

In the Financial Remedies Court sitting at Medway (Remotely)

Thursday 18 July 2024

Case Number 1703-0002-1318-3153

Neutral Citation Number: [2024] EWFC 199 (B)

Before DDJ Nahal-Macdonald

In the matter of the Matrimonial Causes Act 1973

Between

NM (applicant/husband)

-v-

PM (respondent/wife)

Preliminary Issue Hearing

Background

1. The case before me today is an ongoing matter within the Financial Remedies Court ('FRC') between the applicant husband and respondent wife. For brevity, I will refer to them either as the applicant or respondent or as H and W, as is customary, no offence is intended. The hearing was for a determination of a preliminary issue. H was represented by Mr GILCHRIST and W by Mr HARLEY, both of counsel.
2. H is a Solicitor-Advocate aged 69 who has practiced primarily in the fields of criminal and regulatory law, and W is a Barrister aged 58 who is the head of the family team at chambers in London. The parties married in 2010 and separated in 2023, on W's account, or around 2020 on H's account. In effect, this is a marriage of medium length in respect of the cannon of caselaw.
3. The petition for divorce was in September 2023. Both parties came to this marriage after earlier relationships of significance. H has three adult children and two grandchildren. W has one child, who is now at university, who was around 4 years old when the parties married.

4. I heard this case on 4 April 2024 at a First Directions Appointment ('FDA'), where it became clear that there was a significant issue in dispute between the parties which needed to be resolved prior to progressing the case, perhaps to a Financial Dispute Resolution hearing ('FDR') or to a consent agreement. I set the case down with directions for both parties to file and serve narrative statements and evidence in support of their competing positions. The court heard evidence today from each of the parties and they were cross examined in turn. Both counsel made helpful submissions.

The Dispute

5. The dispute centres around the interpretation and effect of a Pre-Nuptial Agreement ('PNA') which was agreed between the parties prior to their marriage on 5 June 2010. The PNA is seven pages long, and includes, inter alia, that:
 - a. the parties "*agree this is not a marriage where upon [...] divorce a 50:50 division should be applied*" and;
 - b. "*both parties enter into [the] agreement free from duress*" and;
 - c. "*neither party [took] legal advice, neither party discouraged the other from doing so*" and;
 - d. "*both parties agree that they are sufficiently conversant with the law, the effects and application of [the PNA] to enter the agreement without independent legal advice*" and;
 - e. *[at paragraph 10] "[W] will not seek to exercise a right in law to a share of the pensions [of H]"* and;
 - f. *[at paragraph 11] "any inherited wealth should be preserved and separate from the matrimonial assets"*
6. The broad crux of the dispute is, whether most centrally paragraph 18 of the PNA, has the effect either party argues it does: i.e. whether certain properties held in the name of H are non-matrimonial or matrimonial property.
7. H owns three properties in the home counties with an aggregate residual value of around £902,000 after accounting for mortgages and cost of sale; W owns one property in London with a nominal residual value of £824,500 in turn, though each disputes the exact values, those are the values I have adopted today for concision. In

the end, as is axiomatic in these cases, the true values will be dictated by the market if the parties cannot agree them, either via Estate Agents or expert valuations.

8. H has greater savings, investments and pension than W, meaning that per the ES2 his total assets amount to £1.7m and W's to £885,000 in round figures. It is agreed that two of the properties held by H, and rented out, were purchased by him during the marriage. What was in issue is the provenance of the funds, vis a vis the effect of the PNA. W specifically avers today that one of the two properties – purchased in 2013 – ought to be considered as a '*second matrimonial home*' as it was, on her view, purchased as a home where the parties would spend holidays and weekends.
9. Broadly, W argues that on the effect of paragraph 18, in context and on her construction of paragraphs 9-11 prior, it would be unfair to consider the property held by H as ringfenced. She further argues the wider point, that even if the property in dispute is, on the face of it, non-matrimonial, that it would be unfair, per s.25 Matrimonial Causes Act 1973, to hold her to that division of assets on a 'needs basis'.
10. H's case is that the paragraph 18 of the PNA should be construed to mean that his property essentially stays his, that W's property remains hers, and that such a construction would still be fair in the circumstances. This is due to the property being specifically excluded from being shared, or later property being the result of 'conversion' also being excluded by virtue of paragraph 18. H's case as to W's needs is that they are met, even based on a roughly 65/35% split, on his construction of the PNA and in respect of fairness and 'needs' as per the framework.

