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Neutral Citation Number: [2022] EWFC 154 (B)

Case No: FD13D00876

IN THE FAMILY COURT SITTING AT OXFORD

IN THE MATTER OF THE MATRIMONIAL CAUSES ACT 1973

Judgment date: 6 December 2022

Before : HHJ Vincent

Between :

A WIFE

Applicant

and

A HUSBAND

Respondent

James Finch, instructed by the Applicant under the Public Access Scheme
Alex Tatton-Bennett (instructed by Charles Russell Speechlys) for the Respondent

Hearing dates: 15 and 16 September 2022

Approved judgment

Introduction

1. The parties were married on 14 December 2010. They have two daughters, B, aged twelve, and C, aged ten. They separated at the end of December 2012, when C was eight months old.
2. The wife petitioned for divorce in February 2013. Her application for financial remedy on divorce was resolved by consent order approved by Deputy District Judge Airey on 3 July 2014.
3. The total liquid assets of the parties were a house with equity of £700,000. The order provided that the wife was to receive a total of £525,000 in cash, to be paid by the husband in instalments. He was to pay child maintenance of £20,000 a year and spousal maintenance of £52,000 a year for five years, thereafter dropping down to £40,000 a year, that sum payable until C reached the age of eighteen or finished school.
4. The mechanism for these payments was as follows:

Upon the applicant wife agreeing that the lump sums and payments from the husband's bonus entitlement will be used to meet the applicant wife and the children's housing needs

And upon the applicant wife agreeing and undertaking to use her best endeavours to invest the lump sums and the bonus payments paid to her by the respondent husband to secure a home for herself and the parties' dependents...;

- *H to pay W a lump sum of £175,000 by 25 February 2015;*
- *H to pay W spousal PPs £4,333 pm until August 2024 and then £3,333 pm until (inter alia) the youngest surviving child reaching the age of 18 or finishing full-time secondary education;*
- *H to pay W child PPs of £833 pm per child (£19,992 pa for both children) until (inter alia) the youngest surviving child reaching the age of 18 or finishing full-time secondary education;*
- *W to indemnify H in respect of any further liability incurred by him in respect of rental payments or utility bills at [address redacted];*
- *H to pay W up to a maximum of £350,000 in aggregate from (a) 30% of the net value of the cash element of his bonus in the years 2015 to 2019 and if not satisfied by then (b) from 2020 to 2024 10% of the net value of the cash element of his bonus;*
- *H to pay the children's school fees until each child attends secondary school.*

5. On a date in 2014 the wife took the children out of their London schools, stopped contact with their father and moved to [county name redacted] with them. There were Children Act proceedings, eventually resolved by consent in September 2014, with the husband agreeing to the relocation and contact resuming.
6. In 2015, the wife applied to vary the July 2014 financial remedies order. She was represented by solicitors, the husband represented himself. The application was brought because the wife sought accelerated receipt of the capital to rehouse herself and the children sooner than had been previously envisaged. The consent order dated 17 July 2015 provided for her to receive further sums on specified dates:
 - Paragraph 2 of the 2014 order is varied. H to pay spousal PPs of £4,333 pm up to August 2016 and then £1,667 pm plus £32,000 in February 2017, 2018 and 2019, and then £20,000 in February 2020, 2021, 2022, 2023 and 2024;
 - Paragraph 5 of the 2014 order is varied. H to pay W spousal periodical payments of £225,000 within 3 days, and £125,000 by February 2018.
7. Under the new order global spousal and child maintenance continued at £72,000 a year until February 2020, but then dropped down to £60,000 (under the previous order the step down did not happen until 2014). This represented a reduction of £48,000 from the original order (£12,000 a year for 2020, 2021, 2022 and 2023). However, the trade-off was the £350,000 initially ordered to be paid by no later than 2024, was received much sooner; to be paid no later than February 2018 (in fact all received by February 2016). In addition, the 2016 and 2017 payments appear to have exceeded the liabilities under the order by £58,000: £44,630 plus £13,370.
8. In accordance with the 2014 and 2015 orders, the husband paid maintenance and the following sums to the wife:

Aug 2014:	£80,000	
Feb 2015:	£185,000	
July 2015:	£225,000	
Feb 2016:	£79,630	(£35,000 to reach lump sum £525,000 plus £44,630)
Feb 2017:	£45,370	(£32,000 for maintenance plus £13,370)
9. The wife bought [a house] in [county name redacted] for £460,000 in July 2015 (having received £490,000 by then). In her statement of September 2021, she says however that she part-funded the purchase with a mortgage of £300,000. It is unclear why she needed to do this. Despite being directed to by the Court, she has not disclosed any further information about it.
10. There were further Children Act proceedings in 2015 in respect of the husband's contact with the girls. These were resolved by order of District Judge Payne in December 2015.

11. In October 2016 the wife applied to the Court to prevent the husband from taking the girls on a skiing holiday, but this was resolved by agreement shortly before a fact-finding hearing was due to take place.
12. In January 2017 the husband applied to Court and obtained an order that he should be permitted to take the girls on holiday to the USA, which is where he is originally from (as is the wife).
13. In April 2018 the wife accepted a job with [*company name redacted*], as Head of Operations based in [*country name redacted*]. She applied for permission to remove the children to relocate with her. This application was refused by Theis J. in July 2018. Following the hearing, the wife travelled to [*country name redacted*] without the girls. The husband relocated from London to [*county name redacted*] to care for the children, and travelled with the children to [*country name redacted*] so that they could see their mother during their school holidays.
14. In October 2018 the wife did not return the children at the end of a holiday with her, as she had been ordered to do. The husband applied for their return to the jurisdiction. The wife cross-applied to the Court, renewing her application that the children relocate to [*country name redacted*] to live with her. Pending determination of her application, the children were returned to the jurisdiction, the husband extended his stay in [*county name redacted*] and the wife remained in [*country name redacted*] for another five months.
15. Theis J refused the wife's application in February 2019 and made the child arrangements order that is currently in force. The wife returned to the jurisdiction. The order provides shared care, the children living with their mother in [*county name redacted*] and spending time with their father every other weekend and in the school holidays.
16. In June 2019 the wife applied again to vary the financial order, but the application was rejected as 'not properly constituted'. She did not re-submit it.
17. A further set of Children Act proceedings is underway (started by an ex parte application made by the wife in September 2019 to the High Court, but immediately transferred to Oxford). A fact-finding hearing is due to take place in [*month redacted*] before District Judge Devlin. The girls have not seen their father since May 2022. He alleges that their mother is acting to alienate them against him, and is seeking for a transfer of residence to his care. She alleges that the girls do not wish to spend time with their father due to their experiences in his care, and seeks continuation of the status quo.
18. The husband re-married in January 2020. He and his wife have a daughter, [X], born in October 2020.
19. The wife entered into a relationship with [Mr Y] sometime around early 2020. When the national lockdown came in March 2020, she and the girls formed a bubble with Mr Y, and they were spending most of their time living in the same household.

