IN THE CENTRAL FAMILY COURT Case No: FD13D00007

B E T W E E N

RICHARD GRANT ROGAN Applicant

and

SARAH ANNABEL ROGAN Respondent

This judgment was delivered in private, but the judge has given leave for this version of the judgment to be published.

WRITTEN JUDGMENT OF HIS HONOUR JUDGE EDWARD HESS
(Handed down by email on 9th June 2020)
(As approved on 28th July 2020 after being amended and redacted following submissions made to both HHJ Hess and Holman J)

1. This case concerns the financial dispute arising out of the divorce between Mr Richard Grant Rogan and Mrs Sarah Annabel Rogan. I shall refer to them in this judgment as 'the husband' and 'the wife' for ease of reference, though I am well aware that they have been separated since 2012 and divorced since 2014, and in the husband's case he is remarried, and I apologise if the nomenclature seems odd to them.

BACKGROUND

2. I shall begin this judgment by setting out (at a little length) some background facts and a relevant chronology to take the reader of this judgment through the facts leading up to the present day.

3. The husband is aged 65, having been born on 1st May 1955. He is an American Citizen by birth; but has lived in the United Kingdom since 1993 and became a Citizen of the United Kingdom in 1999, revoking his American Citizenship, but retaining his American Tax domicile. Prior to his relationship to the wife, he had been married and there were two, now adult, children from that marriage. He made an impression on me as a man with personal charm, passion and courteousness and with an engaging presence; but also somebody prone to bluster and bombast and (as I shall develop below) somebody whose word cannot be treated as always being a reliable indicator of the truth. In his Form E in these proceedings he describes himself as a 'company

director'. Much of his work has been ancillary to the arms trade and it is common ground that the husband has enjoyed a business career involving, at times, significant financial success and ready acquaintance and association with distinguished names in politics (in the United Kingdom and overseas), commercial law and business; but his success is not, and it appears never has been, a flow of uninterrupted and steady PAYE income from predictable and reliable sources. His business life is that of the deal maker, sometimes succeeding in spectacular fashion, sometimes falling flat on his face, often having to involve himself with projects which never happen and individuals around the world who are not always reliable in fulfilling their obligations, and rising or falling with them. It may be that to succeed in this world a good degree of blustering optimism and propensity for risk-taking is a necessary character trait and, if it is, perhaps the husband is suited to it.

4. I note the overall description of the nature of his work contained in the note submitted to the court in December 2015 by the husband's then Counsel, Tim Amos QC, which broadly matches what I have been told in these proceedings:-

"Key to a proper understanding of this case is the unusual nature of H's income source. He works, through a company called Blenheim, to broker "offset contracts" which in essence provide infrastructure to emerging countries as a linked transaction and condition of the purchase by those countries of (typically) armaments from the West. By its nature H's work is subject to very high levels of national security and secrecy, for the reasons set out in H's statement at paragraph 28. The work is necessarily project-based and the individual projects have a very long gestation period. They are also subject to the cultural delays, vagaries and other uncertainties inherent in working with/in, particularly, the Middle East."

5. In a similar vein I also note what Holman J said in his judgment of 21st September 2018 (M-E2)[1], which entirely matches my impression:-

"The husband's business involves the trade in intergovernmental offsets and is complex. It seems to be common ground that during the marriage, as well as since, there could be successful deals, which generated considerable wealth for the husband, followed by periods in which he had no income at all. He always has been a man who had means, but no regular periodic income".

[1] References to (M-xx) are to page numbers in the main bundle and to (S-xx) are to page numbers in the supplemental bundle, both of which I have had electronically, the former running to 270 pages, the latter to 1,925 pages. The disclosure process in this case was not all that it might have been and, as the case proceeded, a significant number of additional documents were disclosed and emailed around, mostly by the husband. Their admissibility was not challenged by the wife's legal team, but it was not possible to incorporate these in the electronic bundle and, where I refer to them in this judgment, I shall attempt to give sufficient description to identify what the documents were.

6. The wife is aged 46, having been born on 17th January 1974. This was her first marriage and she has no other children than those of this marriage. She is and always has been a Citizen of the United Kingdom. She is educated and intelligent, having a Degree in Psychology, and impressed me as a calm, careful, thoughtful but determined person, her dignified restraint and possibly slightly anxious nature contrasting with the husband's bombastic self-confidence. In her Form E in these proceedings she describes herself as a "*full-time mother*", and her success in this role has not been questioned before me. She did some work before the marriage, has more recently been involved in voluntary work with charities such as the 'Samaritans' and 'Riding for the Disabled' and wishes to undertake some further studying before commencing a "*career in the area of health*".

7. The parties met in 2001, began cohabiting in 2002 and married on 31st December 2002.

8. They lived together in the family home at Gaunt House, Standlake, Witney, Oxfordshire, a fine moated 15th century property with large grounds, including a swimming pool and a tennis court. The family generally lived a lifestyle associated with significant wealth, and most of this lifestyle was funded from the husband's business activities before and during the marriage. I sense that, for the husband, the wish to live in a fine home, bound to impress all-comers, is one manifestation of his 'blustering optimism' character trait. For him, the need to have a financially secure home with a sound and permanent funding base is less important.

9. The marriage produced two children:-

   (i) A son, who is now aged 15, nearly 16. He currently attends a fee-paying school in Oxfordshire.

   (ii) A daughter, who is now aged 13. She currently attends a fee-paying preparatory school in Oxfordshire. She is expected to move on to a fee-paying secondary school in September 2020.

10. The parties' relationship sadly broke down and they separated on 31st August 2012. The wife remained living in the family home with the children and, for some years, the husband lived in a separate 'summer house' accommodation within the grounds.

11. The wife commenced divorce proceedings on 2nd January 2013. Decree Nisi was ordered on the 10th June 2013 and Decree Absolute on 7th April 2014.

12. The wife issued Form A on 9th January 2013 and the financial remedies proceedings were allocated to High Court Judge level and were dealt with in in the Royal Courts of Justice. The wife was represented throughout by Hughes Fowler Carruthers (Solicitors) and Mr James Ewins (later, but not then, a QC - Counsel). The husband chose (possibly

unwisely) to represent himself in these proceedings. There were two FDR hearings before Moor J: the first on 15th January 2014 and the second on 14th March 2014. On each occasion the wife was represented by Mr Ewins and the husband was a litigant-in-person (accompanied on 15th January 2014 by a McKenzie Friend, Mr. A). The second hearing was concluded by the making of a final consent order by Moor J on 14th March 2014 (M-B1). The court bundle includes full transcripts of what happened in court at those hearings (S-A46 & S-A69) and also a note taken by an unnamed attending pupil of Mr Ewins of some of the negotiations outside the court room on 14th January 2014 (S-A41). The transcripts show that the negotiations took place against the background of financial pressure from some of the husband's creditors and that, in terms of some of the finer legal points, the husband was rather out of his depth and, in terms of how he was to meet his obligations under the order, he evinced some of his 'optimistic bluster'; but it is clear that Moor J fully and appropriately satisfied himself that the husband was entering into the agreement willingly and with the knowledge that he could seek legal advice on it if he wished to do so (S-A94) and it could not properly be suggested that Moor J should have declined to approve the consent order presented to him. We shall never know, however, what would have happened if the husband had decided to take legal advice at this point. Perhaps a lawyer would have advised caution about the lump sum figure in view of the uncertain nature of some of the postulated sources of capital; but (at least) it seems likely that the drafting of the order would have received more challenge than it did from the husband as litigant-in-person.

