factor.
25. Her case is that the PMA does not reasonably or adequately meet her financial needs. Accordingly, she says, it should be departed from to the extent necessary to achieve a just outcome by reference to needs. H, by contrast, argues that W should be held to the terms of an agreement which both parties considered were fair and appropriate at the time, and which were a necessary condition for their marriage. That is the essential dispute between the parties at this trial.
26. The principal dispositive terms of the PMA are:
 - i) The parties agree that “their respective claims in the event of the breakdown of their marriage shall be determined in accordance with the terms of this Deed”.
 - ii) Their primary intention is that (a) joint property should be divided equally, (b) neither shall make a claim against the other’s separate property and (c) W shall not make any claim against, or by reference to, H’s business interests.
 - iii) Having regard to their backgrounds, and the approach of the courts of the countries from which they originate to questions of maintenance, neither believes that there should be a periodical payments claim against the other in the event of breakdown of the marriage.
 - iv) Joint property is defined as any property held in the joint names of the parties. Separate property is identified as the assets in the schedule to the Deed and all other assets in their respective sole names.
 - v) They each acknowledge that they will be bound by the terms of the Deed regardless of the length of their marriage and any changes in the years to come unless superseded by a Supplemental Deed.
 - vi) The Deed “shall be reviewed” upon, inter alia, the birth of the first child. There was in fact no such review.
 - vii) The PMA establishes a separate property regime; neither will have a share in the other’s separate property and there will be no matrimonial acquest (other than joint property as defined in the PMA).
 - viii) The parties agree that the terms of the PMA meet the anticipated reasonable needs of each of them.
 - ix) On breakdown of the marriage:
 - a) Joint property shall be divided equally.

- b) Each party will retain their separate property.
- c) There shall be a clean break.
- d) In the event that the parties do not have children, neither shall make a payment to the other if the marriage lasts less than 4 years, and thereafter H shall pay W £200,000 for each year of marriage up to a maximum of £4m.
- e) In the event that the parties do have children, should the marriage last less than 7 years H will pay W £600,000 and £200,000 for each completed year thereafter up to a maximum of £4m.
- f) RPI shall apply to the lump sums.
- g) In respect of children, a Schedule 1 claim remains open to be made, and the parties will abide by any order made by the court for financial provision for them.

The resources

27. Before turning to the parties' resources now, I record their resources at the time of the PMA:

- i) H disclosed £972,481 of broadly realisable assets, and a value for his business interest at €45.3m ignoring (a) any discount for lack of control and (b) tax. His income was recorded as £132,000pa gross.
- ii) W disclosed £669,000 of realisable assets (mainly her flat in capital city A). Her self-employed income was recorded as not more than £2,500pm gross.

28. The net assets now are:

Husband

FMH	£4,850,000
Primrose Hill property	£1,758,104
Bank accounts	£784,782
Investments	£5,102,574 (principally start-ups and private equity investments)
Business	£38,000,000
Chattels	ignored
Pension	£14,282
Liabilities	<u>(-£341,183)</u>
	£50,168,559

Wife

Bank accounts	£4,622
Investments	£292,066
Pension	£27,903
Chattels	ignored
Liabilities	<u>-£32,647</u>
	£291,944