20. On 5 January 2021 the wife applied once again to vary the financial order. This is the application under consideration at this final hearing.
21. In May 2021 Mr Y bought [House Z] in [*place name redacted*]. The wife and the girls moved in with him.
22. The FDR in this case took place on 20 September 2021.
23. The variation application was initially listed to be heard on 15 March 2022. The wife applied for the hearing to be adjourned, but on 3 March 2022 her application was refused. She was ordered to pay the husband's costs of the application. Unfortunately, the hearing was then removed from the list anyway, as there was no judge available to take the case.
24. On 16 March 2022, which had been due to be the second day of the hearing, the wife filed her section 25 statement (originally directed to be filed on 13 December 2021 then re-ordered by 10 March 2022, in advance of the final hearing). In that statement she said that in her application she was seeking (i) capitalisation of spousal maintenance; and (ii) increased child maintenance. She confirmed that she was living at House Z with Mr Y, but said that the husband had '*overstated*' her relationship with her current partner.
25. The wife and Mr Y were married on 23 August 2022. The wife informed the husband of this by an email to his solicitors on 1 September 2022.
26. Both girls are now at [*school name redacted*]. Their father continues to pay their school fees, together with the cost of extra-curricular activities (save that he did not pay for a school trip for one of the girls last year. Mr Y paid for it).

Parties' positions at final hearing

27. The wife accepts that she no longer has a claim against the husband for spousal maintenance.
28. There was no mediation or solicitors' correspondence prior to the current application being issued. In breach of various Court orders, the wife did not file or serve her chronology/statement of issues, replies to questionnaires, or a narrative statement until mid-September 2021, some five months after they were due. Up to that point, the husband had no idea what orders were being sought, or the reasons the wife said the previous order needed to be revisited.
29. The reasons given in the wife's statement filed on the afternoon of Friday 17 September 2021 were as follows:
 - (i) the periodical payments she was receiving were insufficient to cover her needs of £6,300 a month. Included in that sum were payments of £1,400 a month for mortgage payments on [her house] (mortgage at £211,862 as of 6 September 2021);

- (ii) there was a disparity of lifestyle between her and the husband; he was extremely well paid in his position, his income had increased substantially since the divorce, and she did not trust that he had represented his true income to her;
 - (iii) she had accrued substantial debt including:
 - £47,000 in respect of her application for permission to take the children to [*country name redacted*],
 - £47,000 to an interiors company which had done work to add an extension to her property and which now had a charge on it as a result of non-payment of fees;
 - £8,000 unpaid legal fees in respect of the dispute with the interiors company;
 - £65,000 loans from friends and family, including her partner Mr Y;
 - £161,000 to the US department of education in respect of student loans;
 - At that time £12,000 costs in respect of the application to vary.
30. The FDR took place on Monday 20 September, but neither party had made open offers beforehand. The husband says this is because he only received the wife's statement on the Friday afternoon before and had no opportunity properly to consider it with his lawyers.
31. The husband made an open offer after the FDR, on 23 September 2021, for spousal maintenance to stop, child maintenance to continue as per the previous two orders, the husband to pay the girls' school fees and pre-agreed extras, repayment of the sum of £3,598 in respect of an indemnity for rent, and for no order to costs.
32. There have been no open offers from the wife. The only offer she has made to settle the litigation came by email on 1 September 2022 (the email to the husband's solicitors in which she informed him of her marriage on 23 August 2022). In that email she asserts that the husband earns more than £650,000 a year. She says the 'Mostyn formula' (also referred to in her statement dated 16 March 2022) should apply to the calculation of child maintenance, i.e. the CMS formula should be applied to a threshold salary of £650,000. This is the foundation for her case that she should receive child maintenance of £2,184.00 per child per month.
33. The wife sought an order for payment of all extra-curricular activities and school fees.
34. This is the position put forward by Mr Finch on her behalf at the final hearing.
35. Under the order the husband is paying £833 a month for each child (£1,666 a month, so £19,992 a year). At this final hearing he has offered to increase that to £1,100 per child per month, which would be £26,400 a year.

36. In addition, he agrees to pay school fees (on the basis the children remain at their current school or that any change of school is agreed with him, he does not agree to pay school fees at any school anywhere in the world), and money for clubs up to £300 per child per term, but in respect of either, does not want to 'write a blank cheque' to the wife.
37. In his position statement, Mr Tatton-Bennett sought for his client a repayment of £48,000 of spousal maintenance pursuant to section 33 Matrimonial Causes Act 1973. This backdates to the time that the wife put [her house] on the market, and from when the husband says she was cohabiting with [Mr Y].
38. The husband makes an application to enforce the indemnity given in the 2014 order in respect of rent incurred by the wife and in which she was ordered to indemnify him.
39. Finally, the husband asks the Court to award (i) payment of his costs by the wife, and (ii) that the wife pays the costs order made against her by District Judge Wakem on 3 March 2022, when her application to adjourn the final hearing at that time listed for 15 and 16 March was refused.

The law

40. Applications to vary are governed by section 31 of the Matrimonial Causes Act 1973.
41. Section 31(7) sets out the principles which govern the exercise of the court's discretion. First, it is provided that:

'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.'
42. Secondly,

... 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—
43. The court must consider all the circumstances, including any change there may have been in any of the matters to which it was originally directed to have regard under section 25. It is not correct merely to look at what has changed since the order was made, that is just one aspect of the exercise; the court has to look at all the circumstances.
44. The application now is only in respect of periodical payments for the children. The court has to assess the reasonable needs and requirements of the children in the light of the section 25 factors and then determine the ability of the parent to provide for such needs and requirements. When assessing 'needs' in the context of child maintenance, *'the court must guard against claims made on the child's behalf but with the disguised element of providing for the mother's benefit rather than for the child'* (Re P [2003] 2 FLR 865.

45. Further, the starting point is that the original order was correctly made and therefore if there has not been a change in circumstances, the Court needs to be persuaded that it is appropriate to exercise its discretion afresh in circumstances where parties reached an agreement in respect of all matters following full disclosure, both were represented and the order was approved by a judge.

46. Thirdly, the section provides:

.... in the case of a 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 to enable the party in whose favour the order was made to adjust without undue hardship to the termination of those payments;

47. In summary, on an application for variation the court is under a duty to consider terminating financial dependence, provided such outcome could be achieved without undue hardship.

48. In her statement dated 16 March 2022, the wife refers to the ‘Mostyn formula’. This comes from the case of **CB v KB [2020] 1 FLR 795**, that, ‘*although it is not written in marble*’, in every case where the gross annual income of the non-resident parent does not exceed £650,000 the starting point for calculating child support should be the result of the formula, ignoring the cap imposed by the CMS of £156,000. For gross incomes exceeding £650,000 the result given using the formula should be the starting point with full discretionary freedom to depart from it having regard to the scale of the excess.

49. Section 33 of the Matrimonial Causes Act 1973 provides as follows:

(1) Where on an application made under this section in relation to an order to which this section applies it appears to the court that by reason of—

(a) a change in the circumstances of the person entitled to, or liable to make, payments under the order since the order was made, or

(b) the changed circumstances resulting from the death of the person so liable,

the amount received by the person entitled to payments under the order in respect of a period after those circumstances changed or after the death of the person liable to make payments under the order, as the case may be, exceeds the amount which the person so liable or his or her personal representatives should have been required to pay, the court may order the respondent to the application to pay to the applicant such sum, not exceeding the amount of the excess, as the court thinks just.

(my underlining)

Evidence

50. I have read the documents in the bundle which include statements from each party, financial disclosure and the various applications and orders made in

previous proceedings. I have read skeleton arguments filed by Mr Finch for the wife, and Mr Tatton-Bennett for the husband, and am grateful to them both for the way they navigated me through the issues in the case, and the evidence.

