Neutral citation number: [2022] EWFC 195 (B)

Case No BV20D12048
and NR22F00563

IN THE FAMILY COURT AT NORWICH

B E T W E E N:

AW — Applicant

- and -

AH — Respondent

IMPORTANT NOTICE

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published, but the anonymity of the members of the family, including the child of the family, must be strictly observed.

All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

This judgment was handed down remotely at 10am on 11 August 2022 by circulation to the parties or their representatives by email. An anonymised version of this judgment will be released to the National Archives in due course.

Mr Peter Baughan (solicitor) appeared on behalf of the Applicant wife
The respondent did not appear and was not represented

Written judgment of Deputy District Michael Horton QC
Dated 11 August 2022

1. This is my judgement in the case of AW and AH. It comes before me on an application for financial provision following an overseas divorce under Part III of the Matrimonial and Family Proceedings Act 1984. It comes before me in unusual circumstances. On 12 October 2021 I heard the trial of AW's application for ancillary relief, ie for financial orders in connection with divorce proceedings. The hearing took place remotely by CVP. I heard evidence from AW and delivered a judgment.

2. However, at the time there was no decree nisi in her divorce petition. I was not in a position to make a court order to give effect to my decision. In fact, I sent to the court

office an order which recited what had happened, and directed that once the decree had been pronounced the file be referred to me for an order to be drawn up and sealed. I also sent to the court office third party disclosure orders in respect of the mortgages on the properties concerned. For unknown reasons, these orders were not drawn or sent out by the court.

3. The fact that I could not make an order in the financial remedy proceedings has become increasingly common experience in the last 18 months or so. In particular, there are several instances where the parties have had FDRs in front of me where there has been no decree and the making of an order to approve the deal done at the FDR has had to await the pronouncement of a decree. Usually this causes nothing more than minor inconvenience.

4. In this case, on 12 October 2021 I envisaged that due course I would be informed that a decree had been pronounced, and that the orders that I had intended to make would indeed be made. However, on 29 March 2022, the husband, AH obtained a divorce in China. The marriage having been divorced in China meant that the English court would not be able to pronounce a decree of divorce, and the decision I had made was now of no value. Following the Chinese divorce, AW took advice, and on 24 May 2022, she applied for permission to apply under Part III of the 1984 Act. The papers were placed before me and on the same day I made an order granting permission for her to apply under the 1984 Act. By that order I recited the fact that I had already made a decision as to the fair outcome of the applicant's application for financial orders; that, on account of the divorce in China, it was no longer possible for the family court in England and Wales to dissolve the marriage, and as a result, it was no longer possible for the decision that I had made on 12 October 2021 to become a perfected court order. I directed that the Form D50E, the application for permission to apply under the 1984 Act, should stand as the substantive application under Part III, and dispensed with the requirement to issue or serve a Form D50F. I directed that the application be issued, that the files be linked (so that the financial order file was linked with the new file created for the purpose of the Part III application). I dispensed with the usual Part 9 procedure under the Family Procedure Rules, and listed the final hearing of the application under Part III of the 1984 Act for hearing on 15 June at 0930, before the start of my main list on that day.

5. The order also set out in bold type that the Respondent must attend that hearing, and that if he failed to do so, the court might proceed to make a final order, such that he make a payment to the Applicant of £300,000, which was the sum that I had ordered in the English ancillary relief proceedings in October 2021, or such other orders as the court might consider appropriate. I directed that the applicant should serve the order on the Respondent and should do so in a manner that was consistent with earlier orders for alternative methods of service. In due course the respondent was duly served and the matter came before me on 15 June.

6. On 15 June I heard brief submissions from Mr Baughan, the solicitor for the Applicant. I gave a preliminary view as to what I would order, and reserved judgment. This is the reserved judgment. In this judgment I will set out (1) the details of these proceedings and how we got to where we are today; (2) the financial position and the assets as known

to me; (3) my decision in October 2021; (4) my decision today; (5) the order I shall therefore make.

7. Before I do so, I will say a word about this judgement. I take a similar view to that taken by His Honour Judge Farquhar in the case of *X v C* [2022] EWFC 79. The move to greater transparency invites judges to attempt to ensure that 10% of their judgments are published on Bailii or the National Archives website and I shall endeavour therefore to have this judgement anonymised and published. Like Judge Farquhar, I consider that it would be harsh to these litigants for the judgement to be published in an un-anonymised form. This case ought to have finished last October, which was before Mr Justice Mostyn's journey from anonymity to full frontal publicity, which began with his judgment on 1 November 2021 in the case of BT v CU. Likewise, these parties are not famous or public figures. I take the same view of the *Re S* balancing exercise, if indeed it needs to be carried out. Accordingly, to the extent that it is necessary for me to do so, I make a reporting restriction order so that this judgment may be published but in an anonymised form.