29. I have accepted H's value of his private equity investments, but exclude future capital calls as a liability; they seem to be more in the nature of a need than a liability. I ignore W's car loan liability as I have not included the value of her car.
30. In respect of H's business interest, in February 2022 it was valued at €99.5m for commercial purposes, without any discount for illiquidity, an increase of some €54m since the PMA figure. By the time of his Form E in July 2023, he said that the value of comparable companies in the sector had dropped, and he accordingly valued his shareholding at about €55m-€65m after a 20% discount for illiquidity. To provide a like for like comparison with the PMA value, and the value ascribed in 2022, adding back the 20% discount gives a pre-tax figure of €68.75m-€81.25m.
31. I refused W's application for an expert valuation at the PTR. I did not think it was either necessary or proportionate in circumstances where a sharing claim is not pursued and on any view H's overall wealth is more than sufficient to meet the needs claim. Further, it was far too late in the day, being made only a few weeks before final hearing. Nevertheless, it seems to me that I should attempt to place a figure on the business interest in order to establish in general terms the financial context within which these financial remedy proceedings should be determined.
32. I will take the midpoint figure between €68.75m and €81.25m; that is €75m ignoring tax and any discounts. I accept that some discount should be applied for lack of control/illiquidity and H's suggestion of 20% is not unreasonable. That reduces the figure to about €60m. Capital gains tax on disposal would be 20% or 34% depending on tax residency. I propose to take a midpoint 27% tax liability which brings the figure down to €44m, or about £38m net.
33. W says that I should take H's share of the business at a value of not less than the €99m gross figure pursuant to the commercial valuation in February 2022. I decline to do so. H has since his Form E consistently said that valuations in the sector are now much lower, and W did not pursue an expert valuation until too late in the day.
34. By the same token, I reject H's attempt advanced at trial to take a lower figure than the one contained in his Form E, on the basis that valuations in the sector have declined further. This purported lower value post-dated W's application for expert evidence at the PTR, which he had strongly resisted, and I note that he has in fact produced no evidence in support.
35. Accordingly, I take the figure of £38m net. In so doing, I acknowledge the fragility of any valuation; the figure I adopt is reasonable on the evidence, but is not an iron clad value. The true value, i.e what a willing purchaser might offer today for H's shareholding, could be higher or lower.
36. There was some debate about the liquidity of H's business interest but in the circumstances of this case, I am not persuaded that any lack of liquidity is of particular relevance:
 - i) W's claims are limited by reference to needs, and can be met from the non-business resources.

- ii) Illiquidity is already baked in, at least to some extent, by the 20% discount which H seeks.
 - iii) The shareholders' agreement entitles H to either (i) sell his shareholding under a pre-emption right to his business partner or, in default, (ii) to force a sale of the entire business. I readily acknowledge that H would not want to take such a course, which might be highly divisive and commercially unwise (sale of shares to his partner would likely have to take place at a hefty discount, and a forced sale of the whole is rarely the optimum way of realising funds) but that would be a matter for H to manage. However, this is all largely academic as H does not need to follow this course in this case.
37. As for income, W earns very modest sums (a few thousand pounds a year). She intends to complete her degree and train as a therapist. She estimates that, due to her parenting commitments, she will not be able to exercise a meaningful earning capacity for at least 5 years, at which point she hopes to earn up to £21,000pa gross on a self-employed basis. Although W has a degree, and a Masters, it is, in my judgment, unrealistic to expect her to return to a corporate career, to which she was not suited, which she did not enjoy, and which she would have to dovetail with the children's needs. Moreover, given her mental health problems there is a question mark about whether she would be sufficiently robust to venture back into that high pressured world. With H's encouragement, she did apply for full time finance jobs in 2021, during Covid when she would have been working from home and they had only one child, although I had the sense that her heart was not really in it. Such full-time jobs would no longer be appropriate as the parties are separated, there are now two children and working fully from home is not achievable. In any event, she did not secure any employment and the feedback she received that she had been out of the sector for too long is unsurprising. In my judgment W's own assessment of her earning capacity is a reasonable one to adopt.
38. H puts his earned income at about £150,000pa gross. But he realised €13m net from the business in 2018 and may in the future seek to extract capital sums. This is not a case where the court looks at payslips alone; the totality of resources, the standard of living, and actual expenditure are much more helpful in painting a true financial picture.