The Law

11. The legal framework was helpfully set out previously for the court by Mr GILCHRIST on behalf of H, and rather than reinvent the wheel, I adopt the salient points as to the approach outlined by him here.
12. The law has long encouraged people to come to agreements and avoid conflict when possible. The seminal case for prenuptial agreements is that of *Radmacher v Granatino* [2010] UKSC 42. If there is a prenuptial agreement, the court should give effect to one 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.

13. There are therefore two limbs as to whether a pre-nuptial agreement should be upheld:
 - a. Whether it was freely entered into (aka ‘vitiating factors’); and
 - b. Whether it is fair not to hold the parties to the agreement in the prevailing circumstances.

14. Vitiating factors may include material non-disclosure or lack of independent legal advice, however this may be context specific, and the fact that both parties to this PNA are lawyers is an important point. The PNA itself provides that they did not take legal advice, did not dissuade each other from doing so, and are both conversant with the relevant law.

15. Even when there is a prenuptial agreement, the court is still under an obligation to take into account the factors in s.25(2) of the Matrimonial Causes Act 1973, per *Brack v Brack* [2018] EWCA Civ 2862 at [103]. The court may then hear an early ‘abbreviated’ hearing to determine whether the agreement should govern the outcome of the case.

16. Mr HARLEY, in his own very helpful and detailed Skeleton Argument on behalf of W, broadly made similar points as to the framework, with additional context as to the ongoing recommendations of the Law Commission, which I note are not settled law or rules per se, but are indicative of the need for certainty underpinned by legal knowledge or ideally expert advice, in good time in advance of the wedding, where calmer heads might prevail.

17. Mr HARLEY reminds me, as does Mr GILCHRIST, that a qualifying nuptial agreement cannot be used to contract out of providing for a party’s *needs*. An agreement attempting to do so will fail as a qualifying nuptial agreement and will be remitted to the court. Agreements that are not qualifying nuptial agreements will continue to be treated as a “relevant factor” under section 25 of the Matrimonial Causes Act 1973 and be subject to the fairness test set out in *Radmacher*. I agree that there is a principle that if needs cannot be met then this is relevant.

18. In summary, at the prior hearing I broadly took the view that I would need to approach the untangling of the competing arguments in this case by reference to a three-stage process: ascertaining the scope and interpretation of the PNA; identifying the source of the funds for each of the assets in dispute; and hearing evidence as to fairness per s.25, which underpins the courts discretion in the FRC. The advocates agreed with that approach, and helpfully narrowed issues prior and during the hearing.

The Operative Parts of the PNA

19. **Paragraph 8** gives a list of disclosed assets to which the agreement is to apply. I find that it essentially creates classes of property for the purpose of the agreement. Those assets included the properties then held by each, personal valuables, cash and pensions.

20. **Paragraph 9** then goes on to make it clear that the intention of the agreement is for the property in paragraph 8 to revert, insofar as possible, to the party who holds it.

21. **Paragraph 10** deals with pensions. It makes plain that W “*has no pension provision*” and that H “*has substantial pensions [via the Civil Service and private practice]*”. It goes on to say that W will not seek to exercise a right or claim in law against H’s pensions on divorce, and that H would in turn not seek maintenance from W. Broadly I find that it means H keeps all his pensions accrued up to the date of marriage, W has no right to them, and H has no right to pursue maintenance from W.