The wider issues

8. Before I turn to the facts of this case, I say a word or two about the matters of general importance raised by this case. Under the jurisdictional arrangements that applied before the United Kingdom left the European Union, the rules governing divorce proceedings included a 'first in time' rule. There was, to use a colloquial expression, a race to issue. We have now left the EU and those jurisdictional rules no longer apply. If there is a forum dispute, other than that involving a dispute between England and Wales and another part of the British Isles, governed by the obligatory stay provisions in Schedule 1 to the Domicile and Matrimonial Proceedings Act 1973, the forum non conveniens rules apply. We no longer have a race to issue. But now it seems we have a race to decree. And it is a race that in this case AW lost. AW issued her divorce petition on 6 July 2020. Despite an order made in the family court, within the financial remedy proceedings, recording that AH had been personally served in June 2021, she was unable to obtain a decree nisi. AW's experience is not unique. Anecdotally, it seems that the centralised Divorce Centre in Bury St Edmunds is unresponsive and, in many cases, simple applications for decree absolute have taken months (given that, following the PAG report, the modern practice is almost universally to delay seeking decree absolute until 28 days after the making of an order which includes a pension sharing order, this builds in unnecessary delay before an order becomes enforceable). Rightly or wrongly, the decision to remove divorce work from most family court centres was made. Originally there were the regional divorce centres, and now we have the online system and the central divorce centre in Bury. Anecdotally, it seems it is difficult even to contact the divorce centre, or get matters before a judge there.

9. The difficulties to which the operation of the current system now gives rise are obvious. It is no longer possible for a divorce petition, or now a divorce application, to be issued in a local family hearing centre. It is no longer possible for the judge conducting the first appointment of a financial remedy application to iron out any difficulties that there might be in relation to the progress of a divorce application, whether in relation to service, or perhaps striking out an answer by consent, where that is something the parties would wish to do. In other cases where I have listed a case for FDR, hoping that by the

time the FDR comes round there will be a decree, there is little that the court can do. I stood out of the list a case this week, where the applicant indicated that they had applied to the divorce centre to have an order made for deemed service of the divorce petition, showing proof of the receipt by the respondent of the divorce petition. Before centralisation, it would have been easy for a judge in the local family court to make that order, and to certify entitlement to a decree, and then to list the case for pronouncement of a decree nisi. This would have ensured that an FDR could take place with the knowledge that a decree had been pronounced and that any compromise reached at the FDR would immediately become an order of the court.

10. One of the goals of the law reforms that came in with the Children Act 1989 over 30 years ago was that all the courts with family jurisdiction should, more or less, have the same powers. We now have the single family court. Yet the hiving off of divorce work to a single location has not improved the service provided to litigants. My tentative suggestions for improving matters include: (i) a party who considers that there might be a timing issue should consider asking the case to be transferred to a local family court hearing centre (after all local courts deal with issues about costs and thereafter the case stays in the local court for pronouncement and decree absolute); (ii) allowing any judge of the family court, sitting at any location, access to the online divorce system. If a judge can log on and approve a financial remedy consent order from any court in which he or she sits, might not the same facility be granted to the online divorce system?

(1) <u>The background and chronology of these proceedings</u>

11. By way of background, the husband in this case, AH, was born in 1984, and he is aged 38. The applicant wife, AW, was born in 1994 and is aged 27. AH came to the United Kingdom as a student in 2003 and stayed here after his studies finished. He eventually settled in East Anglia. In 2014 he bought property A and the Land Registry shows the purchase price was £330,000. It seems that he had a business - and in due course it seems he had a second business. In July 2017, the applicant came from China to the United Kingdom and embarked on a course of study. During the course of her study she began a job as a part-time assistant in one of AH's businesses and as a result of that, the parties began a relationship. By November 2017 they were living together at property A. In June 2018, they travelled to China and were married there. They returned to the United Kingdom and in the autumn of 2018 a property known as property B was bought in the sole name of AH. That property was rented out to students.