Sharing claim

39. W by the PMA foregoes any entitlement to a sharing claim. Nevertheless, it seems to me to be instructive to consider what a sharing claim might otherwise have produced for her, as being illustrative of what rights she has conceded. My focus here is principally on H's business interests which on any view increased in value during the marriage; any such increase was not by reference to passive growth but active management by two hard working individuals.
40. At the time of marriage, H put his business interest at €45.3m gross. On a like for like basis (i.e ignoring discounts and tax) it is now about €75m gross. Thus, the increase during the marriage (or at any rate to the Form E, which was less than a year after the separation) was about €30m. Applying the discount of 20% for illiquidity brings that figure down to about €24m. Deducting tax at 27% reduces the figure further to €17.5m, i.e about £15m. I appreciate that all of this is hedged with uncertainty, but it

at least gives some indication of the net increase during the marriage. It follows that the effect of the PMA may be to deprive W of a claim to 50% of the gain i.e about £7.5m. It may also be that she would have been able to establish a sharing claim in other assets, notably the FMH. I accept that I did not have full argument on this, but it was clearly flagged up in W's counsel's opening Note (specifically para 44) and I see no reason why I cannot, or should not, consider this aspect in broad, but tentative terms. It does not seem to me unreasonable to assume that, had it not been for the PMA, there would have been at least an arguable sharing claim given that, on H's own figures, from marriage to his Form E the business value went up by about €30m gross.

41. In summary I conclude that:

- i) The value of H's business interest now is about £38m net.
- ii) The increase in value of H's business interest during the marriage was about £15m.
- iii) W's 50% claim under a sharing claim might have been £7.5m (on H's case perhaps less, on W's case perhaps more). I reiterate that this evaluation is indicative and illustrative, rather than definitive.

The law on PMAs

42. I refer to what I said **HD v WB [2023] EWFC 2** at para 44 onwards, with some adaptations.

43. The court's overarching duty is to achieve a fair outcome, taking into account the s25 criteria, and bearing in mind that the children are the court's first consideration.

44. There is no doubt that a PMA is one of the relevant criteria, but it is not the only one. The terms of a PMA must be seen in the context of the s25 factors. The extent of the weight to be attributed to a PMA will vary from case to case.

45. The leading authority is, of course, **Radmacher v Granatino [2010] UKSC 42** from which the following propositions can be drawn:

- i) If an ante-nuptial agreement, or indeed a post-nuptial agreement, is to carry full weight, both the husband and wife must enter into it of their own free will, without undue influence or pressure, and informed of its implications (para 68).
- ii) "What is important is that each party should have all the information that is material to his or her decision, and that each party should intend that the agreement should govern the financial consequences of the marriage coming to an end" (para 69).
- iii) "The first question will be whether any of the standard vitiating factors: duress, fraud or misrepresentation, is present. Even if the agreement does not have contractual force, those factors will negate any effect the agreement might otherwise have. But unconscionable conduct such as undue pressure (falling short of duress) will also be likely to eliminate the weight to be attached to the agreement, and other unworthy conduct, such as exploitation of a dominant position to secure an unfair advantage, would reduce or eliminate it" (para 71).

- iv) The court may take into account a party's emotional state, and what pressures he or she was under to agree. But that again cannot be considered in isolation from what would have happened had he or she not been under those pressures. The circumstances of the parties at the time of the agreement will be relevant. Those will include such matters as their age and maturity, whether either or both had been married or been in long-term relationships before. For such couples their experience of previous relationships may explain the terms of the agreement, and may also show what they foresaw when they entered into the agreement. What may not be easily foreseeable for less mature couples may well be in contemplation of more mature couples. Another important factor may be whether the marriage would have gone ahead without an agreement, or without the terms which had been agreed. This may cut either way (para 72).
- v) It is to be assumed that each party to a properly negotiated agreement is a grown up and able to look after himself or herself (para 51).
- vi) “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” (para 78).
- vii) “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.” (para 75).
- viii) 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 (para 80).
- ix) “Of the three strands identified in *White v White* and *Miller v Miller*, it is the first two, needs and compensation, which can most readily render it unfair to hold the parties to an ante-nuptial agreement. The parties are unlikely to have intended that their ante-nuptial agreement should result, in the event of the marriage breaking up, in one partner being left in a predicament of real need, while the other enjoys a sufficiency or more, and such a result is likely to render it unfair to hold the parties to their agreement. Equally if the devotion of one partner to looking after the family and the home has left the other free to accumulate wealth, it is likely to be unfair to hold the parties to an agreement that entitles the latter to retain all that he or she has earned” (para 81).
- x) “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” (para 82).
- xi) It is the court that determines the result after applying the Act (para 83).