The wife

51. Rather than follow the Court-directed timetable, the wife has retained for herself the choice as to when to divulge information to the husband, and what to tell him.
52. The wife was not able to give any sensible explanation for the delays in producing the information she had been required to by the Court, nor for the inconsistencies or changes in her position. She said she couldn't remember if statements or responses were filed late, wasn't sure if they had been, and suggested if they were, then perhaps it was her solicitor who might be to blame.

Co-habitation

53. The wife says she and Mr Y '*started cohabiting very early in the relationship*'. She told me that the relationship started in early 2020 and that the national lockdown in March 2020 accelerated their cohabitation as they formed a 'bubble' with one another's households. In November 2020 [child B] told the Court appointed psychologist that they had 'two homes' with their mum; her house, and Mr Y's.
54. The wife now concedes that by the time she and the girls had moved to [House Z] with Mr Y in May 2021, they could be regarded as cohabiting. This is consistent with the address on her bank statements from June 2021 onwards, from information plainly understood by the girls' schools, and from the husband's own experience of collecting and dropping off the girls from handovers at House Z, often meeting with Mr Y as he did so.
55. The wife suggested in her evidence that this was all very straightforward, and it was the husband who has made a big deal out of it. However, she has not been at all straightforward about how she has communicated with the husband about this.
56. In her statement filed on 17 September 2021 she accepted that she and Mr Y were co-habiting, but said:

'I still maintain [my house] and the expenses in that respect are solely borne by me. It will be necessary to retain that house if financially viable for some time in case things were not to work out with Mr Y and I.'

57. She did not mention that [the house] was on the market, and had been since April 2021. This is a significant omission.
58. She went someway to correcting this at the FDR on 20 September 2021. The recital to the order stated:

Upon it being recorded that the applicant has confirmed to the Court at today's hearing that it is her case that (i) she is not cohabiting with Mr Y and (ii) it is

her intention to sell her home to discharge her liabilities and move with the children into rented accommodation.

59. I pause to note here that Mr Finch argued that this recital should be regarded as made without prejudice at an FDR, and should therefore be ignored by the Court. I reject that argument. I would accept it in respect of information shared during the course of the FDR itself, but not in respect of a clear recording of a party's position on the recital to an order.
60. The statement that she intended to sell [her house] is consistent with it being on the market (although the recital says she 'intends to sell', not that the property had been on the market since April). However, the recital plainly contradicts her witness statement. In the witness statement she said she was cohabiting with Mr Y; the recital states the opposite.
61. Ten days after the FDR, the husband sent an email to the wife asking her to confirm that the children were in fact now living with her and Mr Y full-time, *'It sounds like from conversations with them that you all have been there a while – that is where the dogs are, the girls each have their own rooms and beds (and fun horse wallpaper) etc ... This is of course all very exciting and positive for them, but I do think it is right that I should hear this from you directly rather than indirectly via court disclosures or snippets of stories from the children.'*
62. The wife did not give a straight answer, but came at it sideways:
'.. about cohabiting, you're only trying to win points here for court and get out of financially supporting me and the girls expecting my partner Mr Y to take care of your kids. This is not acceptable to be grilling the children and calling them deceitful!
You have been told and it has been made very clear we are here [because] I've had major surgery on both of my feet with a six month period for full recovery and I require 24 hour care/help to manage things at the moment, which we are. Please stop this nonsense!'
63. In his reply, the husband said, *'... the bottom line is I have the right to know that my children have moved to a different residence. Thank you for clarifying.'*
64. The wife responded, *'your children haven't moved to a separate residence. When [my house] sells and we officially move we will let you know. Please stop texting me. This is over involvement. You knew all of this as it was clarified in court just last Monday. You're pretending not to know.'* (my emphasis)
65. I do not think it could be said that the position had been clarified in court, rather the opposite.
66. By February 2022 the wife's solicitors did confirm in correspondence that she was cohabiting with Mr Y, and suggested that the husband was well aware of this. In her March statement, the wife once again confirmed they were all living together in House Z, but again criticised the husband, this time for *'overstating my relationship with my current partner'*.

67. She said in her evidence to me that she had always been very transparent about her relationship, but things were not always as clear and settled as they might now appear with the benefit of hindsight. She was asked about an email she sent to the husband in July 2022 telling him she and the girls were moving back into [her house]. She said:

‘.. when I say we were moving back into [the house] we were splitting up, Mr Y was moving away and there were lots of issues to deal with, with the girls and Court and the police – we’ve had a together, not together, he’s moving ... other things too personal to share – like lots of relationships it’s been complicated with ex-spouses and each other’s children – we just decided recently we worked it out and decided to get married.’

68. She said that she and the girls had moved back to the [house], but then she and Mr Y reconciled. This is not something that was stated in her witness statement. When asked when exactly this was (at the hearing in mid-September, so only a matter of weeks later), she said she didn’t have a date, it was sometime in July and August. She then said they were still talking, still seeing each other, and then she accepted that [the house] had been rented for most of the summer on Airbnb, but that she and the girls stayed in a bed and breakfast and then with friends in the countryside. She said Mr Y was away for work in [country name redacted] and they stayed in the house while he was gone. At some point in August she was on holiday in America, a trip paid for by Mr Y. So she was unable to point to a time when she and the girls had in fact gone back to [her house]. The wife said that Mr Y proposed to her only a week before they were married on 23 August.

69. I found her evidence that she and the girls had in fact moved back to [her house] in or around July 2022 to be unreliable.

70. Even if the email to the husband saying they were moving back to [her house] had been sent impulsively following an argument with Mr Y, and at that moment she did intend to move the girls back there, plainly that is not how things turned out. The wife does not appear to have felt the need to disabuse the husband of this. It seems the next he heard from her was on 1 September, via his solicitors, informing them she and Mr Y were now married.

71. On any view, there is a degree of obfuscation and lack of clarity from the wife about hers and the girls’ living arrangements. The husband’s straightforward and perfectly reasonable requests are frequently met with indignation, accusations of willful misunderstanding, over-intrusion, or attempts to use information against her to pay less. However, I do not read any of the husband’s requests whether directly from him or through his solicitors as motivated by anything other than what he says, a wish for the mother of his children to keep him informed about the children, and to try to understand her position so far as her application to the Court was concerned.

72. On balance, I conclude that the reason the wife was less than forthcoming was as she says in the statement of 17 September 2021. She had committed to Mr Y, had moved in with him, but did not yet know that this was going to work out in the long-term. She wished to have the insurance of maintaining [her house]

in case the relationship did not work out, and for the husband to continue to be the one to ensure that she would be in a position to maintain that property.