12. In 2019, the parties' son was born. He is now nearly three and a half. In October 2019, the parties moved from property A to a new family home. This was property C. That was purchased in AH's sole name for just under £358,000. Unfortunately, already by that time there had been some difficulties in the marriage. AW alleged an assault on her by AH in May 2019. She alleged a further assault on her in February 2020. As a result of that second assault, she left the family home at property C and moved into temporary housing. She has been housed since then by the housing association. The parties therefore separated permanently in February 2020. She obtained a without notice non-molestation order at the end of February 2020, which was confirmed at the on notice hearing on 11 March 2020. That was an order made shortly before lockdown and AW

says that AH left the United Kingdom and went back to China during the course of 2020.

13. In May 2020, AH issued divorce proceedings in China. AW's divorce petition was issued here on 6 July 2020. On 21 July, AW issued a Form A seeking all forms of ancillary relief, including property adjustment orders in relation to the three properties, namely property C (the last family home), property A (which had been their family home until October 2019) and the rental property at property B. On issue by the court, a first appointment was fixed for 18 November 2020 and the usual directions were given for the filing of Forms E and first appointment documents.

14. On 4 September 2020 the applicant obtained a separate occupation order which was obtained on notice to the respondent. The recitals to that order confirmed that service had been validly affected in accordance with an order made on 2 September 2020. The order required the respondent to allow the applicant to occupy the property property C and not to return to, enter, or go within 100 metres of that property. Having obtained that order, AW nevertheless did not go move back in to that property, and the evidence was that she said that she was too scared to return full-time and so continued to stay mostly in the temporary housing that she had been provided with.

15. Before the first appointment on 18 November 2020, the applicant made an application on 30 October 2020 for deemed service of the divorce petition and financial remedy applications. The order made by District Judge Smith on 18 November 2020 recites that any application concerning service of the divorce proceedings should be dealt with by the Family Court at Bury St Edmunds, and she made no order in respect of the application dated 30 October 2020. Given the view taken by the district judge, that matters of that sort had to be dealt with at Bury, she must have decided there was little point progressing the financial remedy application. AH had not filed a form E nor attended the remote hearing. She ordered that the financial remedy application be adjourned generally with liberty to restore.

16. It seems that in early December 2020, AW saw that the former family home property C was on the market for sale. Her solicitor contacted the estate agents to find out what was going on. I assume that, following this development, an application must have been made to restore the application for financial remedies, because the court sent out on 11 December 2020 a notice of a further first appointment to take place on 15 March 2021. That hearing was taken out of the list at short notice because there was no judge available, and so the first appointment was re-listed for 30 June 2021. In the meantime, AH was personally served in China with the occupation order, the divorce petition, and the financial Remedy proceedings on 15 February 2021. In addition, according to AW's evidence, there was an exchange of WeChat messages between her and the respondent in June 2021. The order also records that AH was personally served with notice of the adjourned first appointment on 21 June ahead of that adjourned first appointment on 30 June.

17. The order made by District Judge Smith on 30 June 2021 includes a a number of provisions. The order recites that the hearing took place by BT MeetMe, that AH did not answer the phone despite the court trying to ring him three times. The order recited that the respondent had been personally served with the divorce proceedings and the

application for Financial Remedy on 15 February 2021 and again on 21 June 2021, with the notice of the Hearing for 30th June. The court went on to recite specifically that service had been effected by personal service on 15 February in China and that the respondent had been properly and duly served under the rules. The order further recited that AH had put the former matrimonial home on the market for sale without informing the applicant, and indeed the property had been sold subject to contract. The court had AW's Form E but nothing from AH. Her order required AW's solicitors to serve notice of the application on all three mortgagees of properties listed in the Form E, and to arrange for personal service of the order, but also gave permission to the applicant to effect service by email and by WeChat. The directions for the future of the proceedings involved AW having to make a section 25 statement setting out details of her income, resources, details of her needs, particulars of properties suitable for her and for their son, and evidence of the value of the three properties, including the sales particulars for the family home. The application was listed for a final hearing to be heard by way of Cloud Video Platform on 12 October with a two hour time estimate, including one hour reading time, and the court dispensed with the need for an FDR. AW duly made her section 25 statement in September 2021 and the matter therefore came before me on 12 October 2021.