46. What is the meaning of “predicament of real need” referred to at para 81 of **Radmacher (supra)**? It was treated as akin to “destitution” by Mostyn J at para 72(iv)(c) of **Kremen v Agresi (No 11) [2012] EWHC 45 (Fam)**, and the same judge at para 14 of **Cummings v Fawn [2023] EWHC 830 (Fam)** suggested, using a bookend analogy, that where a PMA is in play, needs are no more than is necessary to move the applicant’s lifestyle just to the right of the left-hand bookend, i.e little more than “a spartan lifestyle catering for not much more than essentials”.
47. Unsurprisingly, H relies upon these dicta. I do not read Mostyn J as saying that in every case involving a PMA needs must always be assessed in a parsimonious, restrictive way, regardless of the factual context; in my view, it will all depend on the facts, and I doubt Mostyn J was saying otherwise. If he was, that would conflict with (i) the words of the statute which do not limit the court’s discretion in this way, (ii) dicta in **Radmacher (supra)** itself, and (iii) the approach adopted in the jurisprudence by other judges.
48. The breadth of judicial discretion was emphasised by King LJ in **Brack v Brack [2018] EWCA Civ 2862** at para 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** [emphasis added].”
49. In **Radmacher (supra)**, at para 76 thereof, in its introduction to possible circumstances justifying departure from the PMA, the Supreme Court said:
- “That leaves outstanding the difficult question of the circumstances in which it will not be fair to hold the parties to their agreement. This will necessarily depend upon the facts of the particular case, and **it would not be desirable to lay down rules that would fetter the flexibility that the court requires to reach a fair result**” [emphasis added].
50. It seems to me that the Supreme Court in **Radmacher** and the Court of Appeal in **Brack** have emphasised the latitude and flexibility available to the judge to meet the demands of fairness in cases where a PMA has been entered into by the parties. That latitude and flexibility applies to the assessment of needs as much as it applies to the other s25 factors. Each case is a highly fact specific evaluation and discretionary exercise. There is a world of difference between, say; (i) a childless couple whose marriage lasts for 2 years, enjoying only a modest lifestyle, at the end of which one party might need no more than short term maintenance or a highly attenuated housing

budget (perhaps restricted to time limited rental), and (ii) as here, a couple with 2 young children, where the impecunious wife will have the primary responsibility of bringing up the children for many years to come, leaving the already wealthy husband able to enjoy the fruits of his successful career.