22. **Paragraph 11** relates to inherited property. The clear plain meaning of the paragraph is that, even if property is to be inherited after the wedding, it is to remain the property of the person who inherited it and not become matrimonial. It is of note that this is duplicated at paragraph 8 in terms of “*anticipated inheritance*” being an asset particularised there.

23. The previous paragraphs underpin the comprehension of **paragraph 18**. This paragraph deals with the distribution of assets upon divorce. It reads:

“It is the intention of the parties that all other income and assets acquired after 5th June 2010, and not arising from the conversion of any aforementioned assets, should be shared equally. However, both parties recognise that the present running of their respective households exhaust their income.”

24. Mr GILCHRIST submitted that the paragraph turns on two points: (i) **what** are the ‘*aforementioned assets*’ and (ii) **how** are they ‘*converted*’?

25. H submitted that ‘*aforementioned assets*’ are the ones that are specifically referred to earlier in the agreement, such as:

- i. Disclosed assets (paragraph 8);
- ii. Pensions and maintenance (paragraph 10); and
- iii. Inheritances and gifts (paragraph 11).

26. H submitted that ‘*conversion*’ ought to be given the plain meaning from the Oxford English Dictionary definition i.e. “*the action of turning or process of being turned, into or to something else: change of form or properties, alteration*” and that in this case the meaning of the clause is that the intention of the parties was for assets acquired after 5 June 2010 to be shared as matrimonial property. The effect would be to share all property which had not been hitherto excluded at the prior paragraphs 9-11.

27. W, for her part, did not disagree with the submissions as to how I should approach the construction of those related paragraphs, but did continue to assert that one of the two properties purchased by H in 2013, is de facto a ‘matrimonial’ asset. She asserted that H lived with her in her central London flat, and that this afforded H savings which supported his ability to buy the 2013 property (‘*Granville*’).

The competing arguments as they relate to assets held by H

28. It is common ground that two of the three houses owned by H were bought post 2010. The property referred to as ‘*Granville*’ was bought in 2013 and the property known as ‘*Castalia*’ in 2021. They would plainly fall to be considered as matrimonial assets unless H can satisfy the court as to the engagement of paragraph 18 as against the factual matrix. I heard evidence from H and W in turn as to the assets in dispute.

29. It is H's case that he bought 'Granville' in 2013 using an endowment mortgage policy taken out by him in July 1986, with the balance from a new mortgage product. Plainly, H's argument is that the root of the 'new' asset is *conversion* from an existing asset (and a further liability, being the mortgage).
30. H argued in relation to 'Castalia' he had purchased this in July 2021 funded by a lump sum from cashing in one of his pensions. H argued that because paragraphs 8 and 10 expressly ringfenced pensions as non-matrimonial assets, to be held by the original owner, this is another example of '*conversion*' from pre-marital assets.
31. It was W's argument in turn that she had certainly contributed indirectly to H benefitting from the two properties, namely by:
- a. The fact that H lived "rent free" with W in the marital home being her mortgage-free flat in central London, which led to economies of scale and savings for him in terms of commuting and overheads, and allowed him to rent out his own home in turn, to generate income; and
 - b. By decorating the two properties, maintaining them and providing furniture, without which they would not have been habitable
32. Moreover, W advanced that she had spent weekends and holidays working from *Granville* and noted that it was half an hour from the school in Kent where her child undertook their education. H asserted that he had not been involved in the decision over her child's education, and had purchased the property of his own volition. H disputed the argument that the *Granville* property was a "*second family home*" and instead that it was always intended to be a "*holiday home*" but that he would retain it.

'Fairness'

33. H argued that the PNA is not '*unfair*' simply because the court may have made a different order as to the assets at a Final Hearing. In the matter of *JS v RS* [2015] EWHC 2921 (Fam), Sir Peter Singer held that, where one party puts forward a coherent case for an outcome which appears less advantageous than that which the

court might have adopted, the court is under no obligation to make a higher order in line with that it regards as that individual's entitlement.