13. Under this order the husband was required to pay to the wife:-

    (i) a lump sum which, although complicated in its payment mechanisms and instalments, was essentially a fixed lump sum of £5,000,000 to be paid in full by 31st December 2017;

    (ii) a pension sharing order in relation to the husband's Scottish Widows pension which was intended to have the effect of equalising the CEs of the parties' respective pensions;

    (iii) ongoing spousal periodical payments which, again, had some complicating elements, but which (in addition to an arrangement prior to the sale of the family home) was essentially an ongoing joint lives order at the rate of £8,000 pcm from the completion of the sale of the family home onwards plus a portion of any bonus payments received by the husband; and

    (iv) child periodical payments (from the completion of the sale of the family home onwards) at the rate of £1,000 pcm per child plus full school fees.

14. The family home took some time to sell and, in the course of its marketing, some problems had emerged with the operation of and compliance with the March 2014 order. On 18th May 2015 the wife issued applications for the enforcement and/or variation of the March 2014 order (see 28th May 2020 Exhibits PDF, page 52). For these applications the husband instructed a legal team, Kingsley Napley (Solicitors) and Mr Tim Amos QC (Counsel). This process culminated in a consent order made

by HHJ Lord Meston QC, sitting as a High Court Judge, dated 17th December 2015 (M-B10).

15. This order dealt with quite a number of issues, but the main changes relevant to my task were that:-

    (i) the arrangement over spousal periodical payments pending the sale of the family home was clarified such that the husband was required to pay £15,000 pcm from 1st January 2016 on the basis that the wife would meet the outgoings on the family home;

    (ii) it was agreed that the husband would pay to the wife an additional £60,000 by 15th June 2016 in settlement of his alleged non-compliance of the original order;

    (iii) it was agreed that as and when he had paid the lump sum of £5,000,000 in full, the husband's obligation to pay spousal periodical payments would be discharged with a clean break and a section 28(1A) bar was imposed; and

    (iv) a CPI uprating clause was introduced in relation to the monthly child periodical payments order.

16. From reading the note dated 16th December 2015 submitted to the court by Mr Amos QC, I note that he made these comments about the 2014 order:- *"the consent order…is a complex document which was clearly drafted somewhat 'on the hoof'…It is an obvious point that, if H had had lawyers acting for him in the drafting of the Consent Order, there would also have been formal provision for a clean break and formal dismissal of W's income claims upon payment of the £5m. H's recollection is that there was discussion and calculation of the £5m by reference to the Duxbury tables. It seems odd that the clean break provision did not make it into the Consent Order and W/her lawyers will need to explain why it did not."*

17. This issue was, in effect, conceded by the wife's legal team in 2015 and, before me, the thrust of this particular criticism was not challenged; but it has properly been pointed out that the December 2015 order deals with the mischief.

18. In similar vein, at some points in the current litigation (for example in his statement dated 21st June 2018: see M-C11) the husband has suggested that the March 2014 order wrongly fixed an unconditional £5,000,000 lump sum figure, and that the order should have said this figure was conditional upon the husband being successful in his "tax litigation" (M-B2); but this point appears expressly not to have been taken in the 2015 litigation (on advice from Mr Amos QC) and the husband made it clear at the start of the final hearing before me that he was no longer taking this point.

19. The husband has made some progress in paying the lump sum of £5,000,000 ordered in March 2014:-

(i) In August 2015 the husband managed to procure a sum paid into a trust effectively controlled by him called Trust A, apparently from a loan from Bank A, in the sum of $6,000,000. Of this amount he paid to the wife the sum of $2,000,000 and retained $4,000,000 himself (of which more below). It is common ground that the $2,000,000 sum should be treated as part payment of the lump sum, the sum being treated as £1,283,368 (its sterling equivalent).

(ii) On 13th August 2016, when completion of the sale of the family home finally occurred at a sale price of £4,750,000 (somewhat, but not hugely, lower than the £5,000,000 figure used in the 2014 FDR), the wife received £1,720,000 (acknowledged to be a part payment of the lump sum).

(iii) It is common ground, therefore, that the husband has paid £3,003,368 (£1,283,368 plus £1,720,00) towards the £5,000,000 figure so that £1,996,632 remains outstanding. This was due on 31st December 2017 and it has been the wife's case (not, until now, disputed) that she is entitled to statutory interest on the outstanding sum at the court judgment rate of £438 per day or £384,564 up to 28th May 2020.

20. In the meantime the husband formed a relationship with a new partner. She was a widow with two children living with her, namely a daughter, aged 19, and a son, aged 16, very nearly 17. In August 2015 they began cohabiting at a newly acquired property at Larkstoke Manor, Ipsden, Wallingford, Oxfordshire, another fine property in extensive grounds purchased for £4,500,000. This property was acquired via Trust B, utilising almost all of the $4,000,000 referred to above which was transferred from Trust A, plus additional borrowing by Trust B of £2,950,000. The husband and his new partner were the tenants of Trust B (of which more below). On 24th March 2018 they were married (of their expensive wedding celebrations, more below). The husband's new partner had been in employment in France, but appears to have ceased working since moving to England and she and her children have become financially dependant on the husband. She has a modest property interest in France (M-D25).

21. In the meantime the wife formed a relationship with a new partner, but denies that they are cohabiting. On the sale of the family home in 2016 the wife purchased and made her home with the children in an Oxfordshire property purchased for £1,295,000 on a mortgage-free basis.

22. In the meantime there were some difficulties between the husband and the children which caused the issue of proceedings under Children Act 1989 in Oxford Family Court. These proceedings culminated in an order made by DJ Devlin on 28th August 2019, the effect of which was to leave decision-making about contact in the hands

of the children. In September 2019 the husband wrote a letter to the children, the result of which is that there has been only very limited contact since then. It is very much to be hoped, of course, that this situation will resolve itself, and that the husband will resume a full and good relationship with both children, but the existence of ongoing financial disputes and litigation, and all the tension resulting from this, make this really quite difficult.

23. By the end of 2017 the husband not only failed to pay the residual part of the lump sum due; but also began to go into arrears on the periodical payments.

24. On 18th January 2018, therefore, the wife issued a second enforcement application. The enforcement application was heard by Roberts J on 5th March 2018 (M-B21) and Cohen J on 9th March 2018 (M-B23), but was then superseded by the wife's issue, on 30th May 2018, of a judgment summons application (M-B28) and no enforcement order as such has been sought before me.