(2) <u>The financial position as known to me</u>

18. Before me on 12 October, I had the written and oral evidence of AW which set out what she understood the financial position to be. Her financial position was straightforward. Her income consisted of universal credit and child benefit, and the housing element of universal credit was paying most of her rent and council tax in relation to her temporary housing with the housing association. She, by that stage, had finished her university studies and indeed had a master's degree, and told me that she believed that she could earn at least £10,000 a year from part-time work once their son had started school. A child maintenance calculation had been made which stated that the respondent was to pay her £71.08 a week from 20 May 2020. The Respondent had paid nothing under that calculation. Indeed, it seems that by the time, certainly during the course of 2020, the evidence from AW was that he had sold the businesses and effectively moved to China. The importance of that child maintenance calculation is that AW was told that a calculation was made on the basis that AH had a gross income of £592 a week, which is just over £30,000 pa gross. In her section 25 statement, AW also set out her understanding of the values of the properties and did her best to estimate the balance of mortgages that were secured on those properties based on the documents that she had seen during the marriage, what she understood the mortgage payments to be, and any other evidence that she had available to her. The position, therefore, was that property C had a gross value of £425,000, property A had an estimated valuation of £450,000 and property B had an estimated valuation of £300,000. In her written evidence, AW estimated the mortgages on each to be £67,000, 59,250, and 35,600, having regard to what she estimated AH would have been able to repay during their relationship. However, she told me in oral evidence that she believed that AH had put down a 'cash' deposit of £100,000 or so when buying both property C and property B. I estimated the original mortgage balance on purchase, and assumed that in fact none of the capital had been repaid. My estimate of the mortgages on each of the properties, taking a more conservative view, was that their current balances were first £258,000, secondly

£170,000 and thirdly £200,000. That meant that the estimated equity in property C was £154,000, property A was £267,000 and the equity estimated in property B was £91,000. All in all I considered that there was approximately £512,000 of equity in the properties.

19. At that point there had been no application for third party disclosure orders against the mortgagees. Although the mortgagees had been served with notice of the application, none of them, it seems, had responded or provided any information. In terms of her needs case, in her Form E, AW had set out that she considered that she could buy a property for £230,000 and use the help to buy scheme such that she would only need £192,000 in terms of housing capital. Together with moving costs of £15,000, she put her capital needs at £207,000 in total in her form E. In her section 25 statement, she exhibited a number of properties and said that her housing need was to buy at a price of £277,000. She would need £12,000 for moving costs and a further £12,000 to clear her debts such that she put her capital needs at a total of £301,000. I was satisfied, having regard to the evidence of the sale value of the various properties, that the figure of £277,000 was a very reasonable figure for her housing need. Again, she stated in her paragraph 37 of her witness statement that she was able to apply for the government help to buy scheme if necessary. She could borrow 20% of the price, but, of course, after five years she would either need to repay that 20% or pay interest on that sum. Her preference was to buy property outright and my view was that that was the appropriate way to go about things. So, although AW estimated the equity in the properties at just under £1,000,000, I took a more conservative view and considered that the equity was just over £512,000. That was all that was known. Of course, AH had been served with an order to make and file a financial statement and, having declined to do so, and having not engaged in the proceedings at all, he would be in the position of many other people who have failed to give disclosure, running the risk that the court might make an order that might be unfair to him. Such unfairness was, if any there be, solely down to his refusal to engage with the proceedings.

<u>My decision in October 2021</u>

20. Having set out the financial position as known to me in October 2021, taking a conservative view of the amount of equity, I turned to distribution. I took the view that this was purely a needs case. The source of the assets in the case was largely from AH's endeavours prior to the parties beginning to cohabit in 2017. They lived together for just over three years. There would have been some modest marital acquest. Of course, property A was their matrimonial home for about two years and property C was their matrimonial home for about three months. AW had therefore a very modest sharing claim in the circumstances, even where two of the properties had been the matrimonial home, and even though the matrimonial home is often or usually treated as central to the marriage and therefore subject to the sharing principle. Nevertheless, given the shortness of that cohabitation, it seemed to me that the appropriate way to approach the case was to avoid any consideration of sharing and simply focus on needs. The property particulars out forward included a two bedroom property at £225,000, a three bedroom detached property at £285,000, and indeed the most expensive one was at £317,000. I therefore took the view that £277,000 was an appropriate amount which would allow AW to rehouse herself and her son appropriately, having regard to the marital standard living and all the other relevant s 25 factors. AW's case was essentially that she should have that lump sum on a clean break basis, given that AH's income would probably in

all likelihood, if it was at the same level as it had been, be insufficient to provide her with any real benefit by way of spousal maintenance given her continued receipt of universal credit. In addition, although there can be no clean break in relation to child maintenance, the likelihood was that she would have some difficulty in obtaining or enforcing an order for child maintenance for the benefit of their son. She anticipated being, not just his primary carer, but possibly his sole carer during the entirety of her son's childhood.