51. The evaluation carried out by judges since **Radmacher** in these cases demonstrates that, as foreseen by the Supreme Court, hard and fast rules are not appropriate.
52. In respect of housing needs, for example, a number of different approaches have been taken in the balancing exercise weighing up the agreed PMA terms on the one hand, and the needs of the parties on the other. Thus:
 - i) A Schedule 1 type housing award whereby the payee is entitled to occupy the property until the children finish tertiary education was made in **Radmacher** itself (albeit Baroness Hale in a dissenting judgment said that she would have varied the terms of the housing fund to a Martin style arrangement), and also in **Backstrom v Wennberg [2023] EWFC 79**.
 - ii) A Schedule 1 type award with a partial outright payment whereby the property was to be sold upon the children finishing tertiary education and the payee was to receive a proportion of the sale proceeds outright: **Luckwell v Limata [2014] 2 FLR 168**, and **AH v PH (Scandinavian Marriage Settlement) [2014] 2 FLR 251**.
 - iii) A Martin style arrangement whereby the payee is entitled to occupy a property for life such as in **WW v HW 2016 2 FLR 299** (albeit subject to a step down upon the children reaching their majority), **HD v WB (supra)**, **BL v OR 2023 EWFC 229** and **Xanthopolulos v Rakshina 2024 EWCA Civ 84**.
 - iv) An outright payment enabling the payee to purchase a property for himself/herself with no reversionary terms, as in **KA v MA (Pre-Nuptial Agreement: Needs) [2018 EWHC Fam 499]**, **SA v PA (Pre-Marital Agreement: Compensation) [2014] 2 FLR 1028** and **Z v Z (No 2) (Financial Remedy: Marriage Contract) [2012] 1 FLR 1100**.
53. It is of note that, so far as I am aware, there is not a single reported PMA case where a primary carer of the children, with no significant assets of his/her own, has not received a sum of money for housing outright. After a draft judgment was sent to the parties, H's legal team referred me to **BN v MA [2013] EWHC 4250 (Fam)** where, it is suggested, such an order was made. I do not think that case in fact assists H as it concerned a Maintenance Pending Suit hearing where the judge fixed the award at the level of maintenance set out in the PMA; the outcome in respect of housing at final hearing was not in issue.
54. As for an income fund, courts have not shied away from a capitalised maintenance sum. To reflect a PMA, that sum can be limited by the level of maintenance or the length of term. Thus, in **Radmacher (supra)** 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)** and **BL v OR (supra)** the capitalised fund was on a whole life basis.

55. I was referred to **Collardeau-Fuchs v Fuchs [2022] EWFC 135**, but I do not find that decision of much help in this case because of the vast factual discrepancy. In **Fuchs** the wife received in her own right assets totalling about £37.5m pursuant to a PMA, whereas here W's entitlement is restricted to £818,025 in addition to her own modest assets.

The parties' cases on needs

56. W submits that appropriate housing for herself and the children is met by the FMH. It consists of 2,605 square feet, has 5 bedrooms, and is in an area close to friends and schools. Were she to move, she estimates she would need a similar sum to the value of the FMH (£5m) to rehouse in North London. She says that when the children finish tertiary education, her housing needs would reduce to (on present figures) about £2.5m for a 3-bedroom house in the area.
57. H says that W can rehouse in a 4-bedroom property in an appropriate area for a sum of about £1.9m. Something similar to his own property would, he says, be more than adequate; it has 4 bedrooms, is 1,745 square ft in size and close to the children's schools.
58. As usual, I have been met with a battle of property particulars and I have heard a significant amount of oral evidence on the subject. I made a direction at the PTR for the parties to file particulars between £1.9m and £5m so that I could see a full range, without prejudice to either party's contentions that such properties would not be appropriate.
59. H served a number of his proposed property particulars late in the day. W was, as a result, unable to visit them all. However, she studied the particulars, viewed them from the outside where possible and formed a clear sense of location. She was able to comment on all of them and I am satisfied that she was not hampered in expressing a considered view on each property. H by contrast had not visited any of his proposed particulars, although he had seen some from the outside. Essentially, W said that the properties put forward by H, and those in the court directed range between £1.m and £5m, were deficient in one or more of the following respects; unsafe or unattractive areas, too small, too far from the schools, limited garden space, distant from parks, in need of renovation, on busy roads.
60. As for W's income needs, she puts forward a budget for herself at £288,000pa, with children's costs in addition at £63,000pa. H says this figure is grossly overstated. He, by contrast, says that his own income needs are £93,000pa which he considers much more realistic

Analysis

61. The PMA represents a constant influence on the case. By that document, signed with full knowledge of its meaning and consequences, and with the benefit of legal advice, W was aware that her claims on divorce would be heavily restricted. Future anticipated circumstances included the birth of children and provision was calibrated in the alternative (children or no children). The marriage was relatively short (just over 5 ½ years including a period of cohabitation). H was independently wealthy at

the time of signing the PMA, and clearly (as W acknowledged) wanted to protect that wealth, particularly his business. All of these points weigh in the balance.