25. The judgment summons application was first heard by Cohen J on 6th June 2018 (M-B29), but substantively by Holman J on 5th July 2018 (M-B32), 20th and 21st September 2018 (M-B37), 18th March 2019 (M-B39) and 28th November 2019 (M-B54). At the September 2018 hearing Holman J found that the husband was guilty of contempt of court by failing to pay £55,000 out of the £56,000 spousal periodical payments due between November 2017 and May 2018. He found that the husband had had, at the time, the means to make the payments, but had "*made a choice, which can only have been deliberate, to prioritise other expenditure over expenditure on his former wife. Most conspicuously, in a period between January 2018 and mid-May 2018, the husband spent about £24,775 on a wedding to his present wife here in England, plus about £48,000 upon a wedding to the same wife in Morocco…that refusal or neglect has been deliberate and willful and is culpable, being in contempt of court"(M-E5).* Notwithstanding this clear finding (which the husband has told me he entirely accepts and he has repeatedly expressed his apologies during this hearing for what he did in that period), Holman J has successively decided to defer consideration of the sanction for this contempt, initially to March 2019, then to November 2019 and then until after the completion of the current hearing before me, after which it is to be restored on notice before him. Encouraged by the husband's expressions of optimism about the future, and perhaps fearing that a committal order, however much deserved, might in fact do more harm than good to the wife's prospects of receiving monies from the husband, and wishing to give the husband a chance of succeeding in varying the original order, Holman J has left the threat of committal as a 'sword of damocles' hanging over the husband, reminding him in March 2019 that he "*needs to leave here today clearly understanding that the door of the prison is ajar*" (M-E11).

26. In the meantime, on 10th September 2018 the husband issued an application for the variation of the lump sum and periodical payment orders made in 2014 and 2015 (M-B34). By order of HHJ O'Dwyer dated 20th May 2020 (M-B85) this application

was listed to be heard before me for final hearing on a 5 day time estimate in week commencing 1st June 2020.

27. In the meantime, on 22nd July 2019 the wife issued a Hadkinson application (M-B43) in which she sought to prevent the husband from pursuing his variation application until he had done certain things. On 8th August 2019 HHJ Robinson adjourned that application to be heard with the ongoing judgment summons application (M-B50) and a limited Hadkinson order was made by Holman J on 28th November 2019 (M-B51), but the husband has been able to comply with its terms and it has not had the effect of preventing the hearing before me going ahead.

28. The disclosure process in the application before me has moved forward in a somewhat haphazard fashion, but (at the end of this hearing) I am in possession of a substantial body of documents, including the following:-

    (i) from the husband: a Form E dated 8th January 2020 (M-D1), statements dated 21st June 2018 (M-C8), 6th August 2019 (M-C28), 6th September 2018 (M-C17), 8th January 2020 (M-C31), 2nd April 2020 (M-C44), answers to questionnaire dated 2nd April 2020 (M-D88), 2nd April 2020 (M-D104), 3rd April 2020 (M-D108), 14th April 2020 (M-D109), a position statement dated 28th May 2020 (not in the bundle, but with various sets of 'attachments' by PDF) and quite a number of random documents circulated by email during the hearing; and

    (ii) from the wife: a Form E dated 24th January 2020 (M-D30), statements dated 30th May 2018 (M-C1), 24th August 2018 (M-C15), 6th March 2020 (M-C37), answers to questionnaire dated 20th April 2020 (M-D110), a statement from her solicitor dated 22nd July 2019 (M-C20), a position statement produced by Ms Charanjit Batt (Counsel) dated 28th May 2020, and, likewise, quite a number of random documents circulated by email during the hearing.

29. The hearing before me has proceeded remotely by Zoom. I am satisfied that it has been a fair hearing and that both parties Article 6 rights have been fully respected (and nobody has suggested otherwise). Both parties have had a full chance, unimpeded by the remote nature of the hearing, to put their own case and challenge that of the other. The husband has appeared as a litigant-in-person. The wife has appeared by Ms Charanjit Batt (Counsel) and has been attended throughout the hearing by her Solicitor from Hughes Fowler Carruthers, Mr Liam Bennett. I am grateful to Ms Batt's chambers (QEB) for setting up the Zoom hearing and agreeing to ensure that all the video recordings are properly lodged with the Central Family Court.

30. It has been common ground before me that the husband is in very substantial breach of his obligations under the 2015 order. The offer letter dated 28th May 2020 sought

to summarise the position in accordance with the table below. This has not been challenged before me and, subject to my comments below about statutory interest on the lump sum (i.e. part B), I shall take it to be mathematically accurate and proceed on the basis of the accuracy of this table:-

A. Outstanding portion of March 2014 Lump Sum Order	1,996,632
B. Statutory Interest on A to 28th May 2020	384,564
C. Arrears and Costs per Holman J order of 18th March 2019	140,933
D. Interest on C to 28th May 2020	14,889
E. Costs per Holman J order of 18th March 2019	12,810
F. Unpaid spousal periodical payments between March and November 2019	48,000
G. Costs per Holman J order of 28th November 2019	5,640
H. Interest on G from 9th to 28th May 2020	173
I. Further costs per Holman J order of 28th November 2019	21,300
J. Interest on G from 9th January 2020 to 28th May 2020	652
TOTAL	**2,625,593**

31. At the end of the oral submissions on 4th June 2020 I reserved judgment and promised to circulate a written judgment as soon as I was able, which I now do.

APPLICABLE LAW

32. Given that the nature of my task is to deal with a variation application under Matrimonial Causes Act 1973, section 31, I need to turn to the relevant statute and case law.

33. In considering the various applications before me I need to have in mind the provisions of Matrimonial Causes Act 1973, section 31. The relevant parts of that section read as follows:-

"(1) Where the court has made an order to which this section applies, then…the court shall have power to vary or discharge the order or to suspend any provision thereof temporarily and to revive the operation of any provision so suspended.
(2) This section applies to the following orders, that is to say—
… (b) any periodical payments order;
…(d) any order made by virtue of section 23(3)(c) (provision for payment of a lump sum by instalments)…
(2A) Where the court has made an order referred to in subsection (2)(a), (b) or (c) above, then, subject to the provisions of this section, the court shall have power

to remit the payment of any arrears due under the order or of any part thereof.
…
(7) In exercising the powers conferred by this section the court shall have regard to all the circumstances of the case, first consideration being given to the welfare while a minor of any child of the family who has not attained the age of eighteen, and the circumstances of the case shall include any change in any of the matters to which the court was required to have regard when making the order to which the application relates, and—
(a)in the case of a periodical payments or secured periodical payments order made on or after the grant of a decree of divorce or nullity of marriage, the court shall consider whether in all the circumstances and after having regard to any such change it would be appropriate to vary the order so that payments under the order are required to be made or secured only for such further period as will in the opinion of the court be sufficient (in the light of any proposed exercise by the court, where the marriage has been dissolved, of its powers under subsection (7B) below) to enable the party in whose favour the order was made to adjust without undue hardship to the termination of those payments;
…"

34. Accordingly, if I consider it just, I can vary or discharge the original order. In terms of periodical payments I have, in theory, the power to backdate any variation order to the date of the original order, but backdating to take effect prior to the date of the variation application would require an "*exceptional circumstance which justified*" such an order: see Stephen Brown P in *Cornick v Cornick (No. 2)* [1995] 2 FLR 490. It is more common for courts to regard the date of the variation application as the earliest feasible date for a variation, i.e. in this case 10th September 2018, indeed Holman J refers to this as a likely maximum parameter in his judgment.