73. During her evidence she quite casually dropped in information that is likely to have had a significant impact on the husband hearing for the first time. She initially refused to answer questions about IVF treatment she and Mr Y had undergone in May 2021 (in relation to the issue of whether her relationship with him was fluid and uncertain as she had previously suggested, or settled and committed), but later in her evidence volunteered that they were currently planning to expand their family.
74. In respect of Theis J's judgment of the wife's application to relocate to [country name redacted], she suggested that Theis J had indicated she might renew her application again. When asked if she still planned to go and live in another country, she said, quite casually, *'yes I would like to live in [redacted] for a year or two ... there is always planning ... there is no secret about it, I would be planning to go.'* She mentioned that her husband now works in [redacted] as head of [company name redacted]. There is nothing about these plans in her statement, and this information is likely to have come as somewhat of a shock to the husband listening and hearing it for the first time. The wife's tone was quite casual, as though if this is something that she wishes for the girls, then it would happen. (Since the hearing I understand that she has now made a formal application to relocate with her children to [country name redacted], but I am not dealing with the Children Act proceedings, and they are not relevant to the issues I have to determine).
75. The wife was airily dismissive of questions about her finances, saying a few times that she was not very good with numbers. The impression I got was that she has not felt the need to get on top of the figures, because she has looked to the husband or Mr Y to help her with any shortfall between what she is spending and what she has available to her. She has not provided a clear picture of her incomings or her outgoings.
76. She was quick to blame the husband for a whole catalogue of things. She complained that there were difficulties in him paying for all the clubs and activities, but when questioned, her accusations turned out not to be well-founded. For example, she said he paid for only one clarinet lesson, but when pressed said he paid for just one term of lessons. She was pressed again and conceded that in fact he had paid for the lessons over a whole year. She said that the husband had not paid all the school fees, but further investigation revealed that the only fees unpaid related to her decision to switch schools suddenly without giving the requisite notice.
77. She did not appear to expect to have to pay for any share of the costs of the girls' education or their extra-curricular activities. There is no order in place that the husband should pay all the secondary school fees, he has done so voluntarily.
78. In March 2022 her intention was to ask the Court to capitalise her claim for maintenance. She said she had no idea that marriage to Mr Y five months later was a possibility. She accepts of course that her claim for spousal maintenance has fallen away, but the schedule which has now been prepared relating to child maintenance only has been substantially increased compared to those prepared

on her behalf in February 2021 and in September 2021. She acknowledged that the items on the list were not all things that she was currently paying for, but were her assessment of the children's needs going forward. She was vague as to the costs of anything on the list, and accepted that her husband pays for all costs relating to running the household, had paid for the holidays she and the girls had taken with him over the past year, that she drove his cars, and that the school fees, extra-curricular activities in and out of school, including horse-riding were paid by her husband directly.

79. The wife has not been able to articulate what it is about hers, the husband's or the girls' circumstances that has changed since the time the previous orders were made so as to lead to the need for a review upwards of the payments she receives for child periodical payments. Her application is based on the premise that her ex-husband has earned substantial sums of money since their separation and she feels entitled to receive a share in it.

The husband

80. The husband works for an investment company. Contrary to the wife's assertions, he has given exceptionally full disclosure of his financial circumstances, of his income now and every year during and since the marriage, and the basis on which bonus payments are calculated and distributed. He has provided detailed spreadsheets to show what he has received (in US dollars and GB pounds), and what he has paid to the wife since the separation. He has helpfully set this out in calendar years and tax years, and has disclosed relevant documents concerning income, and tax liabilities.
81. He and his wife have a young daughter. His wife works full-time.
82. He accepted that he had refused to pay for one school trip, which was in the end paid for by Mr Y, and said this was a mistake he regretted. He is willing to continue to pay for school fees and additional extras for the girls, but not to the extent that there is no discussion about it. He noted that one of the international schools in [country name redacted] charged \$50,000 a year. The wife had unilaterally moved the girls from their school in London to [county name redacted] and then again to their current schools without reference to him. He would not want an order that facilitated any further school moves without reference to him. He does not consider it reasonable that he is paying for transport costs for the children to get the bus to school where their mother does not work, and she and her husband have chosen to move a substantial distance away from the school the girls' attend. He is willing to pay for the girls' after school activities and has been doing so, including music lessons, and the speech and drama sessions which the girls started when they were living with him in [county name redacted] in 2018.
83. The wife said it was important to have an order that the husband met all these costs, because otherwise she would be in the invidious position of seeking his permission for everything, and this would be an opportunity for him to exert control over her and the children's lives. The husband said it is not that he is unwilling to pay, but he does not wish to simply write a blank cheque, or be liable to pay for things which he does not regard as reasonable, for example the fees incurred as a result of the wife arriving late to collect the children from school. In the context of ongoing Children Act proceedings where he is not

currently seeing the children, he would like to have some communication with their mother, so he knows what activities they are doing, can show an interest and support the girls in their hobbies.

84. I do not perceive the dynamic in this case to be one of financial control. The wife is not wholly financially dependent on the husband. She has had choices about how she has allocated the funds received in the divorce – she chose to buy a property that she could invest in, extended her borrowing on it, refurbished the roof and extended it. Since the marriage she has had the capacity to work, and at times has done so, to increase her income. At least since May 2021 she has been housed by Mr Y who has met hers and the girls' costs of living, she has received income from the Airbnb rentals, alternatively she has the choice to free up capital from selling [her house].
85. A refusal to say yes to every request for sums over and above what she is receiving from the husband is not in itself evidence of controlling behaviour.
86. I have not seen any evidence that the husband has sought to exert control or manipulate the wife by refusing to pay maintenance, attaching conditions to payment of maintenance, or otherwise. Two examples were put to him – the refusal to pay for one school trip, which he accepted was a mistake, and delayed payment of half the £20,000 spousal maintenance due in February 2022. His solicitor wrote to the mother's solicitor explaining that the sum was withheld as the husband was intending to ask for a cessation of maintenance payments and repayment of the indemnified sum re rental at the final hearing at that time scheduled for March. The wife's solicitor objected on her behalf and the £10,000 was paid within ten days.
87. There are more instances of the husband's hand being forced by the unilateral actions of the wife than the other way round. The initial move to [county name redacted] from London, which dramatically changed the arrangements for him to spend time with the children. The wife's decision to go to [country name redacted] notwithstanding Theis J refused permission for her to take the girls, necessitating the husband's move to [county name redacted], initially agreed to be three months, but extended again by the wife's unilateral decision to keep the girls after the holiday in October 2018 and then to stay on in [country name redacted] on her own for a further four months until the conclusion of the High Court proceedings. Then in [county name redacted], a unilateral decision by the wife to change the girls' school from [school A to school B], incurring a liability of a term's school fees. There is no basis for suggesting the husband should meet this liability, he had no part in incurring that penalty. However, the wife initially framed the outstanding debt as evidence of a failure on the husband's part to contribute towards the school fees.
88. The husband was straightforward and open in the way he gave his evidence. He came across as exhausted by years of litigation. His witness evidence and oral evidence was essentially reactive - trying to respond to the allegations made against him, trying to set out the facts with clarity, but not seeking to score points or raise counter-allegations against the wife.
89. He explained clearly the process by which his earnings were determined, the workings of the bonus system and the payments of 'phantom carry'. He has gone above and beyond what was required of him in terms of disclosure.

90. I found nothing sinister in differences Mr Finch pointed out between his Form E and the very general information given to his mortgage adviser for the purpose of submitting an application. The husband’s assessment of his needs for the purpose of that application is of the essential items of expenditure that would have to come out of that disposable income, demonstrating that there is sufficient left over for mortgage repayments. The schedule for the Form E looks at the reasonable expenses of his daily life.
91. There is no need to go through these items in any particular detail because the husband can comfortably afford to pay the amount of maintenance that The wife now seeks. That in itself is not determinative of her application.