21. Having heard evidence from her, as I say, I took the view that the appropriate sum that she would have would be £277,000 for her housing needs and £24,000 for her debt to cover her legal fees and for moving expenses and the like. At the conclusion of that hearing, notwithstanding the absence of a decree, therefore I gave judgment and indicated that she should receive a lump sum of £300,000 (rounded down from £301,000) and an order for sale of property C. If, on the exchange of contracts for the sale of the property C it appeared that that property would realise less than the lump sum owed to her, then at that point, property A would be sold and the balance outstanding after the lump sum coming out of property C would come out of the sale proceeds of property A. I directed that all further orders, applications and documents in the proceedings should be served on the respondent by email to his hotmail.com email address and also directed that the applicant should message the respondent via WeChat to inform him that documents had been sent by email by way of service. The applicant had liberty to apply for transfers of the family home and the other properties into her sole name if that was reasonably necessary to effect the sale of those properties or to obtain possession, and I adjourned her claims for property adjustment orders for that purpose until the payment of the lump sum in full. I further directed that the respondent should sign any documents required to affect the sale or transfer of properties and return those documents to the applicant's solicitors within seven days of service and in default I directed that those documents might be signed on behalf of the respondent by a District Judge of the family court pursuant to s 39 of the Senior Courts Act 1981 and s 31J of the Matrimonial and Family Proceedings Act 1984. Otherwise there was a clean break.

22. I prepared a draft order to give effect to my judgment. As I have said, that order was not sent to the court office to be perfected whilst the decree was awaited. However, I did make third party disclosure orders against the mortgagees of each property and those orders directed each of the mortgagees to provide a redemption statement and the last twelve months of transactions on the mortgage account. Those orders should have been made but for reasons unknown were not.

(4) <u>My decision today</u>

The English divorce proceedings

23. Following my judgment on 12 October 2021, the applicant renewed her attempt to obtain a divorce from the English court. Mr Baughan has provided a very helpful chronology of the English divorce proceedings and I turn to that now. The first part of the divorce proceedings was the application to issue the English proceedings without a marriage certificate. That application was submitted on the 20 May 2020 and in due course the application was granted. The petition was issued on 6 July 2020. On 30 October 2020, AW made an application for deemed service of the divorce and financial

remedy proceedings - that was the application that came before District Judge Smith on 18 November who indicated that it should properly be made to the divorce centre at Bury. Having managed to serve the Respondent personally through a process server on 15 February 2021, the applicant therefore made her application for decree nisi on 29 April 2021. That application was rejected by the court on 17 May with a request for the statement in support of the application of the decree nisi to be amended. A week later on 25 May that amended statement was refiled. On 30 June, as I have already indicated, District Judge Smith made an order in the financial remedy proceedings which included the recital that the respondent had been personally served with the divorce proceedings. On 8 August, the family court at the Bury Divorce centre requested a certificate in relation to reconciliation as that had not previously been filed. On 27 August, the application for the decree nisi, the amended statement in support, and the reconciliation certificate was refiled at Bury.

24. On 3 December 2021, so about six weeks after the hearing on 12 October in front of me, the family court at the Bury Divorce centre, refused the application for a decree nisi on account of what was said to be an unacceptable marriage certificate translation and an insufficient statement of service. That latter point was notwithstanding the fact that the order made by District Judge Smith on 30 June had confirmed that the respondent had been personally served with divorce proceedings in compliance with the rules. The first part of that refusal was made notwithstanding the order made on 4 June 2020 which allowed the petition to be filed without a marriage certificate. AW tried again on 4 February and resubmitted her application for a decree nisi. As is typical, her solicitors made regular phone calls and chasing emails to see if things could be speeded up. On 5 April, an application with a statement in support was submitted to the divorce centre requesting expedition. On 21 April the applicant's solicitors were told that the decree nisi had been approved by the Judge on 4 April and was currently waiting to be typed by the admin team. They should therefore expect to receive the certificate of entitlement to the decree within the next two weeks. It turns out that was wrong because on 6 May, the court indicated that they should not have informed the applicant's solicitors that the decree nisi was imminent: that was incorrect. The court staff indicated that it was not possible to expedite the decree nisi or decree absolute, and that there was a 30 week backlog for considering application notices in D11, and decree nisi applications were taking 29 weeks. By that stage, of course, the Chinese divorce order had been made on 29 March 2022.