35. It is common ground that the 2014 order was a lump sum by instalments within the meaning of Section 31(2)(d) above and is therefore, in principle, subject to variation. Case law, however, suggests that I should be slow to vary the overall quantum of a lump sum order. The leading authority on this point is the judgment of Bodey J, sitting in the Court of Appeal, in *Westbury v Sampson* [2002] 1 FLR 166 when he said (my emphasis included):-

"Nevertheless, given the constant emphasis in the authorities generally on the need to uphold the finality of orders intended to be final, including orders as to capital, it seems to me that very similar considerations ought in practice to be applied under s 31 as those laid down in Barder v Caluori [1988] AC 20, sub nom Barder v Barder (Caluori Intervening) [1987] 2 FLR 480, at any rate as regards varying the overall quantum of a lump sum order by instalments (as distinct from re-timing or 're-calibrating' the instalments). ***The re-opening under s 31 of the overall quantum of lump sum orders by instalments, especially when made as part of a package intended to be final (and all the more so when ordered by consent following an agreement) should only be countenanced when the anticipated circumstances have changed very significantly, and/or for cogent reasons rendering it quite unjust or impracticable to hold the payer to the overall quantum of the order***

originally made. *This formulation gives a little more latitude as regards s 31 of the Matrimonial Causes Act 1973 than do the Barder conditions for the grant of leave to appeal out of time; but that must I think follow from the statutory requirement under s 31(7) that the court is to consider 'all the circumstances'."*

36. This decision received tacit approval from the Supreme Court per Lord Wilson in *Birch v Birch* [2017] UKSC 53:-

"It is worthwhile to note that an order for payment of a lump sum is occasionally variable even if, as is likely, the variation will directly prejudice the interests of the payee. Thus section 31(2)(d) of the Act expressly empowers the court to vary an order for payment of a lump sum by instalments. In the words of Bodey J (with whom Schiemann and Sedley LJJ agreed) in Westbury v Sampson [2001] EWCA Civ 407, [2002] 1 FLR 166, at para 18, the subsection "not only empowers the court to re-timetable / adjust the amounts of individual instalments, but also to vary, suspend or discharge the principal sum itself, provided always that this latter power is used particularly sparingly, given the importance of finality in matters of capital provision""

37. In the course of the hearing I drew Ms Batt's attention to the decision of Baron J in *H v H (Lump Sum: Interest Payable)* [2006] 1 FLR 327. The issue dealt with in that case is what a court should do about an order which includes an element of double counting, i.e. where an ongoing periodical payments order is, in reality, in lieu of interest, but where statutory interest is also claimed. Ms Batt accepted the principle and also that the pursuit here of interest on the lump sum and ongoing periodical payments pending payment of the lump sum offended that principle. Her submission was that the consequence of this was that the wife should be allowed to pursue periodical payments, but not statutory interest as well, but another result is that interest should be allowed, but not periodical payments.

38. It has been the husband's case before me that he is, at present, insolvent and could be (and might well be) made bankrupt by any one of his many creditors. Amex have already issued a statutory demand against him and others are apparently awaiting the outcome of these proceedings. In these circumstances it is, I think, pertinent for me also to note how orders in family proceedings would be affected by any bankruptcy orders made against the husband and whether there is any time limitation on the wife's pursuit of her lump sum. The answers, as a matter of law, are as follows:-

    (i) A lump sum order made in family proceedings is a provable debt in bankruptcy proceedings so, if the husband was made bankrupt, the wife could seek to recover her lump sum through the bankruptcy mechanisms: see *Rayden & Jackson on Relationship Breakdown, Finances and Children* at paragraph 15.174. The same is true of costs orders and interest, but is not true of arrears of periodical payments.

(ii) Unlike most commercial debts, however, a lump sum order remains outstanding when the bankruptcy is discharged: see *Insolvency Act 1986*, section 281(5)(b) and *Rayden & Jackson* at paragraph 15.193. Arrears of periodical payments would also remain outstanding, not being provable debts in bankruptcy.

(iii) There is no time limitation on a lump sum order itself, but there is in respect of the interest. If a party seeks to enforce a lump sum order after six years there is no bar to that, but any claim for interest will be limited to 6 years from when the sum owed was due: see Roberts J in *Mann v Mann* [2016] EWHC 314 (Fam).

ANALYSIS OF THE FACTS OF THIS CASE

39. Having noted all these matters, I now turn to my observations on how I should analyse the facts of the case against these criteria and what orders I should now make.

40. As for the court in 2014 and 2015, my **first consideration** remains the **welfare of any minor children of the family**, that is the parties' son and daughter. It is important that any order I make gives proper consideration to their need for housing, feeding and clothing, education and general welfare.

41. I need to analyse, in relation to the wife and the husband respectively:-

(i) First, the "**property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future**", and the **changes** to this since 2014.

(ii) Secondly, the "**income, earning capacity…which each of the parties to the marriage has or is likely to have in the foreseeable future, including in the case of earning capacity any increase in that capacity which it would in the opinion of the court be reasonable to expect a party to the marriage to take steps to acquire**" and the **changes** to these things since 2014.

42. I shall start with the relatively straightforward task of assessing the wife's position:-

(i) In assessing her capital position in 2014 I am assisted by having seen a schedule of assets/debts prepared for the FDR in January 2014 which was, I think, largely uncontroversial and showed that her position in 2014 was, very broadly, as follows:-

50% share of the family home at Gaunt House[2]	2,152,255
50% share of joint Bank Accounts	-8,662
Bank Accounts in sole name	24,157
Investments in sole name	176,849
Debts in sole name	-8,467
Chattels in sole name	26,500
50% of joint chattels	50,000
Pensions in sole name	186,922
Monies owed by parents	191,260
TOTAL	**2,790,814**

(ii) As set out above, we know that she subsequently received the benefits of a pension sharing order, £1,720,000 from the sale of the family home in August 2016 and £1,283,368 by way of part lump sum payment in August 2015. We know that she used some of this money to purchase a mortgage-free interest in her current home.

(iii) In assessing her position now I am assisted by having received the schedule prepared by Ms Batt in the course of this hearing which was, again, largely uncontroversial and showed that her position now is, very broadly, as follows:-

100% share in her current home in Oxfordshire[3]	1,256,150
Bank Accounts in sole name[4]	256,434
Investments in sole name	1,447,701
Debts in sole name, including outstanding legal costs	-211,500
Chattels in sole name	58,000
Pensions in sole name	469,095
TOTAL	**3,275,880**

(iv) It can readily be seen that the wife has accrued capital in the way already reported, and in accordance with the order, but that otherwise her position has not significantly changed. Were she to receive the remainder of the lump sum ordered she would have assets in excess of £5,000,000 and this is where the 2014 order anticipated she should expect to reach.

(v) Her earnings in 2014 were minimal or non-existent and this remains the case in 2020.

(vi) The wife plainly has an earning capacity and she has acknowledged this fact in her evidence before me and she hopes in due course to work in a capacity

[2] I shall use a valuation figure of £5,000,000 because, whatever the husband had in mind, that was the figure presented to Moor J at the FDR, and deduct the outstanding mortgage (£503,491) and sale costs to reach a net equity figure of £4,304,509 and then x 50%

[3] This property is subject to an agreed valuation of £1,295,000 and is mortgage free. I have deducted notional sale costs

[4] This figure includes the £216,500 owed by her mother, of which £200,000 originated during the marriage

which is not yet very clear. The husband has not put forward before me any detailed case as to what the wife could or should be earning and I have really no figures to comment upon. In any event, even if the husband pays her not a penny more towards her lump sum, she has free capital of £1,961,730 (i.e. excluding her home and the chattels) from which to pay her outgoings.

43. Now that I turn to the husband, my task becomes significantly more difficult. In essence, Ms Batt's case on behalf of the wife is that the husband's disclosure is so poor and his dishonesty so manifest that I can really make no reasoned assessment of the husband's capital and income position which could possibly persuade me to release him from his obligations by varying the consent order which he signed up to in 2014. Doing my best to analyse the material before me I have the following observations.