34. This was the same in the earlier case of *Z v Z (Financial Remedies: Marriage Contract)* [2011] EWHC 2878 (Fam). Mr Justice Moor stated that, had it not been for the prenuptial agreement, he would have divided the assets equally. However, the burden on someone arguing not to uphold an agreement was a heavy one, and there had to be the clearest evidence before a court would contemplate using this as a reason not to enforce the agreement. In that case, the court ended up giving the wife around 40% of the property on a needs-basis.
35. *Radmacher* summarised the three main areas as to whether a prenuptial agreement was fair as:
 - i. Children of the Family;
 - ii. Non-matrimonial property; and
 - iii. Future circumstances
36. H maintained that there is a significant amount of non-matrimonial property, which is the exact thing the agreement was trying to protect. It is also submitted that the agreement meets the future needs and circumstances of the parties. It is not as though there has been some material change in the lives of the parties that were not covered by the agreement itself. The most common future circumstance that would change the needs would be if there was a child born and one party stayed at home to look after them, but that is not the case here.
37. It is therefore submitted by H that the result of the correct interpretation of the prenuptial agreement is that all parties retain all the assets in their current name (apart from some cash and/or equivalent pension accrual post marriage). This is due to it all be specifically excluded from sharing under the agreement, or from it arising from property that was converted from specifically excluded property.
38. As to income capacity and other resources, H is a solicitor-advocate, working as a consultant. His income is around £119,621.00 per annum. W is a barrister working in

family law with 25 years of call. She puts her income at £40,000.00 per annum. It is submitted by H that that is low and that she is not maximising her income.

39. W for her own part says that she has had recent health difficulties but is maintaining her workload at the Bar. She asserts that she is “*coming to the end of [her] career*” which I found puzzling bearing in mind her age relative to H and the nature of this profession, where it is not uncommon for lawyers to continue working, albeit on a reduced basis, for a decade or more beyond her age.

Live Evidence

40. Both parties gave evidence and were cross examined as against oral evidence and the written statements they relied on. I made a preliminary ruling that large parts of the witness statement I ordered from W were irrelevant, characterised by unnecessary innuendo and without an evidential basis, such as would amount to a backdoor attempt at a ‘conduct’ argument per section 25(2)(g) MCA which was not appropriate or helpful. The advocates agreed not to adduce evidence on those matters.
41. Notwithstanding my recollection is that W sought this preliminary issues hearing, and that it has the effect of being akin to a ‘Show Cause’ hearing in which the burden would be on the person seeking to not be bound by the PNA, W refused to give evidence first, so H instead agreed to go first.
42. Further to the written statements and skeleton arguments, H was initially asked about the purpose of *Granville* as he saw it, which was now the focussed argument from W. He maintained that this was only a “*holiday home*” and not a “*second family home*” where the family would spend anything like significant or equal time. He accepted that W’s child went to school near there, in Kent, but that he was not involved in the choice of school and made the choice of buying that property separately. I found his answers as to *Granville* to be clear, coherent and concise.
43. H was cross examined on the background to the PNA at some length. He maintained that W had drafted and typed the PNA, that her expertise in family law eclipsed his, and that he was happy to sign the document. It was suggested that the document was finalised around May 2010 but not signed until the day before the wedding, but H

denied any pressure, '*emotional haze*' or other form of duress on either party. He maintained that both parties were lawyers and neither suffered any duress or second thoughts. H suggested that because the terms are now not favourable to W, she wants to resile from it.

44. H was adamant that the development potential of W's flat in London is perhaps twice the estimated value, because it is part of a four-story block of flats whereas the surrounding buildings are much taller, which makes it attractive for builders.

45. It was put to H by Mr HARLEY that he must have been aware of the case of *Radmacher* as it went through the courts in 2010, but H denied this. I find as a matter of fact that the Supreme Court did not publish the judgment in that case until October 2010, and the wedding was in June, so I was not attracted to that point.