Section 25 analysis

Turn to section 25 MCA1973:

(a) the income, earning capacity, property and other financial resources 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;

92. The husband is an Investment Advisor at [*company name redacted*]. He lives in London, in a property which he owns with his wife. The property is subject to a mortgage.
93. His income is made up of (i) a base salary; (ii) a discretionary bonus and (iii) deferred compensation awards (‘carry’ and ‘phantom carry’, which are payments of very small percentages of the investment income from investments raised by the husband or his team. The receipts are dependent on performance of the funds, often deferred for many years, and payable while the husband continues to work for his employer). His base salary is £225,000 gross, and he has consistently received substantial bonuses, of carry or phantom carry. In February 2022 this was \$625,000 (of which \$550,000 was paid then and \$75,000 deferred for payment). In the years since the marriage the husband has received varying sums; at the time of the marriage and for a few years after he remained in the investment team where his bonuses/’carry’ awards were more volatile but at times extremely lucrative.
94. His total pre-tax income from all sources up to and including 2015 (the year of the second financial remedies order) in GB pounds was as follows:

2009	2010	2011	2012	2013	2014	2015
100,000	363,000	404,112	427,918	645,690	599,165	647,219

95. Thereafter, his total pre-tax income from all sources has been as follows:

2016	2017	2018	2019	2020	2021
666,529	2,645,345	583,351	1,678,105	766,130	£424,658

96. He had extraordinarily good years in 2017 and 2019. I accept his evidence that he has no control over when the firm will release funds to him or the amount. The husband has more recently moved to the [another team in the firm] and while he still expects to receive generous bonuses, he is not expecting them to be at levels previously achieved. However, he would expect in the region of £450,000 a year in bonus on top of his basic salary. The husband is well able meet the needs of himself, his immediate family and pay child maintenance to his ex-wife, but his income source is not without limit.
97. The wife is a journalist and has worked for [*international organisations, names redacted*]. She has a PhD in [*specialist subject redacted*] from Oxford University and a Masters in [*specialist subject redacted*]. She speaks [*three languages – redacted*]. When she was working in [*country name redacted*] she was receiving \$20,000 a month. For the eight months that she was in [*country name redacted*], the husband looked after the children in [*county name redacted*], but she continued to receive maintenance payments from him. She has not worked since she returned to the UK in 2019.
98. The children are at secondary school and take the school bus. The wife has an impressive CV and there is no reason why she could not work part-time or full-time if she chose to do so.
99. She has received an income from spousal and child maintenance. Until 2019 that was a global sum of £72,000 a year, which then stepped down to £60,000. The spousal maintenance element has ceased as a result of her re-marriage on 23 August 2022.
100. I understand her to have received at one point £140 a month child tax credits but am not sure whether this is still received.
101. Her current housing needs are met by living in the house owned by Mr Y and he pays for hers and the girls living expenses. In January 2020 Mr Y transferred £27,520 into her account, and the same amount again in August 2021. The wife said she did not know what these sums were for. Thereafter Mr Y has paid smaller sums directly into her account over time, amounting to £34,019 to 5 September 2021. The wife referred to this as ‘lending’, but has not produced any evidence of an obligation to repay Mr Y. He paid for holidays to Italy and Greece in summer 2021 and a holiday to the USA in March 2022, a trip to Italy in April 2022, France in May and June 2022, a trip to Thailand in April, two trips to [*redacted*], in February and June 2022 respectively, and in August another holiday to the USA. He has paid the wife’s legal fees in these proceedings and the associated Children Act proceedings.
102. The wife drives but is not incurring costs of owning a car other than petrol as Mr Y has a Tesla, an Aston Martin and a Defender which she can use.
103. The wife owns [her house], which is subject to a mortgage. This provides a further source of income for her, from rentals, alternatively she could sell it to release capital. Between April and September 2022 she received payments of £11,956 representing income from renting it through Airbnb.

(b) the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future;

104. In her September 2021 witness statement the wife says the outstanding mortgage (I believe there are two) on [her house] is £211,862.89. Despite being directed to, she has not given any financial disclosure which might explain when or why these mortgages were taken out. I understand there was a project to extend the property, and that the thatch roof needed re-doing.
105. So far as her needs are concerned, the initial budget supplied by the wife in her Form E2 put her needs at £6,346 a month for her and the children. The Form E2 was filed in 2021, following issue of the application for variation of maintenance in January 2021. This was four months after the maintenance payments had stepped down in line with the revised order. The wife argued that her maintenance should be increased by around £1200 a month to meet the shortfall between her income needs and her maintenance payments i.e. return her to her previous position. Even though she had five years to prepare for the step-down, it is not clear that she had taken any steps to improve her position, but simply applied back to the Court for an order to revert to payments in line with what she had previously received.
106. The budget supplied in December 2021 put monthly needs (spousal and child maintenance) slightly higher at £6,862.
107. The budget she provided on 6 September 2022 is in respect of child maintenance needs only. The children's needs going forward are assessed by the wife to be £5,962 per month. That means that she has stripped out only £900 a month for the spousal maintenance which she accepts she can no longer seek from the husband.
108. There has been drastic inflation of the amounts claimed in respect of the children. I find that the wife has overstated the children's reasonable needs.
109. The claim for £1,401 a month as mortgage payments that appeared on previous schedules has gone. The wife sought this payment from the husband because, she said, *'he did not give me sufficient money to buy the property mortgage free.'* It is right that this item is no longer on the schedule. It is not reasonable for her to seek this from the husband in circumstances where (contrary to her assertion) she had received capital sums sufficient to rehouse herself mortgage free, and where hers and the girls' housing needs are now met by her husband.
110. The reasonable needs are assessed for both girls. The wife claims a proportion of the household utility bills, but she is not currently paying anything towards these expenses. She initially put down £1,600 a month for housekeeping, food and school meals presumably for her and the girls. This has now come down to £800. Again Mr Y has been paying for this expenditure and The husband for the school meals, because he pays the school fees.
111. I would consider **£750 a month** in total to be reasonable to represent the costs relating to the girls of running the household, including a cleaner for their rooms, buying groceries, and additional TV/internet subscriptions (Disney plus).

112. The claim for £1,080 a month for childcare/babysitting at an average of eighteen hours a week is new to the September 2022 schedule and excessive in circumstances where the girls are at secondary school, the mother is a home-maker and therefore able to provide childcare after school and during school holidays. The rate of £15 an hour is excessive. I would allow **£100 a month**.
113. School and home clothes and shoes are put at **£285 a month**.
114. School trips and clubs (up to £300 per child per term) are to be covered by the husband separately.
115. The wife and the girls have moved a fair distance from the girls' school in [*county name redacted*] so that the costs of the school bus are now £1800 per child per year. The husband suggests that this expenditure is unreasonably incurred and should be borne by the wife, who made the decision to move so far away. However, they have not moved so far that the girls are out of reach of the school bus. I suspect that there would not be a huge variation in price if they were a little closer in. I consider this item should go on the school bill as an item for the husband to pay direct as he may get the benefit of a sibling discount, and the amount payable will reduce once B has left the school.
116. The costs of computers, tablets and mobile phones at £300 a month (£1800 a year per child) is excessive. I would allow £50 each a month for mobile phones, to include cost of phone, line, and accessories, so **£100 a month**. The girls are likely to require laptops for school but items such as tablets would fall within the claims for birthday and Christmas gifts. They will not need £1200 a year for school laptops. This type of item is best purchased by the husband as and when the need arises, identified by school.
117. Books, magazines, subscriptions are included in my assessments of general household costs or in gifts.
118. I would consider **£50 a month** hairdressing reasonable for both girls on the basis they are likely to have their hair cut every other month.
119. £20 each pocket money is reasonable. **£40 a month**.
120. Given that the girls' hobby is riding, sports equipment, sports lessons and sports club memberships are reasonable. I consider **£250 a month** reasonable.
121. The assessment of the amounts for Christmas and birthday presents and buying presents for their friends is put at **£240 a month** (£1,440 a year for each child).
122. £350 a month 'holiday money' for the girls is not explained and appears excessive. Trips with friends (£63 a month), eating out (£100 a month), and holidays (£1,200 a month) is also excessive. Together these items add up to more than was put forward in the earlier schedules.
123. Assuming that the girls might have three holidays a year with their mother, which might include travel to America to see their extended maternal family, skiing (although historically this seems to have been something they have done with their father), and assuming flights and their share of the accommodation might be £1,500 for each holiday one might get to around £9,000 a year for both, so £750 a month. I would add a further £100 a month

for trips with friends, eating out and holiday spending money, totaling **£850** a month. This need has in recent years been met by Mr Y and through his work is likely to be able to continue to provide some flights at a discount.