44. The following broad features of the husband's presentation were identified in 2014 and seem to me to present again in 2020:-

    (i) His business dealings and interests are almost impossible to evaluate by any conventional accounting method. This is partly because of the nature of his dealings, partly because of the complex and regularly moving structures through which he deals and partly through the absence of normal account preparation or full disclosure in its normal sense. Anybody trying to evaluate his wealth and present and likely future income will find themselves looking through dense, impenetrable fog and having not much more than his not always reliable narrative account to go on.

    (ii) What is usually most visible through this dense fog tends to be a substantial pile of debts, and a collection of unresolved potential confrontational litigation, the combination of which would be supremely alarming to most people. Occasionally a large amount of money emerges from the fog, the origins of which are sometimes as unclear as everything else.

    (iii) Yet, somehow, the husband has kept things afloat for many years through all this and, when he is in trouble, he resorts to an 'optimistic bluster' which includes assurances of bona fides and confident assertions that, if only he is given time, all will be well. Generally, at least in the past, something has emerged to dig him out of any hole in which he finds himself.

45. All this makes it very difficult for an opposing legal practitioner or a judge to know what to believe and accept of what the husband says. If I go back to the position as it was perceived to be the case in 2014, I can look at Mr Ewins' schedule from January 2014 and his supporting note and can see how it looked then:-

    (i) Mr Ewins noted that the husband's business interests had been investigated by an accountant, Mr Plaha at BDO. He had expressed the view,

summarised by Mr Ewins, that: "*As to the capital value of Blenheim, the answer is at the extreme end of the 'it depends' spectrum, giving rise to a range of £0 to £21,000,000. As to liquidity, there is currently none. As to income, Blenheim needs to complete the transactions currently in the pipeline in order for the husband to receive future income…without new revenues the business was worth nothing and H would earn very little or nothing going forward. However, H has repeatedly stated to the expert, to W and in these proceedings, that there are two deals with more or less immediate prospects of completion*". I pause to comment that a range of £0 to £21,000,000 is a very large range indeed, rendering reliance on it as really no more than a vague stab in the dark.

(ii) Taking out the business interests, the schedule (in broad terms) in 2014 looked like this:-

50% share of the family home at Gaunt House	2,152,255
50% share of joint Bank Accounts	-8,662
Bank Accounts in sole name	5,991
Investments in sole name	3,086
Debts in sole name	-2,099,760
Chattels in sole name	23,082
50% of joint chattels	50,000
Pensions in sole name	483,487
TOTAL	**609,479**

(iii) The other feature identified as a potential asset in 2014 (though not actually in the asset schedule) was a putative negligence claim against a number of possible tax professionals, including Speechly Bircham LLP. The potential claim arose out of allegedly bad tax advice. The potential quantum of the claim has been variously stated to be £2,000,000, £3,000,000 or even £4,000,000. I note that Mr Ewins' pupil wrote down during the January 2014 negotiations the figure of £2,900,000 (S-A41), but also that when the claim was finally issued in 2015 the figure of £3,868,470 was the figure in the prayer in the pleadings. At the time of the 2014 negotiations this litigation had not even been commenced. The husband seems to have been sufficiently confident in 2014 to treat this almost as 'money in the bag', hence its appearance in the 2014 order, yet the wife's legal team, whilst (obviously and understandably) being willing to embrace it as an asset in the name of the husband, were properly careful to draft the order so that he took all the risk of it crumbling away to nothing. (Query whether a lawyer representing the husband in 2014 would have allowed this to happen?). In the end this litigation did crumble away to nothing. The husband's legal costs of pursuing the claim were rising inexorably and pursuit of the claim was ultimately considered not viable and his claim was dismissed by consent. I note the way that Mr Amos QC dealt with this in his note of December 2015, paragraph 17: "*If, as now appears likely, H will not have recourse to such funds because there won't be any, that is (under the consent order) H's problem*".

(iv) We know that in January 2014 the husband was willing to offer £1,720,000 from the family home plus a top up to £5,000,000 plus a substantial pension sharing order plus a substantial amount of child maintenance, including expensive school fees. Absent substantial future business success, and possibly absent substantial future litigation success, this offer was objectively unaffordable in 2014, yet the husband willingly made the offer in January 2014 and stuck to it in March 2014 and didn't seek to unpick it in 2015. This husband was not the normal one who has an order forced upon him against all his gloomy but false prognostications. His prognostications were highly optimistic and he willingly made the offer and seems genuinely to have believed that he could afford it.

(v) Why did he make the offer which he did in 2014? Either he knew positive things which were not available or clear to others (this is what Ms Batt postulates). Or he deluded himself with his own 'blustering optimism'.

(vi) Leaving that question in the air I move forward through the succeeding years to the present day and comment on a number of features of his presentation now.

46. His presentation to me, by Form E and subsequent documentation, is of a person currently in a dire state of insolvency. In broad terms his presentation of his current position is (broadly) as follows:-

Real Property	0
Bank Accounts	-13,757
Amex Credit Card Liability	-53,699
Debt to Kingsley Napley	-184,569
Debt to Masterplan Consulting	-449,500
Debt to Barclays	-45,000
Debt to Watson Fuels	-4,173
Debt to Kleinwort Generale	-793,238
Further Debt to Kleinwort Generale	-106,105
Debt to Grant Thornton	-4,426
Debt to Creditor A	-754,131
Debt to Lloyds Amex	-18,038
Debt to Creditor B	-122,250
Debt to Creditor C	-48,250
Rent Arrears on Larkstoke Manor	-332,297
Chattels	25,000
Pensions in sole name	0
TOTAL	**-2,904,433**

47. This analysis does not include his indebtedness to the wife which is the focus of this case (more than £2,000,000 – see above). Nor does it include the mortgage debt

owed by Trust B on Larkstoke Manor (more than £3,000,000) because, on the face of it anyway, this is not his personal debt.

48. I now turn back to the issue of Larkstoke Manor. In August 2015, as I have said, the husband came into possession of $4,000,000, apparently through a loan from Bank A. The money was paid into Trust A, an offshore trust which the husband controlled and of which he was a beneficiary. At this point he wanted to buy and live (himself and his new partner and her children) in a fine home in Oxfordshire. He wanted to avoid paying any tax on the receipt of this money and (on his case) he wanted to do something to benefit his children. Perhaps also (it is suggested by Ms Batt) he was attracted by a structure which would prevent the wife from enforcing her debt against his home. Whatever his motivations, his answer to this conundrum was to transfer all the money into a different offshore discretionary trust (Trust B), to disqualify himself as a beneficiary of that trust (although, curiously, he has not yet been able to find a copy of the executed document which brought that about), to add his children and (now) step-children as potential beneficiaries to the trust, and to acquire a property at Wallingford, Oxfordshire for £4,500,000 via Trust B via a shell holding company called The Property Company. Additional borrowing was required by Trust B to bring this about and the husband arranged for this to happen from a bank (Bank B, whose book has now been taken over by Bank C (Channel Islands) Limited). A loan of £2,950,000 was executed as between the trustees and the bank. The husband (and his new partner) formally became the tenants of the property at a rent of £9,800 pcm. It was apparently intended that the rent would be paid out of surplus bank borrowings for the first two years and the husband would then take over. Having transferred the money out of his ownership, he secured residence rights in the property and he has been there ever since. As a result of documents disclosed only during the court hearing, more light has been thrown on what has happened here. The simple fact is that the husband has not paid a single penny of rent since 2015. The surplus borrowed proceeds ran out in 2017 and the trust was unable to pay any loan interest and the bank is now seeking repossession and there are extant proceedings in the Oxford County Court. With the level of the debt fast rising with unpaid interest towards the point that it may reach the likely level of sale proceeds of the property under a forced sale there is a fear in the husband's mind (which is probably justified) that this asset might crumble away to nothing. One sensible remedy might be to obtain a tenant who can afford to pay the rent, but this would involve the husband losing his home and so he is desperately trying to execute a rescue package whereby another loan is taken out (perhaps for about £3,600,000 from Bank D) to pay off Bank C (Channel Islands) Limited and to create another surplus of borrowed funds from which to make interest payments for another year or two years while the husband's business prospects revive themselves. As the wife said, this is typical of the husband's practice of "*kicking the can down the road*". How this is in the beneficiaries' best interests it is quite difficult to understand, but there is no evidence that I have seen to suggest that the trustees are very interested in the subject. One is left wondering as to the real efficacy and purpose of these trusts if the husband can do really what he wants to benefit himself with little regard for the beneficiaries (of which, he says, he is not one).