46. It was put to H that there was a review clause in the PNA, but that neither party reviewed it over the years, and that this was something they should have done, not least as H later moved from a Civil Service prosecution job to a private practice one where he earned more money, perhaps going from around £35,000 to £55,000. H maintained that neither party discussed, nor sought a review of the PNA and this cuts both ways, which I accepted as a matter of fact. I saw no evidence that either party had considered a review over the years.

47. H denied that he has a materially better lifestyle than W, and in fact says that because he no longer has access to the London flat, he can no longer stay there when working or socialising in London, leading to further costs if he needs to work in the capital. I accepted that broadly, the two have a similarly comfortable lifestyle, with certain concessions and not on a lavish basis from the information available.

48. It was put to H at some length that his pension accrued in private practice (indeed, working for one of the biggest and most renowned law firms in the world) between 1976 and 2000 was a highly significant asset, and that he obscured the value of it from W at the time of the PNA. H strongly denied this assertion, maintaining despite persistent and somewhat forceful cross examination from Mr HARLEY that he did not know the value of that pension from 2004 when he left the firm, to 2013 when he

drew it down to pay for *Castalia*. He denied this was a lack of transparency on his part, and maintained that the principle of each party keeping inheritance, property and pensions was clear, not the amounts of the same if they were not known. I found it quite concerning that there was assertion being put to the witness absent an expert basis for the calculation, i.e. at one point I intervened when it was suggested that the pension had been worth “£800,000” at the time of the PNA, when there is no evidence for this. I took it at face value that H did not enquire or know about the value of the private sector pension in 2010, nor did W. I found it somewhat unedifying that W seems to be putting to H now that he had hidden the value of this asset from her. I also took note that none of the parties addressed me on what by inference must be 13 years of public sector, defined benefit, pensions, held by H, which are an arguably rarer and often prized asset type.

49. H was cross examined as to what he thought W’s needs were, and what she would do in the medium to longer term without a pension of her own. H pointed out that Clause 10 of the PNA clearly demonstrates that it was W’s intention to treat the equity in the London flat held by her as a ‘pension’. H maintained that the flat, proximal to various desirable areas on the South Bank, could be rented out for, he suggested £1,500 per week. In summary, H maintained that the PNA was freely entered into, was clear on its terms and was not unfair.
50. W gave evidence in turn. She maintained that when *Granville* was purchased it was a “*very happy time*” in the marriage – for instance that this home was used for leisure, entertaining and dinner parties. She explained that the family were part of the local church community, they had a garden and better access to the countryside and open spaces in which to raise her child, who was at all times treated as a child of the family.
51. W maintained that H is wrong about the development potential of the flat in London which she still holds. She maintained that it was “*demeaning*” to suggest that she could rent the flat out and live elsewhere later on, and maintained that she had not known the value of H’s private pension, and did not enquire. She maintained in 2010 she was in her forties, and that she was not thinking about retirement.