25. So that explains how in this case the race to a decree had been lost by AW. That prompted her application for permission to apply for financial provision under Part III of the 1984 Act as I have already indicated. In the first part of my judgment I have set out how I dealt with her application for permission to apply under Part III of the 1984 Act. In a statement dated 13 May made in support of her application for leave to apply under the 1984 Act, AW exhibited a copy of the Chinese divorce and a translation. She set out her belief that AH was living with his parents in a property in Fujian Province. She asked the court to give effect to the judgment that I had already delivered, namely that she should receive a lump sum of £300,000, but instead of receiving it by way of an order under the 1973 Act, she asked that the court make that order now under Part III of the 1984 Act. The statement exhibited a copy of the Chinese divorce order and judgment. It is entitled in the translation as 'a civil judgment', and the proceedings are entitled [redacted] Province, …, District People's Court. The judgment records that

both parties had authorised agents (attorneys or solicitors) acting for them in the proceedings, that there was a divorce filed on 9 August 9 2021, and a public hearing was held on 28 March.

26. The court recited the history of its proceedings, including the fact that AH had originally filed a divorce lawsuit in May 2020, but it had been rejected. It recites what AW was telling the court, including about the assets in Britain. The court considered the fact that AH had filed two divorce lawsuits and that his wife had also filed a divorce lawsuit in England and Wales, demonstrated that the marriage had broken down and indeed, therefore, for that reason, a divorce was granted. The court made an order for video contact between the father and their son and encouraged the parties to negotiate further the time and method of face to face contact. An order was made for child maintenance of 2000 Yuan per month and it went on to say this:

"3. About common property and debts. Both parties did not put forward the request for division of property and debt and relevant evidence during a period of proof and defence. [AW] asked in court to divide the joint property of husband and wife located abroad, but did not submit the original notarised evidence, so it was difficult for our court to accept it. If the parties think that there are common property and debts that need to be divided, they can file another case to deal with property disputes after divorce."

27. Otherwise, the document consists of a summary of the relevant articles of the Civil Code of the People's Republic of China governing divorce and other matters.

28. The evidence submitted for the hearing before me on 15 June included an email from the lawyer representing AW in the Chinese proceedings. That email states that the divorce came into legal effect on 12 June 2022. He or she also states this: 'based on the court process and evidence of this case, I, the lawyer, believe that [AW] can no longer obtain assets from [AH] by filing a lawsuit in a Chinese court.' It seems, therefore, that whilst in theory it might have been possible for AW to obtain an order from the Chinese court to deal with the English property, in practice the court seemed reluctant to do so in the absence of notarised evidence.

29. My order of 24 May 2022 gave permission for AW to apply for financial provision following the Chinese divorce, and directed that she serve on the respondent by email a number of documents. Those documents were: the unsealed copy of the order; the sealed copy, when it was obtained; the application form for permission to apply under Part III; the draft order sought; the hearing notice produced by the court for 15 June; and the applicant's statement of 13 May made in support of her application for Part III. The evidence before me was that a process server had attended the properties owned by AH in East Anglia. The process server attended [a property next door to property A] and spoke with a resident, who stated that AH was their landlord and that they had seen him at the property on 28 May cutting the grass. In fact, AH does not own [that property]; he owns [property A], so this appears to have been a misunderstanding. There was no sign of AH at the properties that he owned, nor indeed at the business premises that he previously operated. A member of staff at that establishment told the process server that AH was back in China and from what she had heard, he had left about two years ago. The applicant's solicitors sent to the respondent by email on 27 May the

documents required by my order, including a draft order sought. The statement of service that was provided for me for the hearing confirmed that he was also personally served with those documents on 5 June at the address in [redacted] Province. The evidence produced at the hearing also showed a confirmation of delivery of that email on 27 May to the respondent, and a message from the applicant's solicitors on WeChat advising the respondent to check his email as documents had been served. The documents put before me indicated that the WeChat message had been received. The draft order sought, which was sent with that email, was in similar terms to the order that I would have made following my judgment on 12 October, ie for a lump sum of £300,000, sale of property C, and for sale, if necessary, of property A. The draft order also included an order that there be no order as to costs.

30. Although Mr Baughan invited me at the hearing on 15 June to make an order for costs, it seemed to me in the circumstances, where the draft order sought had been explicit that there was to be no order for costs, it would not be appropriate for me to make any order for costs dealing with the additional costs arising out of the need to bring Part III proceedings.