49. The whole business becomes murkier still when one examines the sequence of events revealed by the very late disclosure. The wife's legal team in the family proceedings asked for disclosure of documentation relating to the repossession proceedings. The husband replied on 2nd April 2020: "*I am not prepared to provide any documentation related to the ongoing court proceedings…My position in these proceedings being limited solely to that of a tenant and my defence as such*" (M-B97). When he did, at my request, reveal his defence, it referred to a statement dated 27th January 2020. When, again at my request, he revealed the statement this showed some features highly pertinent to the family proceedings. Having, in his Form E in the family proceedings dated 8th January 2020, presented himself as badly insolvent, it was revealed that in his statement to Oxford County Court dated 27th January 2020 he presented himself as a man of significant means, well able to deal with the bank's issues. In paragraph 22 of the statement he described himself as an owner (with his current wife) of a 42.37% share of a "*Luxembourg based aircraft leasing company which in turn has unencumbered assets of a net value of around €20,000,000*". In paragraph 24 of the statement he said: "*I have a substantial claim of $20,000,000 against Company A…should the matter go to full litigation the claim quantum will be for $125,000,000*". When this was revealed, it was suggested by me to the husband that it was really quite difficult to reconcile what he had said to Oxford County Court with what he had said to the Central Family Court, and I asked whether he would like to clarify which version was true. He told me that both versions were true and suggested that on 8th January 2020 he had bona fides believed he was badly insolvent (hence his Form E presentation), on 27th January 2020 he had bona fide believed that he had substantial interests (hence his statement deposed with a statement of truth that day), but that shortly after that (within a few weeks) he had again bona fide believed that he was badly insolvent again (hence his presentation to me in a position statement dated 28th May 2020). I am afraid I find this explanation wholly lacking in credibility. He told me that he was going to reveal all to the Oxford County Court at the hearing on 14th May 2020, i.e. tell them that the statement of 27th January 2020 was true at the time, but no longer held good, but was relieved from this task by the adjournment of that hearing (apparently promoted by the bank, cognisant that repossession orders are not permitted during the Covid-19 restriction period). When he revealed, again at my request, an email he had sent to the bank on 13th May 2020, however, rather different intentions were apparent – the husband was planning to maintain his presentation of insolvency to the family court and, once he had dispensed with the wife's claims, this would "*allow me to move forward where I have been severely hampered for these past two plus years in many a way*" whereas "*If I am seen to raise monies for yourselves but claim I am unable to satisfy her demands they will file again for a financial determination of their judgment summons*". This, it seems to me, is a litigant dishonestly playing one court off against another in a very unattractive manner. It seems to me that he was either being dishonest to the family court or to the county court, the only question remaining for me is which version is true one.

50. I have listened carefully to the description by the husband of the movement in his business and trust enterprises since 2014 and I have considered such documentation as he has provided and, in my role of assessor of his current position, have the following observations:-

(i) If the normal methodology for assessing the capital and income production value of businesses and trusts is to look at properly prepared and hopefully filed annual accounts, there is little help here because no meaningful accounts annual trading accounts are presented for any of the businesses or trusts – either they have not been disclosed or they do not exist. For example, in his answers to questionnaire the husband stated "*I do not have any trust accounts. No accounts have been prepared…The trusts to the best of my knowledge have no assets.* Whatever is the truth of the assertion that no trust accounts exist, I am left attempting to piece information together from random documents and from possibly self-serving narrative from the husband.

(ii) I am left wondering, as was Ms Batt, why it is that a number of people and institutions have lent so much money to the husband or have left invoices outstanding. For example, why did Creditor B (£122,250) and Creditor A (£754,131) and Creditor C (£48,250) and Masterplan Consulting (£449,500) continue to lend so much money to the husband without any security for their advances? What do they know about him which I don't? What did he tell them about his future prospects? I am left in the dark. In Creditor A's case the husband has told me that he has borrowed money putting his own dwelling house in jeopardy – why would he do that unless he hoped for a return? Could it really just be personal friendship? How could it be that Kleinwort Generale have run up c.£900,000 of fees apparently servicing trusts which have no assets? Why are there no invoices evidencing what they did for their fees? Why have they not pursued payment? Why did the husband say in his answers to questionnaire: "*I am not prepared to provide any further information*" (M-D97)? There are no satisfactory answers to these questions.

(iii) What was the purpose of the husband dissolving Company B and Company C in February 2019 and starting up new companies with similar names a few days later? Again, it is difficult to understand the husband's strategy here.

(iv) The husband has produced some communications from companies which include adverse comments on the husband's business performance or the termination of arrangements – for example the letter dated 6th October 2016 from Company D, the letter dated 6th June 2018 from Government A, the letter from Company E's lawyer dated 11th December 2019, the letter dated 31st January 2020 from Company A – but it is really quite difficult to put these in context or extrapolate much from them which is helpful to the current assessment. In so far as there is a collective pattern to them, they perhaps present a picture of the husband not doing very well in his recent business activities. Do they represent a picture of an unravelling and failing

business or are they only one selected part of a mixed picture?

(v) On the husband's presented case there are really only two areas of hope for the future receipt of money. First, he suggests that he should receive £300,000 from the compromise deal reached at the failed conclusion of the Company E enterprise, from which he was originally owed more than £700,000. The email from Company E's lawyer dated 23rd March 2020 suggests this will be paid in three tranches of £100,000 on 20th April 2020, 20th May 2020 and 20th June 2020; but none of this money has been paid and another letter dated 30th April 2020 suggests that a lack of liquidity caused by Covid-19 has delayed the payments, but an initial payment of £50,000 has been apparently promised imminently and the husband hopes to use it to buy off Amex's statutory demand. It is difficult to make an assessment of the likelihood of these payments being made, but the husband is, as ever, optimistic that they will be. Secondly, the husband did in 2019 receive some money for work with a gold mining company, Company F. He is hopeful that this work will be reinstated in Autumn 2020 and that he might receive £25,000 pcm for 18 months from then. His position statement says: "*A second phase has been proposed by me. As yet we have no indication as to whether it will be accepted and if so when*". Once again, we are left with a prospect of monies, an optimistic assessment by the husband and very little hard detail. If the husband is telling the truth when he says, "*beyond this there are no other contracts past or present*" then, even if his hopes for monies from Company E and Company F are realised, there seems objectively not much hope that he can make substantial inroads into paying off the debts which he says he has. But is this statement true? As Ms Batt says, absent proper accounts, we have no real way of assessing it. If we cannot assess it, it is his fault for resisting full and clear disclosure.