52. In terms of her practice at the time of the PNA and now, W maintained that she had previously been working at a ‘set’ which only did crime, and then she moved to her current chambers, where she began to work more in family, and latterly she does do “*a bit*” of matrimonial finance. It was put to W that on her chambers website profile it did indicate that she practiced in matrimonial finance and in ‘*TOLATA*’ and related matters. W sought to demure from this, indicating that chambers staff write the profiles, and that she was predominantly practiced in private family and care.
53. It was put to W that prior to the signing of the PNA, she had accepted briefs involving financial remedies. She said this was possible. It was put to her that she drafted the PNA, she said this was inaccurate, she “*did not take the lead*” and she “*typed it but didn’t draft it*” – which I found to be confusing and an attempt to minimise her role.
54. As to H’s private pension, W maintained that she did not know the value of this, and inferred that H had kept “*the magnitude*” of this asset secret. I did not find any compelling evidence to support this inference of secrecy and/or dishonesty by H.
55. W maintained that H had told her father, when asking permission to marry her, that he would “*take care of her*” and made various paternal comments of that nature. W used the term “*crafty*” when speaking about H, which I found to be frankly unhelpful and in contrast to the evidence of H, which had not sought to cast aspersions as to W. It is further axiomatic that both are officers of the court.
56. W suggested that she had wanted the protection of the PNA so that she would not be “*cheated*” out of her flat in London, and agreed that at the time of the marriage, it was the superior property in terms of value compared to the property then held by H. I found this to be persuasive indicative evidence that in terms, W was in fact likely the driving force behind the PNA, though she does now not want to be bound by it.
57. W said that the parties had “*very clear*” discussions at the time *Castalia* was purchased in 2021 as to provision for their respective children, and that this was around the time that H had lost his mother. W’s account was that the property was purchased to make “*our future more secure*” and disagreed that this was not discussed.

58. Paragraph 10 of the PNA was put to W – where it says that H had a “*substantial*” pension. W sought to resile from this, and sought to suggest that the clause was written for the benefit of H, and that due to him being older than her, and that it was to protect H in later life as he was closer to needing his pension, and to “*protect her from maintenance claims*”. I found this narrative unclear and not compelling.
59. I asked W questions about this at the close of her evidence – i.e. whether the reality is that she was “*doing better*” than H at the time of the marriage (in terms of income, standing in the professions and the value of their respective homes in 2010) and whether on reflection that the attack on the PNA was disingenuous. W denied this, and placed emphasis on the shared impression that the marriage would be longer and more equitable than the PNA suggested.
60. W was asked questions about the beneficence of her father, who the court heard had paid for W’s child’s tuition and is currently making contributions toward the overheads at university.
61. It was put to W that her income was low for her years of call. She said she did not know as against comparators in the industry whether £40,000 was low for her years of call or area of expertise. She maintained that she worked very hard in a difficult field.
62. It was put to W that there was no medical evidence to support purported medical impacts of menopause or epilepsy. She accepted this, and said that the two conditions in tandem caused fatigue and concern to her, and that she became rundown.
63. It was put to W that she did not provide any mortgage capacity evidence. She said that she did not have affordability, but the lack of any evidence to support this was frankly unhelpful. The court takes note of the fact that there is a difference between a lay person who does not have a mortgage simply telling the court that she has no mortgage capacity, and not even making enquiries with a broker. It was put to her that she could take a mortgage and use that as a vehicle to pay for somewhere else. W seemed very upset at the suggestion that she would enter the marriage without a mortgage and then have to take one at her stage in life.

64. W said she was “*quite insulted*” when Mr GILCHRIST put to her that H had offered to contribute to the bills on the flat in London. She said this was “*absolute rubbish*”. It was put to her that H instead paid for club memberships, nights out and groceries etc. W seemed to begrudgingly accept this was correct, but said that whilst H would pay for meals out, they rarely did go out for dinner, and instead H spent a lot of money on himself including his musical hobby and clothes.

Submissions

65. Both advocates made submissions further to their skeleton arguments and the evidence from H and W. Mr HARLEY for W submitted that the chambers W works from is a lower league set which “*fights for the scraps*” whereas Matrimonial Finance work tends to go to established sets with prestige in this area. It was submitted that W is not in a profitable area of legal work, and that her expertise is not in the requisite area of matrimonial finance to have fully understood the gravity of the PNA.
66. Mr HARLEY emphasised that the wording at paragraph 10 in the PNA -where it says the pension held by H was “*substantial*” – was an elastic term, which is context specific, and that the broad value of that pension fund is as much as £800,000 now, which had W known about it, might have led to a rethink of the terms of the PNA. There was a lack of legal advice, lack of disclosure and those things make the PNA materially doubtful. He invited the court to consider whether if there had been legal advice, disclosure as to the value of the pensions, would the terms of the PNA have been different?
67. Moreover, Mr HARLEY said that the strongest argument for his client was in terms of needs. It was palpably unfair that H is in a much better position than W when there is a dispute as to the use of *Granville*, which W says was used as a second “*family home*”, not rented out, and which W views as a matrimonial asset. It is unfair to rely upon W selling off her home or raising a mortgage or having to rent, when H would not be in that position. Mr HARLEY maintained that the adult child of W does require further monetary input and it is unsafe to assume W’s father will continue to make that provision, or that W will inherit from him in due course.