62. On the other hand, a factor of considerable (indeed magnetic) significance, and a powerful counterweight to the PMA, is that W will be the primary carer for these children for the rest of their minority. Further, the fact of marrying and having children has had a significant impact upon her. She is no longer an independent woman in capital city A with a mortgage free flat and stable earnings. She is (and certainly feels) vulnerable and dependent. She now has no alternative property of her own, and her earning capacity has been heavily diminished. She committed some of the proceeds of her flat to fund renovations to the FMH which belongs to H and in which she has no legal interest, and took an active part in the refurbishment project; those actions have financially benefited H, as the legal owner, but not her. H also benefited from the stamp duty rebate. I was struck by H in evidence referring to W's financial contribution to the renovations as a gift to him which seemed to me to be a technical adherence to the PMA with minimal recognition of what W gave up. She contributed fully to the marriage as wife and mother, and made sacrifices for the sake of the relationship (the sale of the flat and giving up full time work.
63. These are all material changes since the PMA was entered into. True, the parties anticipated having children. But para 20 of the PMA expressly records that the PMA "shall be reviewed" in the event of, among other things, the birth of children. In my judgment that clearly indicates the parties contemplated that it might not be a fair document upon children being born. The fact that it was not reviewed does not prevent this court from considering the overall fairness of the PMA in the light of present circumstances.
64. H no doubt wants the children to be brought up in a happy, stable environment where the children, and by extension W, are financially secure; to do that, he needs to provide not just for the children, but also for W. I do not think it will help anybody in this case if W is left with modest resources of her own, yet is required to do her very best to bring up these children for years to come. If the bookend analogy deployed in **Cummings v Fawn (supra)** is helpful, I would place the needs of W and the children in this case well to the right of the left-hand bookend.
65. It would be unfair, in my view, for W to be restricted to Schedule 1 type housing such that she would, upon the children finishing tertiary education, be required to leave the property. Where would she then live? Her earning capacity is nowhere near that of H's. Her capital, on H's case, would comprise the lump sum of £818,025 plus her own modest assets, but those sums would be needed to meet her income needs. I do not think it fair to run the risk of the children, who by then will be adult, seeing their mother in heavily reduced financial circumstances whereas their father will be far wealthier.
66. It is clear that W is deeply attached to the FMH. I suspect it is something of an anchor at a very challenging time for her when the marriage has broken down, bitter litigation has ensued, she is the principal carer of the children, she faces an uncertain financial future, she has minimal assets and no meaningful earnings, and there are ongoing physical and mental health issues. However, it does seem to me that, in the context of this case (including the terms of the PMA), the FMH overhouses her and the children, who are young enough to be able to adapt easily to a move. It ties up a very large

proportion of the non-business assets; absent sale, it would be difficult for H to pay a capitalised sum which W seeks, and meet the obligations of child maintenance and school fees, from his remaining non-business capital. He might well have to resort to accessing capital from the business which is contrary to the terms of the PMA and unfair to him. There is ample housing stock available within reach of the schools, and in amenable local areas, albeit not necessarily to the same standard as the FMH. I am confident that W also, once these proceedings have settled down, will adjust to different accommodation. In my judgment, the FMH should be sold, and W should receive a sum of money outright for purchase of an alternative property.