124. The cost of hygiene and health products to my mind comes under the general groceries and running costs heading above.
125. £200 a month for organic food for the family dogs is not properly attributable as an expense relating to the children.
126. Adding these sums together, I calculate the income needed by the wife to meet the girls' needs to be **£2,665** a month.
127. Apart from the American student loans, the wife's list of debts appear all to have been incurred after the end of the marriage. I was not taken to any evidence during the hearing about this and have not been told what if anything is outstanding, I understand Mr Y has paid most if not all of them. A significant part of the debts is concerned with litigation between the wife and the husband, which he should not find himself paying by a back-door route. Costs in relation to decisions to invest in [her house] are akin to a business investment. The wife received sufficient funds to rehouse but chose to extend the property. She should be able to recoup the value of that investment through its rental or by selling.

(c) the standard of living enjoyed by the family before the breakdown of the marriage;

128. The parties' standard of living would appear to be the same, if not improved since their separation. The husband has received some large bonus payments, continues to hold a senior post in his investment company, and now lives with his wife who also works full-time. They live in a town house in London. The wife lives in a six-bed country residence in [*county name redacted*] and continues to have a high standard of living. Both parties have been on a number of holidays abroad with the children. The children are privately educated, and take part in a wide range of activities outside school including horse-riding.

(d) the age of each party to the marriage and the duration of the marriage;

129. The wife is 50, The husband is 48.
130. The parties met in 2009, were married in December 2010, separated in December 2012. The wife petitioned for divorce in February 2013. The decree absolute was pronounced in August 2014, after the finances were resolved by the order of July 2014. The relationship lasted five years from start to finish.

(e) any physical or mental disability of either of the parties to the marriage;

131. No relevant factors to consider.

(f) the contributions which each of the parties has made or is likely in the foreseeable future to make to the welfare of the family, including any contribution by looking after the home or caring for the family;

132. There is some tension here from the ongoing Children Act proceedings, due to have a five-day fact find, as part of the husband's application to the Court that the children move permanently to live with him. The wife has now it is understood cross-applied for the children to move to [country name redacted] with her.

133. I proceed on the basis of the situation as it is on the ground at the moment, the children are living with their mother full-time. If the arrangements return to those as set out in the current order, with the children staying every other weekend and for longer times in the holidays, that would not have a significant impact on the assessment of maintenance.

134. If the children move to live with their father full-time, then that is likely to be a change of circumstances that would lead to a complete rethink of maintenance, but the parties are not asking me to look at that scenario in the alternative.

135. I proceed on the presumption that each of these parents has and will in the foreseeable future continue to contribute to their daughters' needs to their best abilities.

(g) the conduct of each of the parties, if that conduct is such that it would in the opinion of the court be inequitable to disregard it;

136. Mr Tatton-Bennett asserts that the wife's litigation conduct is relevant to the issue of costs, but not to the question of the application to vary.

(h) in the case of proceedings for divorce or nullity of marriage, the value to each of the parties to the marriage of any benefit . . . which, by reason of the dissolution or annulment of the marriage, that party will lose the chance of acquiring.

137. This is not relevant to the application to vary.

Conclusions

Variation of maintenance

138. My task is to consider whether in all the circumstances the order for child maintenance should be varied.

139. The Court is not reviewing the adequacy (or otherwise) of the previous orders and adjusting or rebalancing the outcome. However, those orders are the context and the foundation of the application.

140. On behalf of the wife, Mr Finch's central assertion is that because the husband's annual pre-tax income exceeds £650,000 the Court must apply the 'Mostyn formula' so as to ensure the wife receives an adequate proportion of his income in maintenance.

141. I find this approach is misconceived. I accept Mr Tatton-Bennett's submission that this is effectively seeking continued spousal maintenance by the back door. Mr Finch's submissions ignore the fact that these parties were divorced nearly a decade ago, and came to terms in respect of financial arrangements based on the circumstances that existed at that time. The wife received sufficient sums from the marriage to enable her to rehouse, and then to provide for herself and for her children. The tapering of the maintenance payments was in recognition that she received the lion's share of the equity the parties had in the former matrimonial home, and that she had an earning capacity that she would be able to utilise once the children were older. After a very short marriage she received a net income of £72,000 a year for six years, then dropping down to £60,000 in 2020.
142. The wife was represented by lawyers when the initial agreement was made in 2014, but applied to vary in 2015. She was represented again at the time of the variation order, which restructured the payments. The last instalment of the £72,000 payments came to an end in August 2019. It was around that time that the wife first applied to the Court for variation (this was the application that was initially rejected and then not pursued by her).
143. I consider the husband's offer of increased payments to £2,200 a month in respect of child maintenance to be fair and reasonable.
144. That creates a shortfall in my assessment of the wife's needs of £550 a month, but bar £850 her budget is all directed to 'extras' consummate with the lifestyle that she would wish for her children. I find that she is in a good position to contribute towards those costs. She receives £140 a month in child tax credits, she can return to work part-time (she was recently in [country name redacted] giving a presentation), she can rent out [her house]. It is not reasonable for the husband to pay more, because he is already committed to a number of additional items of expenditure outside the order; including school fees, to include travel, extra-curricular activities, school trips.
145. I have had regard to all the section 25 factors, and I am not satisfied there has been a change in circumstances to justify a change an increase in child maintenance above what the husband is now offering.
146. My reasons for coming to this conclusion are as follows:
- a. The husband was a high earner at the time the parties separated and continues to be a high earner. The method of calculating his bonus entitlement and remunerating him is complex, arbitrary and relatively unpredictable, but I am entirely satisfied that he has not sought to withhold any information about his remuneration, nor taken any active part in structuring the timing or amounts of his payments with any view to depriving his ex-wife of money. She has no ongoing entitlement to a percentage of his income;
 - b. There is no change in the wife's circumstances that would justify a variation in her maintenance to the extent she seeks. The parties separated after two years of marriage, at which point the wife received the majority of the joint assets of £700k and substantial spousal and child maintenance. She now has a home with her new husband to which she does not currently make a financial contribution, and does not pay for

day to day outgoings such as food, cost of a car, utility bills. She has an investment property which she can choose to rent out or sell and use the equity. Her children are at secondary school, and she has an impressive set of qualifications that could enable her to work full-time or part-time if she chose to.

- c. She has not put forward any cogent evidence to the Court about outstanding liabilities. But if she incurred substantial debts since the time of separation that is not the husband's responsibility to indemnify her for them, and in any event, they largely now seem to have been discharged by Mr Y.
- d. The children's needs have not changed substantially since the time the previous orders were made.
- e. The schedule provided by the wife for this final hearing is inflated and contains a number of items that the wife neither pays for now nor will need to in the future;
- f. The argument that there should be an increase in maintenance to reflect the 'disparity of lifestyle' is ill-founded. Firstly, it is questionable whether there is any real disparity. If anything, the wife now enjoys a significantly more luxurious lifestyle than the husband and his wife. She does not work whereas they are both working and incurring childcare costs. Secondly, this was an exceptionally short marriage and there is no obligation upon the husband to continue to account to her for any share of his income or for there to be parity. If either of them were to inherit large sums of money or win the lottery they would not be required to account to the other for a share, and nor do they need to in the event of an upturn in income.