68. In turn, Mr GILCHRIST for H submitted that per *Radmacher* – only “*material*” disclosure needs to have occurred – and that is exactly what happened here. The disclosure did not need to be forensic or in greater detail beyond the parties agreeing that the pension was “*substantial*” – this was highly indicative in the context of professional people entering into this agreement in the terms they did. He said I should take the PNA on the face of it and not find that the basis was unsafe, and noted that throughout the caselaw are examples of even lay people being bound by the terms of a PNA without legal advice.
69. Mr GILCHRIST suggested that there is no such thing as a “*family*” home in specific terms in the law, there is a “*matrimonial* home” and that the parties spending some time at *Granville*, in terms of weekends and holidays, is not conclusive evidence that the property is “*matrimonial-ised*” per se.
70. It was conceded that there are several pensions held and added to by H during the marriage, which amount to roughly £57,500 in today’s money, but the property held in the name of H can all be traced back to pre-marital assets, and are caught by the operative paragraphs in the PNA. It was put that agreements which were fair at the time should be upheld now.
71. It was submitted that I can take note of the support that has been offered throughout the last decade and a half by the father of W toward her child in terms of funding his tuition and maintenance, and that W is an only child, so an assumption can be made that when her father passes away, she stands to inherit from his estate, such that her financial needs will not be in question.
72. Moreover, Mr GILCHRIST submitted that the terms of the PNA, the tracing of the provenance of funds and the rough division of assets now held on the basis of approximately 65/35% were not inherently unfair as against the framework, and that I should not go behind that division now, save perhaps for a balancing payment being made in due course for assets accrued during the marriage, as above.

Findings

73. As to construction first: I found that as a matter of simple construction, paragraphs 9-11 set out the various assets held before the marriage, the intentions of the parties

thereafter and a guarantee against seeking pension sharing orders on divorce. Those paragraphs underpinned the use of the word “aforementioned” in paragraph 18, and the word “conversion” carries its ordinary meaning, i.e. if I can trace the provenance of an asset acquired post-marriage to a pre-marital source, then it would not, on the face of it, be caught by the second part of paragraph 18, and would be ringfenced.

74. As to the quality of the Agreement and the factual circumstances when it was signed: As to the point that the two parties are lawyers but did not have specialist skill in the area of matrimonial finance, I accept this. I do not accept that as a matter of interpretation of the caselaw or the circumstances here, they should not be bound by the terms because of an agreed choice not to seek legal advice.

75. I note that in other cases, lay people have been bound by agreements absent legal advice, and the risk of making the choice they did would have been abundantly clear to any lawyer in that position. I do not accept that the proximity between signing and the marriage is such that it would cause undue influence or emotional haze, as it was put, not least because I heard evidence that the agreement was drawn up at least a month prior. I also find as a matter of fact that W was the one who drafted the agreement, albeit with input from H, and that they ought to take joint credit for it and equally to be jointly bound by its terms, freely entered and not on the face of it perverse.

76. I found that the two houses in dispute, albeit purchased in 2013 and 2021, were from assets ‘converted’ by H from his pre-existing and pre-earned assets, namely from an endowment dating back to 1986 and a pension dating to his time in private practice, from 1976 onwards. That places them squarely within the protection afforded by paragraph 18 as assets that the person who holds them would keep.