67. I do not accept H's contention that W is able to rehouse reasonably for about £1.9m. The particulars put forward by H are deficient in too many aspects, as identified by W, and it is important to bear in mind that W needs accommodation for the children as their main home, whereas H's property (which to my mind is not an appropriate benchmark for the reasons articulated by W) is used by them for more limited periods of time. W and the children will need to accept a compromise between size of property and location, but H's particulars are far too much of a compromise. In my judgment W and the children can reasonably rehouse for about £2.75m excluding costs of purchase, stamp duty and any renovations.
68. I will provide that the FMH be sold and after costs of sale W shall receive 56.7% (£2.75m) and H the balance (£2.1m). There shall be no floor of £2.75m for W; if the house sells for less, her housing budget will be correspondingly lower, although it may be that purchase prices of smaller properties may also be available at lower prices. I understand that there may be some cgt on sale, which H shall meet from his share; W's share is not to be reduced by tax.
69. Stamp duty on the purchase of a property at £2.75m would be £241,250. There will also be costs of purchase and in my judgment, W will need additional funds to carry out some refurbishment, although she should not need much for furniture as I am told she will retain the majority of the contents of the FMH. To cover all these items, H will pay W a lump sum of £300,000 on sale of the FMH.
70. I considered whether if I provide for an outright sum to W for housing (as I do), that sum should be subject to a charge in H's favour when the children finish tertiary education, for by then W's housing needs will arguably be met by a smaller property. The consequence would be for her to sell her property at that stage and find alternative, cheaper accommodation. On the facts of this case I have decided against that course for the following reasons: (i) I do not think that W will be able to purchase a vast or extravagant property for £2.75m, (ii) the difference between £2.75m and a reasonable sum for W alone is, in my judgment, likely to be relatively modest in the context of the assets in this case, (iii) it may be that the entirety of the sum would be needed if, for example, she wanted to move to a smaller property but in a more desirable location, (iv) I do not see why she should be forced to sell when she would no doubt hope that the children, by then adult, and in due course grandchildren, would come to stay, (v) she should have the option of releasing funds for her own income needs if required, particularly as the capitalised periodical payments may not be sufficient and (vi) it is unreasonable for her to look constantly over her shoulder, with the attendant anxiety of a forced sale at some point in the future.

71. As for income needs, W's budget is in my view considerably overstated. Her original schedule of income needs attached to her Form E put her budget at £375,000pa, with children's expenses on top. I felt W's answers about her budgetary requirements were at times based on guesswork. Her asserted costs of holidays during the marriage were overstated, although not as much as H contends, but I accept that they did have (pre children) 7 or 8 holidays a year in expensive locations.
72. The analysis of expenditure during the marriage seems to me to be a better guide to the sort of standard of living enjoyed by the parties, and to an appropriate budget going forward, than W's claimed budget, although it is not by itself determinative. Those sums were, as I have indicated, about £250,000pa on average in 2021 and 2022. I take into account that the purchase by W of a smaller property than the FMH is likely to reduce some costs, and, further, that W's budget going forward is for three people, not four. Further, H points out, I think reasonably, that these figures included a total of about £72,000 for art purchases and £18,000 for H's hobby of antique books which might fall in the category of non-recurring items; deducting these items brings the annual expenditure to closer to about £205,000pa. I am less persuaded that smaller sums for H's therapy and some post separation accommodation costs in the latter part of 2022 should also be disregarded; the monies might just as easily have been spent on something else.
73. On the other hand, 2021 and 2022 were in part during Covid years when costs were probably a little lower than normal (particularly holidays). The children were extremely young, and their needs (and therefore costs) will increase as they get older. And the scale of the wealth in this case cannot be ignored.
74. Stepping back and looking at it in the round, I consider that an appropriate budget is £110,000pa for W and £40,000pa for the children (£20,000 each). That is £150,000pa in total which in my judgment is fair.
75. The figure of £110,000pa for W shall be capitalised, as W seeks, over a 10-year period. I reject H's submission that it should be expressed as ongoing periodical payments. A clean break is highly desirable (the litigation has taken its toll on the parties), can be easily achieved, and is consistent with the statutory objective.
76. The 10-year term is arguably generous to H. W might legitimately have sought periodical payments until the children reach 18 or finish tertiary education. I am not entirely confident that she will be self-sufficient within 10 years. Partly for that reason I have, as indicated above, not provided for any step down in W's accommodation.
77. W suggests that I should assume an earning capacity of £21,000pa gross from 2031 which is 7 years away. In my judgment, a 5-year time span before she can earn sums at that level is more appropriate, to be factored into a Duxbury calculation. If she earns anything before the initial 5-year period comes to an end, it is likely to be modest and should be ignored.
78. Taking all this into account, the Duxbury figure for the 10-year term is £906,208 which I will round up to £910,000. W proposes that £200,000 of her own capital be set against that figure, which reduces it to £710,000.