147. The husband agrees to pay for school trips that the girls are going on with their classmates during term time, for example geography field trips, Duke of Edinburgh trips, summer residential trips at the end of the school year, but says that there should be discussions between the parents about the optional extras which are both expensive and can potentially conflict with family holidays or other commitments, for example, ski trips, language exchanges, or sports tours.

148. I do not see why the wife should have expected the husband to pay for breakfast club, after school clubs, fines for late pick up of children and the outstanding bill of £1,928 relating to these costs incurred since 2016 should be paid by the wife not the husband (I understand he has paid any liabilities relating to the time the children were full-time in his care in 2018).

149. I agree that it should not be assumed that the husband should be expected to cover the 'extra extras', or that the girls should be brought up with an expectation that every single trip on offer is available to them, or that if they do not go it is because their father is blocking them in some way. I agree that such significant decisions should be decided on a case by case basis.

150. I agree that the husband should continue to pay school fees for the girls at their current schools, but would accept that he should not be under an obligation to pay for any school at any cost. Any change of school should only

be made with the agreement of both parents who have parental responsibility for the children.

Enforcement application

151. Between August 2012 and August 2014 the wife and the children lived in a rental property in London. The husband agreed to act as guarantor for the wife on the extension of the tenancy agreement in August 2013. At paragraph 4 of the 2014 financial order, the wife agreed, and was ordered to indemnify him against any liability for the tenancy.

152. The landlord subsequently sued both the wife (as tenant) and the husband (as guarantor) for damages for unpaid rent, damage to the property and costs. The letter of claim and later proceedings were served on the wife in [county name redacted], but not on the husband. She did not notify him of the proceedings. She initially sought to defend the claim, but ultimately summary judgment was obtained in June 2015 against both her and the husband. She did not tell him about this, even though they were in contact at around this time, negotiating in respect of her application to vary the original financial remedy order. I accept the husband's evidence (on which he was not challenged) that the first he heard about it was when he was cc'd by the wife into an email in October 2017 from her to the Claimant's lawyer, directing him to seek payment from the husband.

153. The husband paid the outstanding payment of £9,512.88 immediately. He says this has caused him reputational damage as someone who works in finance, and the impact on his credit rating has limited his options when finding a mortgage lender.

154. The wife only indemnified the husband in respect of the rent. That element of the judgment sum was £3,500 and it is this that the husband claims plus interest of £98.00.

155. There is no defence to this application. Whether or not it is petty to seek it in the general scheme of things is neither here nor there. The husband would not have asked for it back if he did not find himself in proceedings again. He remains £6,000 out of pocket for a liability that he was not responsible for incurring.

Back payment of maintenance

156. The Court has a discretion as to whether to order repayment, having regard to all the circumstances.

157. From the answers obtained in cross-examination of the wife, her statement, his client's statement, and in his written and oral submissions, Mr Tatton-Bennett demonstrated the tortuous path by which the husband came to learn that his children had moved with their mother to the home of her new partner, now husband.

158. There has been obfuscation, admission, denial then concession.
159. I have had regard to the contemporaneous emails and documents submitted to the Court. I find that the husband's motivation in asking the wife about her circumstances was primarily, as he said at the time, because he wanted to know with whom his daughters were living. It is entirely reasonable for him to wish to understand and be in a position to deal with any practical or emotional consequences for them of a change in theirs or their mother's situation. I do not consider that the husband was on some kind of mission to score points, or find a way to avoid paying maintenance. He reasonably expected the wife to level with him about what was going on.
160. The 2014 order could have provided for maintenance payments to stop after a period of cohabitation of six months or longer, but it did not. The order did not provide her formally to give notice of cohabitation.
161. However, undoubtedly the duty of disclosure was upon her, given the application she had made to the Court for variation of maintenance upwards, and in March 2022, for the claim to be capitalised. The husband was entirely within his rights to enquire as to hers and the girls' circumstances, in order that he could take advice, and be in a position to negotiate from a position where he had a full understanding of the facts.
162. The wife has fallen short in that duty. This meant that the husband incurred time and expense instructing his solicitors to deal with this in correspondence, dealing with it in his statement, and for it to be an issue that took time at Court hearings.
163. It is easy to look with hindsight and consider that a marriage that eventually took place was inevitable, but I accept that this was not on the cards from day one, and in the wife's mind, the possibility that this relationship might not work out still remained.
164. However, the wife and Mr Y had been living together since early in their relationship (at first going between their two houses then from May 2021 at House Z). The girls were encouraged to see this as a permanent move. The house was chosen by the couple together, with the girls' interest of horse-riding facilitated, within reach of the girls' school by bus. The girls had bedrooms decorated for them, two dogs bought by Mr Y for the family, and teachers at school were told this was a permanent move. Mr Y was supporting the wife financially and was fully involved in the children's lives as a step-father, joining in family activities, meeting their father at handovers. He and the wife were going through IVF, committing to their future together.
165. The wife was not straightforward about this to the husband or the Court. She has given mixed messages about her intentions, insisted that it was only a temporary arrangement due first to covid, then her convalescing to surgery on her feet.

166. If spousal maintenance had come to an end once cohabitation started, and the relationship with Mr Y had broken down shortly thereafter, would she be able to manage without due hardship? It is arguable that she could. The wife received significant financial assistance from Mr Y from an early stage in the relationship. She did not sell [her house], wanting to keep it as insurance against relationship breakdown.
167. There was a long period of cohabitation in this case during which the wife was receiving spousal maintenance from the husband that arguably she did not need.
168. Having regard to all the circumstances, on balance I have decided that I should not exercise my discretion to award a back-payment of maintenance, for the following reasons:
- (i) An ex-husband is not required to insure his ex-wife against all eventualities, including the consequences of the breakdown of all future relationships. However, at the same time, a person should not be so fearful of the loss of the financial security intended to be provided for them by a spousal maintenance payment, that they feel restricted in taking steps to enter into a relationship or allow it to progress in stages towards a greater commitment. There must be a period of time before a cohabiting relationship has become settled and permanent where it remains justified for spousal maintenance to continue.
 - (ii) It was open to the parties to decide for themselves what period of time of cohabitation would trigger the end of spousal maintenance, but they did not provide for that in their order.
 - (iii) I have to look at the circumstances as they were at the time. I accept that the obligation of an ex-spouse does not necessarily stop immediately when a cohabitation starts. I would accept that a two year ‘testing phase’ is probably at the extreme end of the spectrum, particularly in this case where Mr Y and the wife were plainly in a long-term, committed relationship by at least the spring of 2021. However, the impact of covid is significant. The first eighteen months of the relationship with Mr Y coincided with the pandemic, when many relationships were put on fast-forward. The options for many new couples were to accelerate their new relationship and move in together, or else barely see one another, and miss the chance to develop the relationship at all.
 - (iv) The husband did flag up (through his solicitors) before the hearing in March that he intended to apply for maintenance to come to an end, but not that he was seeking for a repayment. The application for back-payment of maintenance was raised only by Mr Tatton-Bennett in his skeleton argument the day before the final hearing. There has been no formal application to the Court.