77. In respect of the somewhat novel argument that the property purchased in 2013 is somehow “*matrimonialised*” due to the parties spending time there as a “second family home” I find this to be misconceived. I take the view that when one accepts that the provenance of funds used by H to purchase *Granville* in 2013 was from his pre-marital assets, then in turn the straightforward term “conversion” in the PNA at paragraph 18 is conclusive. To argue that the asset was somehow brought outside of

the protection afforded by paragraph 18 by virtue of the family spending time there is to ignore the purpose and scope of the PNA. Indeed, if that were correct then surely H would by extension seek a share in the London Flat, as he would argue it was matrimonialised by virtue of the parties mainly treating it as their “*primary family home*”.

78. Turning to the consideration of the s.25 conditions as against the facts of this case, and noting that the PNA may be otherwise set aside in certain circumstances, i.e. in needs cases. I find that on a strict interpretation of the framework, this is not a needs case. Albeit with a lesser share – on around 35% of the assets held by W- on the face of it those assets amount to around £900,000. This is not the type of case where a party would be left homeless or impecunious with that sort of share.
79. W on her own evidence and pursuant to the assets she held at the start of the marriage is not in any different of a position from 2010. Granted, she is older and closer to retirement, but I am not persuaded that she needs to imminently stop working and the evidence I have is from someone who is highly experienced and competent in their field. Instead, I found that even with 35% of the total nominal “pot”, W would have enough now and in the future for her needs, and when she does decide to retire, there would be an argument she would then be over-housed and could downsize, as appears to always have been the plan and indicated from the PNA itself.
80. The fact that W has failed to build a pension pot in 40 years of adulthood perhaps belies a reliance on the beneficence of her parents, first in buying the flat in London for her in 2003 and then later in paying for her child to go to private school and now to university. That is not something which H ought to be penalised for, as a matter of law, but it is invidious. W made the point that aged 44 when the marriage began she was “not thinking about retirement” whereas now at 58 she is from her own evidence. Respectfully, the indication from the PNA is that her intention was always to downsize or otherwise treat the London flat akin to a pension. I cannot comment on the financial merit of this approach, it is one she was free to follow as an adult.

81. There are no minor children to account for and the evidence is that the adult child of W is supported by the grandfather. Neither party has any medical evidence of a specific condition or disability which would cause them to stop working immediately.
82. W has a lower income on paper, but I am persuaded that she ought to be able to increase it, noting her years of call in the field, and other outside work available such as in training. I do not accept that because she is working in a set which doesn't provide a lot of profitable work, she cannot think about other avenues: i.e. working for a local authority in the care field with her experience would provide a higher income than this and indeed a local government pension, or simply looking to change to a different set and diversify into areas of work (including, as it says on her web page, matrimonial finance) which would supplement her income.
83. Further, I note that the Bar Council's annual report into gross earnings at the Bar in November 2023¹ suggests a median gross income for a female barrister in family work at the independent bar of around £150,000. I of course note this is not universal, and "family" will include higher paid areas of work than care, and will also not account for chambers rent and other overheads, but it is indicative. In short, I find that it is more likely that W is not taking steps to maximise her income and ought to do so.
84. In turn, W is younger than H and has longer to work and save until retirement. Her housing needs are in fact met and exceeded. In summary I can find no compelling evidence in support of the PNA being 'unfair' in respect of the inherent safeguards at S.25 of the Act in this case.
85. I note that separately there may still be some liability from H to W for post-marriage accrued assets, including investments or cash. That is a matter for the parties separately from this hearing.
86. My judgment therefore is as sought by H, namely in terms:
- i. I declare the prenuptial agreement should be upheld;
 - ii. I make a clean break order (to effect the agreement in practical terms); and
 - iii. I find costs are at large and will be addressed on the quantum

¹ At <https://www.barcouncil.org.uk/resource/barrister-earnings-by-sex-and-practice-area-november-2023.html>

DDJ Nahal-Macdonald

18 July 2024