(vi) It is certainly one possibly true scenario that the husband is currently in a genuinely perilous financial position and that he will not in the foreseeable future generate sufficient monies to deal with his indebtedness and that the statement of 27th January 2020 to Oxford County Court was deliberately dishonest and misleading. If somebody pursues him with a bankruptcy petition in the foreseeable future it is difficult, on the presented evidence, to see how he could extract himself from it. It has to be said, however, that he has dug himself out of such positions before and his determination and ability to find money from somewhere may yet allow him to find a way forward. Further, since I cannot regard the husband as an honest or reliable witness of his own presentation, I am unable to rule out the possibility that there are significant parts of the picture which remain hidden from view.

51. In relation to the "**financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future**" and the **changes** to these since 2014, in particular considered in the context of the **standard of living** the parties enjoyed during the marriage and the parties' respective **ages** and **contributions** to the marriage, and the **duration of the**

marriage, and the **conduct** of the parties I have the following observations:-

(i) Whilst the husband of course has financial needs at present and for the future in terms of housing and general living, and whilst his age (65) suggests he should be towards the end of his working life, and whilst it is common ground that such money as exists in this family has come from his business enterprises, it has to be noted that if the $4,000,000 he had in his hands in 2015 has been lost this is the result of his own, possibly foolish but deliberate decisions and also that his decision to spend large amounts on wedding parties in 2018 rather than meet his maintenance obligations has already been found to be a contempt of court. It is difficult for a person to behave in the way which he has and then expect a court to attach significant weight to his own needs when he has, himself by his own behaviour, caused his inability to meet those needs.

(ii) As I have said, the wife (in very broad terms) has a good mortgage-free home plus free capital of £1,961,730 from which to meet her living expenses. On a Duxbury basis this fund would be regarded as producing an income of somewhere between £75,000 and £100,000 per annum for life. Her Form E budget puts her needs at £148,221 per annum, but this is reasonably generously constructed and includes expenditure on the children (some of which would or should be met by child periodical payments, assuming they are paid). It would, I think, be difficult to say that the wife's needs will not be met by her existing funds, and if this were a first instance decision it might be difficult for her to ask for more; but against that (as Ms Batt has pointed out) the deal in 2014 was that she would receive another payment of c.£2,000,000 and this was calculated in the context of the family's standard of living as then assessed and specifically and deliberately offered by the husband, who was the only person who really knew about his own position.

52. Having analysed all the facts as I have above, how should I deal with the application before me?

53. The husband's position at the outset of the case was that the proper answer was as follows:-

(i) I should discharge him from all capital obligations to the wife, both in terms of the lump sum order, any interest on it.

(ii) I should discharge him from all obligations to pay spousal periodical payments to the wife so that there should be an immediate clean break. I should also backdate this order to the date of his application, i.e. 10th September 2018.

(iii) He also asked me to vary the child periodical payments order in various ways. In fact, in the course of the hearing his complaints have been dealt

with and it is agreed that my order should say that, during tertiary education, any child periodical payments orders still existing should be divided as to one third to the wife as a roofing allowance and as to two thirds direct to the respective child. He does not, I think, pursue a thought there should be formal checking mechanisms on how any child maintenance is actually spent and it has been clarified that the existing school fees order only covers agreed extras (so, for example, it is open to the husband to decline to pay for a particular item of extras, in which case the item would have to be paid for by the wife or not received – see M-B8). Otherwise, the husband was content for the child periodical payments order to remain in place. I am content to adopt this solution for the child periodical payments order.

54. On 4th June 2020, the fourth day of the final hearing, the husband put forward a new written proposal as follows:-

(i) I should discharge him from capital obligations to the wife only to the extent that all statutory interest should be removed (past and future) and that the outstanding lump sum obligation should be reduced to £1,750,000; but that the obligation to pay this sum should be put back to June 2023.

(ii) I should leave in place the spousal periodical payments obligations to the wife, but that these would accrue and build up in interest-like fashion and not be payable until June 2023.

(iii) In the event that the full lump sum was not paid by the due date in June 2023 there would be an immediate penalty of 20% on any unpaid balance and the obligation to pay the increased sum would then be put back to June 2026.

(iv) In the meantime there would be a highly complicated profit-sharing arrangement involving the full disclosure of business trading information and formal commitments by the wife not to "*subvert*" any of the husband's business or trust structures.

55. The wife's position at the outset of the case was that the proper answer was as follows:-

(i) Notwithstanding that she was owed by the husband the sum of £2,625,593, she was prepared (as a "pragmatic approach") to have this figure reduced to £1,500,000 (inclusive of lump sum, arrears of maintenance, costs orders and interest) but that this sum would have to be paid by 31st July 2020. Statutory interest at 8% would run from 31st July 2020 until the debt is paid in full.

(ii) The wife sought a costs order relating to the variation proceedings (plus the adjournment hearing). The figure in her schedule for this is £73,524 plus £6,620.

(iii) I should in addition vary the obligation to pay spousal periodical payments to the wife to a figure of £2,000 pcm.

56. By the conclusion of the case, and having considered the husband's offer of 4th June 2020 and the observations of Baron J in *H v H* [2006] 1 FLR 327, the wife had slightly changed her position to the following:-

(i) She was prepared to have the lump sum figure reduced to £1,750,000, payable by 31st July 2020, but without statutory interest.

(ii) She continued to seek a costs order relating to the variation proceedings (plus the adjournment hearing) of £73,524 plus £6,620.

(iii) I should leave in place the obligation to pay spousal periodical payments to the wife at the figure of £8,000 pcm until the lump sum is paid in full.

57. I now turn back to the applicable legal test and, in particular, the judgment of Bodey J, sitting in the Court of Appeal, in *Westbury v Sampson* [2002] 1 FLR 166 when he said:-

"The re-opening under s 31 of the overall quantum of lump sum orders by instalments, especially when made as part of a package intended to be final (and all the more so when ordered by consent following an agreement) should only be countenanced when the anticipated circumstances have changed very significantly, and/or for cogent reasons rendering it quite unjust or impracticable to hold the payer to the overall quantum of the order originally made."

58. It is clear that the husband is asking me to re-open the overall quantum of a lump sum by instalments which was part of a consent order which was intended to be a final package. It would perhaps be wrong to construe this text as if it were a statutory provision, but it is a deliberate and careful statement by an experienced and respected financial remedies judge and it is properly structured to allow a payer only very limited opportunity to renege on capital obligations. Just as the court is slow to allow changes in asset values and business expectations to justify the setting aside of a consent order as a *Barder* event (see, for example, *Myerson v Myerson* [2009] 2 FLR 147), the interests in finality of capital orders should cause the court to be very cautious about allowing changes in asset values and business expectations to justify a variation of capital orders under Matrimonial Causes Act 1973, section 31.