The law

31. I now turn to the law in Part III governing applications for financial relief following an overseas divorce. Under s 13 of the 1984 Act, permission to apply for such relief is required, and the court shall not grant leave unless it considers that there is substantial ground for the making of the application. The case law indicates that that must be a solid ground, more than simply a good arguable case. In circumstances where I had given a judgment and would have made a substantive order, had there been a decree here, it seemed to me that it was inevitable that there was more than a good, arguable case and there were substantial grounds for granting leave. Accordingly I had granted leave on 24 May.

32. The court can only entertain an application under Part III if the jurisdictional requirements under s 15 are met. In this case, the applicant wife has been habitually resident in England and Wales since 2017, when she came here as a student. She therefore falls within s 15(1)(b), having been habitually resident in England and Wales throughout the period of one year ending with the date of application for leave. The jurisdictional requirements are therefore met. At both the leave stage and the stage of the substantive application under s 16 of the 1984 Act, before making an order for financial relief, the court must consider whether, in all circumstances of the case, it would be appropriate for such an order to be made by a court in England and Wales. Unless so satisfied, the court must dismiss the application. In making that decision, the court has to have regard to the checklist of factors in s 16(2). These are as follows:

    a. the connection to the parties to the marriage have with England and Wales. Clearly here the connection is a strong one, AH had lived in this country for 17 years, he had acquired a business, he had acquired three properties in this country. The parties had lived most of their married life in this country, their son was born in this country and had lived most of his life in this country, and of course, AW remains living in England and Wales;

b. the connection which these parties have with the country in which the marriage was dissolved. The marriage was dissolved in China. These parties were Chinese nationals and hail from China. AH has, it seems, returned to live there and both parties have family still there;

c. this item does not appear to apply - there is no relevant connection which these parties have with any other country outside England and Wales;

d. this relates to any financial benefit which the applicant or a child of the family has received, or is likely to receive, in consequence of the divorce, or by virtue of any agreement or the operation of law of a country outside England and Wales. I will take this together with the next item (e);

e. in a case where an order has been made by a court in a country outside England and Wales requiring the respondent to make any payment or transfer any property for the benefit of the applicant or a child, the financial relief given by the order and the extent to which that order has been complied with, or is likely to be complied with. In this context, there is nothing in either (d) or (e), save the child maintenance order made by the Chinese court. The evidence was that AW had not received any payments of child maintenance either under the child maintenance calculation made of the child maintenance in this country or under the Chinese court order, and it was her case that that order was unlikely to be complied with;

f. any right which the applicant has or has had to apply for financial relief from the other party to the marriage under the law of any country outside of England and Wales and if the applicant has admitted to exercise that right, the reason for that omission.

33. As to (f), I return to the judgment of the Chinese court. I have already referred to the passage in the judgment dealing with 'common property and debts'. This seems to me the language of liquidation of a matrimonial property regime or the division of jointly owned assets. Of course, other than a dormant and empty bank account, there are no joint assets in this jurisdiction. So, in that context, it seems likely that the email provided by AW's Chinese lawyer, which says that AW can no longer obtain assets from AH by filing a lawsuit in the Chinese court, is probably right. I observe that AW's Chinese lawyer is not an independent expert, the email is not Part 25 compliant, and I have no independent expert evidence as to Chinese law, and I therefore treat that evidence with some caution. It might be the case that, unlike many other jurisdictions, the Chinese court would have had regard to and/ or made orders relating to the English properties. But it has not done so, there is no current application for any orders relating to the English property in the Chinese court, and in my judgment it is more likely than not that this cannot now be done. I will consider the importance of that evidence when I look at the overall assessment of the s 16(2) factors in a moment.

34. Turning back to the checklist:

> g. the availability in England and Wales of any property in respect to which an order under this part of the Act in favour of the applicant could be made. Of course, in this context, there are three properties which are available for such orders to be made;

h. likewise, the extent to which any order made under Part III is likely to be enforceable. An order under Part III here against those properties, is, of course, likely to be enforceable as they are situated in England and Wales; and

i. the length of time which has elapsed since the date of the divorce. There is no delay of any sort here which would influence the outcome.

35. I have in mind all those factors, all the circumstances of the case, and the fact that I had considered it appropriate in the English divorce proceedings to award the applicant a lump sum of £300,000 and to order a sale of the English properties in order to achieve that. I bear in mind the great difficulty that AW might have in seeking any provision in the Chinese court. I also have regard to the fact that, had the English court been more responsive to AW's request for a divorce in this country, there would have been no need to resort to Part III. In the light of the above, I am satisfied that it is appropriate for an order to be made by a court in England and Wales under Part III, having regard to the factors set out in section 16 of the Act. Sections 17 and 18 of the 1984 Act import the court's powers under section 23, 24 and 24A of the 1973 Act and require me to consider the same factors that I considered when I made my judgement in October of last year. I am satisfied that the strength of the connection with England and Wales is such that the outcome of the Part III proceedings should be the same as what it would have been under the 1973 Act.