Costs

169. The costs liability from the order relating to the application to adjourn the hearing in March 2022 remains outstanding and must be paid by the wife to the husband.
170. The general rule in financial remedy proceedings (Family Procedure Rules 2010 rule 28.3) is that the court will not make an order requiring one party to pay the costs of another party.
171. The court may however make an order requiring one party to pay the costs of another where it considers it appropriate to do so because of the conduct of a party in relation to the proceedings (whether before or during them). (FPR 28.3(6))
172. In deciding what order (if any) to make the court must have regard to:
- (a) *Any failure by a party to comply with the rules, any order of the court or any practice direction which the court considers relevant;*
 - (b) *Any open offer to settle made by a party;*
 - (c) *Whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;*
 - (d) *The manner in which a party has pursued or responded to the application or a particular allegation or issue;*
 - (e) *Any other aspect of a party's conduct in relation to proceedings which the court considers relevant; and*
 - (f) *The financial effect on the parties of any costs order. (FPR 28.3(7))*
173. Refusal to negotiate openly will amount to conduct in respect of which the Court will consider making an order for costs. See Mostyn J in *OG v AG* [2020] EWFC 52:
- 30. The revised para 4.4 of FPR PD28A is extremely important. It requires the parties to negotiate openly in a reasonable way. To take advantage of the husband's delinquency to justify such an unequal division is not a reasonable way of conducting litigation. And so, the wife will herself suffer a penalty in costs for adopting such an unreasonable approach.*
- 31. It is important that I enunciate this principle loud and clear: if, once the financial landscape is clear, you do not openly negotiate reasonably, then you will likely suffer a penalty in costs. This applies whether the case is big or small or whether it is being decided by reference to needs or sharing.*
174. The wife's litigation conduct has prevented the parties being able to enter into any meaningful negotiations, because she has not enabled the parties to reach a point where the financial landscape was clear. She launched her application in January 2021 without prior warning to the husband, or invitation to negotiate. She took nine months thereafter to give any inkling of what orders she sought and why.
175. She has been late in complying with all the directions made.

176. At the outset of proceedings she filed her Form E nearly four weeks late.
177. At first appointment on 15 March 2021 both parties were ordered to reply to the other's questionnaires by 6 April 2021. The wife's replies came on 14 September 2021.
178. She was ordered to file a statement in response to the husband's by 20 April 2021, but did not do so until the afternoon of Friday 17 September 2021, when the FDR was listed on Monday 20 September 2021.
179. She did set out for the first time in the statement of 17 September 2021 the broad thinking behind her application. There was no opportunity for the husband to respond to that statement before the FDR. She had not made any open offers leading up to the FDR. At that hearing she gave the information that was recorded on the recital about her intention to sell [her house] and move to a rental property, which was plainly inconsistent with the information the husband had understood from what was happening on the ground, and what she had said in her witness statement. When the husband asked for clarification ten days later she repeated that the current arrangement was temporary. In the circumstances it was unlikely that settlement could be reached, because further investigation was then required.
180. This then remained a live issue that the husband had to deal with in his statement of December 2021.
181. The husband's open offer made three days after the FDR in September 2021 was not far off the position the Court has now reached. It is likely that if the wife had responded at any point before 6 September with a counter-offer, the parties might have been able at the least to narrow issues, or potentially resolve the dispute.
182. The wife was directed to file a section 25 statement on 13 December 2021 but did not do so. She had still not done so on 3 March 2022.
183. At the time her application to adjourn the final hearing on 15 and 16 March 2022 was refused, the wife was directed to file her statement by 10 March 2022. She did not, and it eventually came in only after that hearing had been removed from the list due to lack of judicial availability. It was filed on 16 March 2022.
184. Mr Finch says none of these breaches of orders sound in costs, because the hearings that were listed could still take place. I disagree.
185. The wife drew the husband into litigation from January 2021 without warning to the husband, or invitation to negotiate. She did not set out her position. She did not attend a MIAM or propose any form of mediation. For the first eight months he had no idea what the basis for her application was, and incurred costs trying to find out, instructing solicitors to chase for her to complete disclosure of financial information, to respond to questionnaires, to file her statement, to make offers in the run up to the FDR. The husband's

statement had to deal with the points raised by the wife in respect of cohabitation, a far lengthier statement than would have been needed had she approached the issue with transparency. If, as she now says, the situation was fluid and uncertain, then she could have said something to that effect to the husband. She did not, but threw down a number of contradictory positions, took offence at any requests for clarification, and flatly denied that she had been the cause of any confusion.

186. The proceedings continued on past March, because a judge was not available to hear the case at that time, but it is unlikely that there could have been a final hearing at that stage, because the wife had not filed her statement by 10 March as ordered. She was acting in person at this time (her solicitor had come off the record in February 2022), but the order of 3 March was clear as to what was required of her.

187. Again, the conflicting information then given in March 2022 and in the months that followed meant that the cohabitation issue remained live. In March 2022 she was seeking to capitalise maintenance payments. Her solicitors confirmed in February and March that she was cohabiting with Mr Y, but in July she sent a clear message to the husband that she and the girls were moving back to [her house]. On 1 September she told him through his solicitors that she and Mr Y were married, and on that date conceded the application for spousal maintenance was no longer pursued. The budget that she put forward for consideration by the Court in March was different to the one in September 2021, and the September 2022 drastically revised what had gone before. The husband had to respond afresh to each new position.

188. I agree with the submissions made on behalf of the husband that the wife's litigation conduct has been such that what would otherwise have been a relatively straightforward case has become needlessly complex. I take into account that it cannot be said that each and every episode of poor litigation conduct can be linked to wasted costs, but I am entitled to look at her conduct as a whole. In my judgment, taken as a whole, it has led to an unnecessary waste of time and expense and has prevented the parties from entering into meaningful negotiations in what should have been a straightforward case.

189. In my judgment it is appropriate to exercise my discretion so as to make a costs order against the wife as a result of her litigation conduct. I am satisfied that the husband has been put to significant additional expense as his solicitors have had to (i) chase the wife in respect of her non-compliance with Court orders; (ii) respond to the ever-changing cohabitation issue.

190. In addition, her failure to set out her position at an early stage, invite negotiations, or make an open offer (until 6 September 2022) has meant that the application proceeded inexorably on to an expensive contested final hearing. The application has essentially failed, as the change of circumstances argued for has not been identified. The Court has made an award which is consistent with the position put forward by the husband.

191. The fact that the husband's position has been essentially vindicated at the hearing is not of itself a reason to make a costs order in his favour. However, that this result has been reached, against the tide of obfuscation and disregard of court orders by the wife, supports my view that had she conducted this litigation as she should have done then a similar position would have been reached as a result of reasonable negotiation, with the consequent saving of time and costs.
192. The amount of costs is also discretionary. The husband's costs of the application are £133,253.40.
193. Having regard to the circumstances, and the list of factors at FPR 28.3, I consider that the wife should pay 50% of those costs; £66,626.70. I take into account that the husband would have incurred costs in any event, that the maintenance has in the end been shifted upwards, and that he was not successful on the issue of back payment.
194. The financial effect on the wife of this order is not unmanageable because she has the resource to meet the costs from her unutilised earning capacity, or by generating rent or capital from [her house].
195. I consider this order to be fair, and proportionate to the nature and consequences of the litigation conduct.

HHJ Joanna Vincent
Family Court, Oxford

Draft judgment sent to parties: 7 November 2022
Approved judgment handed down: 6 December 2022