59. It is perhaps appropriate as a contextual exercise to compare the equivalent exercise of discretion of a court releasing a payer from undertakings. In *A v A* [2018] EWHC 340 (Fam) Cohen J suggested:-
"I would like to impress that these cases must and should be rare. Parties are entitled to and expect finality when they enter into a clean break. But occasionally

circumstances will arise where the change is so significant and unforeseen that the basis of the order is undermined and leads to an injustice which should be corrected if the circumstances are such that it will not cause excessive prejudice to the respondent."

The features likely to justify the court's intervention are likely to include an unforeseen change of circumstances undermining the basis of the original order, but key to any intervention is the imperative of a relief from injustice.

60. On analysis of the words used by Bodey J, there are, it seems to me within his text, the following questions for me to answer:-

(i) Have the financial circumstances changed very significantly since 2014?

(ii) If so, is that change of circumstances such as to render it quite unjust or impracticable to hold the husband to the overall quantum of the 2014 order? It seems to me that the word "quite" in this context should be construed as adding to the force of the subsequent words, perhaps to be read as "very". Although the words "unjust" and "impracticable" are expressed as alternatives in Bodey J's text, they are in my view tied together in the sense that the qualifying impractability should result substantially from an event outside the payer's control, so if he himself is a substantial cause of the impractability then it would probably not be unjust to hold him to the quantum of the original order.

(iii) Alternatively, are there other cogent reasons (not falling into the category of a very significant change of circumstances) which render it quite unjust or impracticable to hold the husband to the overall quantum of the 2014 order?

61. In answering these questions I have the following observations:-

(i) I do not think that my doubts (expressed above) about whether a legally represented husband in 2014 would have been advised to enter into the deal which he did should carry much weight in my deliberations now. The fact is that the husband, who knew more about his then business prospects than anybody else, willingly made the deal. It was his decision not to take legal advice and he has to live with the consequences. Similarly, the fact that the wife is not at all in a financially parlous situation at present does not detract from the fact that she entered into a deal in 2014 and is, prima facie, entitled to receive what she bargained for.

(ii) One significant change in circumstances since 2014 was caused by the use of the $4,000,000 in 2015, as discussed in detail above. Whatever were his motivations at the time for this decision, many of the problems he has now were caused by the husband's deliberate decision to distance himself from that money in the way which he did and his risky and unwise decision to cause the borrowing of so much money in the way that he did. Accordingly,

since he is a substantial cause of his own problems, I could not properly regard the problems that flowed from these decision as rendering it unjust to hold him to the original order. If he had bought a modest house at that time and retained the money to gain proper control over his business activities then his financial situation might now look very different.

(iii) In terms of the likely future performance of his business and trust enterprises, and as to how they link to his debt situation, I have found it very difficult to reach any clear conclusions because of the lack of proper information from the husband. In one sense this is exactly what the position was in 2014 and the husband, then and now, has chosen to leave others in the dark so, in that sense, the circumstances have not significantly changed. In so far as he really is in a worse situation than he was in 2014, his litigation conduct (both in obstructing disclosure in explaining his position and in relation to the Oxford County Court statement of 27th January 2020) rather undermines his position in arguing that he is suffering an 'injustice'. A litigant coming to court seeking 'justice' rather undermines his position if he does not come with 'clean hands'. In such circumstances it is not "quite unjust" to hold him to his original deal.

(iv) I suspect that, unless something significantly changes, enforcing the capital order will be very difficult for the wife. On the facts as they stand at present, it seems to be very unlikely that she will have a sufficiently clear case to be able to pursue a judgment summons in relation to the capital payment and other enforcement measures may also be very difficult. It may be that the debt can never be enforced. Things may change, however, and the husband's offer of 4th June 2020 suggests that, in time, he hopes to make a lot of money, whether it is in three years' time or more. If he does do this, then it may not be either "impracticable" or "unjust" to allow the wife to enforce her capital claim. The order would not be discharged by bankruptcy proceedings or by time limitation so it is not at all impossible that in due course she might be able to enforce.

CONCLUSIONS

62. Accordingly, I have come to the following conclusions on this application:-

(i) Whilst there is a strong case for my not changing the capital order at all, since both parties have in their amended open positions alighted on the figure of £1,750,000 (albeit with different structures), I have decided to vary the capital order to adopt this figure. My order will require payment of that lump sum and it will be recorded that the calculation of this figure includes all the interest accrued so far, costs orders made so far including reserved costs, and arrears accruing to date.

(ii) The wife is entitled to have that paid straight away and I shall accordingly adopt the wife's deadline of 31st July 2020 for the payment of this sum. I do

not select this date on the basis that I have identified a way for the husband to pay the sum by this date, but as a benchmark date for the accrual of interest. I reject the husband's suggestion that this should be put back to 2023 or 2026. The money was due in 2017. I agree with Ms Batt that the husband's ancillary proposals (for a complicated profit-sharing arrangement involving the full disclosure of business trading information in return for commitments by the wife not to "*subvert*" any of the husband's business or trust structures) are wholly impractical and unworkable.

(iii) I have given thought to what I should do about the inter-relationship between statutory interest (which at 8% would accrue at a rate of £11,666 per month, but be subject to limitation issues) and the imposition of ongoing periodical payments (currently set at £8,000 per month). Although Ms Batt has invited me to delete the statutory interest and retain the ongoing periodical payments order I have reached the conclusion that the inclusion of statutory interest and the deletion of periodical payments (by the imposition of a clean break) is the more appropriate order here. It limits the opportunity for further destructive and expensive variation litigation and makes clear that the spousal maintenance obligation is gone, but that the obligation to make a capital payment is retained. If, for example, the wife re-married then the accrual of interest would continue which underlines the fact that the interest is a penalty imposed as a result of non-compliance with the order and is closer in character to the non-payment of other civil debts.

(iv) I will vary the child periodical payments order in accordance with the agreement now reached between the parties (i.e. the addition of the roofing allowance provision). I will not change the school fees order (the husband being content that it should continue and happy with the clarification about extras). Nothing I have ordered prevents a variation application or a CMS referral occurring in relation to these matters, but the husband has, before me, been very keen to continue with the child support obligations first entered into in 2014.

63. As far as costs are concerned I note that I have not been addressed on this subject, save that Ms Batt has accepted that the principle of no order for costs applies to this case. With the purpose of avoiding the expense of yet another hearing I express the provisional view that, considering FPR 2010, Rule 28.3(5) & (6) in the context of the husband's litigation conduct, I should make an inter partes costs order in favour of the wife in the sum of £40,000. If this is accepted on both sides then it can be incorporated into an order. If either side wishes to have a costs hearing to argue about this then I shall list a hearing and consider full submissions, but that will, of course, raise the issue of the costs of that hearing if I am not persuaded against my provisional view.

64. Nothing I have said in this judgment is intended to bind the hands of Holman J as to what he does next in the judgment summons part of the case. I am also content to leave it to him to decide what part, if any, of this judgment should be made public. I

note, however, that the case will need to be listed back before him and he will no doubt wish to have a copy of this judgment.

65. I would be grateful if Ms Batt could draft an order consequent upon this judgment and seek to agree it with the husband. I would be grateful if she could report to me by email on the progress of this exercise by 12 noon on 16th June 2020. If necessary I shall list another hearing in due course to consider any matters arising, but I am hopeful that this will not be necessary.

His Honour Judge Edward Hess
Central Family Court
9th June 2020