36. Accordingly, my judgment is that the fair outcome of these proceedings, having regard to what I understand the assets to be, having regard to both parties' needs, having regard to the source of the assets and the need to achieve a fair outcome, is for AH to pay AW a lump sum of £300,000.

(5) <u>The order I make</u>

37. The final part of my judgement, therefore, deals with the order that I shall make. It shall be in similar terms to the order that I would have made last October based on the draft prepared at that time. The order is for a lump sum of £300,000; an order for sale of property C, and, if necessary, property A; an order for substituted service by way of email of any orders and applications in these proceedings on the respondent; an order adjourning property adjustment claims if it is necessary to enforce and/ or effect the order for sale by transferring the properties into her sole name, and an order requiring the respondent to sign any documents necessary to give effect to the sale or transfer of properties, to return those documents to the applicant's solicitors within seven days of service and in default, providing for a judge to sign pursuant to s 39 of the Senior Court's Act of 1981, as applied by s 31J of the 1984 Act.

38. In considering the making of an order pursuant to s 39 of the Senior Courts Act 1981, I have had regard to a recent decision of Mr Simon Burke QC, sitting as a Deputy Judge of the High Court in the Queen Bench Division, in *Lindsay v O'Loughnane* [2022] EWHC 1829 (QB). In that case, the claimant sought enforcement of a number of orders that had previously been made, including orders for enforcement of a judgment debt against pension funds. In so doing, he had to consider s 39 of the Senior Courts Act 1981. That section provides 'where the High Court or family court has given or made a judgment or order directing a person to execute any conveyance, contract or other document, or to endorse any negotiable instrument, then, if that person (a) neglects or

refuses to comply with the judgment or order, or (b) cannot after a reasonable enquiry be found, that court may, on such terms and conditions, if any, as may be just, order that the conveyance, contract or other document shall be executed, or that negotiable instrument shall be endorsed, by such person as the court may nominate for that purpose.'

39. Paragraph 58 of the judgment in *Lindsay v O'Loughnane* refers to a conflict in the case law as to whether the exercise of the power in s 39 of the 1981 Act requires an actual non-compliance to have occurred as a matter of jurisdiction arising. The judgment refers to the decisions in *Blight v Brewster* [2012] EWHC 165 (Ch), and *Gee v Gee* [2020] EWHC 1842 (Ch). In *Gee v Gee*, HHJ Matthews, sitting as a Judge of the High Court, had been satisfied that the requirement for neglecting or refusing to comply with the judgment or order was jurisdictional, but the court in that case concluded the requirement was satisfied because the defendant had failed to comply with the previous order (the correct interpretation of which had been the main subject of the judgment). In paragraph 60 of the judgment of Mr Burke QC there is reference to the White Book 2022, at 9A-138, which indicates that an order should not be made in anticipation of a failure to execute unless the defendant has already shown by his conduct that he refuses and will refuse to execute. On the facts of the case before Mr Burke QC, he declined to include the order under s 39. He did so on the basis that the mere fact that the defendant was a judgment debtor who has failed to honour the judgment debt, did not mean by itself that he was bound to disobey the court's order that was sought in relation to his pension fund. He acknowledged, at [64], the temptation to make the order now, to include the s 39 provision, if only to save the time and costs that would be associated with a further hearing, if the defendant did not comply with it. However, that would overlook the jurisdictional provision, and that was something which had not been considered a sufficient basis for making the order in *Beveridge v Quinlan* [2019] EWHC 424 (Ch).

40. On the facts of this case, I am quite satisfied that the respondent has already shown by his conduct that he refuses and will refuse to execute. He has failed to comply with any of the court directions in these proceedings: including orders to file a Form E to attend hearings. I am therefore satisfied that there is jurisdiction to make the order under s 39 and it is appropriate to include that provision in the order.

41. Finally, I will make the orders that ought to have been made in October for third party disclosure orders against each of the mortgagees. That will enable the true level of borrowing to be obtained but it also will enable AW to have some proper conduct of the order for sale and to liaise with those mortgagees in order to enforce the order for sale.

42. I will therefore make the orders suitably amended from those which I indicated would be made back in October 2021. That is my judgment.

DDJ Michael Horton QC
The Family Court at Norwich
11 August 2022