79. H shall, from the date of sale of the FMH, pay child maintenance at £20,000pa until they complete tertiary education, such sum to be apportioned as to one third to W and two thirds to each child when they reach 18 or finish secondary education, whichever is later. These sums shall be CPI linked.
80. H shall pay nursery and school fees, to include reasonable extras on the school bill. The costs of out of school clubs and activities shall be shared equally.
81. H shall pay W interim maintenance of £12,500 pm for three months, then £5,000 pm until sale of the FMH, as well as nursery fees and school fees. That shall start on the next due date.
82. Chattels are to be divided by agreement, on the basis that W shall retain the majority of the contents at the FMH.
83. H has now paid the outstanding school fees due for this term. He must forthwith reimburse W for last term's fees. I did not think he gave a satisfactory explanation for his failure to pay the fees on time, and it will have engendered more mistrust on W's part.
84. The net effect for W will be:
- | | | |
|------|------------------------------|-------------------|
| i) | Own assets | £291,944 net |
| ii) | 56.7% FMH | £2,750,000 |
| iii) | Lump sum for stamp duty etc. | £300,000 |
| iv) | Capitalised pps | <u>£710,000</u> |
| | Total | £4,051,944 |
85. H by contrast, will have his own assets, about £50.1m, less payments to W of £3,760,000 (56.7% of the FMH, the lump sum and the capitalised pps) i.e about £46.3m. In percentage terms W will exit the marriage with about 8% of the assets, and H with 92%. H will have ample liquid funds to pay the lump sum and the capitalised pps order from his share of the sale proceeds of the FMH, with monies to spare. He will retain all of his bank balances and investments, including the private equity funds which are due to pay out over 2025 to 2030. His business will be unaffected.
86. Had the parties not signed the PMA, W might have been entitled to receive on a sharing basis as much as £7.5m, and possibly more. Even on a needs basis, I consider that, absent the PMA, her award would likely have been greater than I have provided for; retention of the FMH and a longer Duxbury term (perhaps even a whole life term) would have been arguable.
87. W will have, I am satisfied, sufficient to meet her needs and those of the children. If she chooses, she can of course apply more monies to a property, such that her income fund will be reduced accordingly, or vice versa. That will be a matter for her; there are no conditions on application of these funds.
88. I am satisfied that this decision gives appropriate weight to the PMA, protecting H's business interest and restricting the extent of W's claims, while at the same time reflecting W's ongoing long-term responsibilities for the children, the relationship generated impact on her, the extent of the wealth and the family's standard of living.

The outcome leaves H with the vast preponderance of the assets, while meeting the needs of W and the children, albeit to a lesser degree than would have been the case absent the PMA.

Costs

89. I asked the parties to make some submissions on costs in closing even though they did not know at that stage what my decision would be. Mr Glaser KC on behalf of H had intimated at the start of the hearing that he would be seeking some form of costs order, and I thought it desirable to deal with the issue provisionally, in order to try and avoid a further hearing on it.
90. I am quite satisfied that no order for costs is the proper outcome here. True, W's first two offers, in October 2023 and January 2024, sought about £12m and £11m respectively to be paid to W outright, plus child maintenance and school fees. Those offers were hopelessly ambitious and completely ignored the PMA. But her final offer in February 2024 was arithmetically much closer to my decision in this judgment, although she has not succeeded in retaining the FMH. H by contrast did not make an open offer at all until 26 February 2024 (6 weeks before trial), and has maintained throughout that W should receive nothing beyond the terms of the PMA. In fact, I have departed from the PMA so as to meet W's needs, and H's offer has fallen well short. Further, the most glaring piece of litigation misconduct was H's inexcusable failure to disclose the purchase of his property until after the event. Either party is at liberty now, in the light of this judgment, to apply to me for a costs order to be made, but I will require very strong persuasion to do so.