This approved judgment was handed down by the Judge remotely at a hearing and by circulation to the parties' representatives by email. The time and date of hand down is deemed to be 10.00 a.m. on 30 November 2023.

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. 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.

IN THE FAMILY COURT AT OXFORD

IN THE MATTER OF THE MATRIMONIAL CAUSES ACT 1973

Neutral Citation Number: [2023] EWFC 255 (B)
Date: 30 November 2023

Before: HHJ Vincent

Between:

RN

Petitioner

and

DA

Respondent

Brent Molyneux KC, instructed by Mishcon de Reya solicitors for the petitioner husband
David Burles, instructed by Belmont & Lowe solicitors for the respondent wife

Hearing dates: 30, 31 October, 1 and 30 November 2023

JUDGMENT

HHJ Vincent:

Introduction

1. The husband and wife are in their late fifties. They first met as teenagers. They married in 1991 after living together for about a year. They have four children; in descending order of age; child A, child B and child C (all born in the early to mid-1990s), and child D born in the mid-2000s.

2. On 5 April 2012 the husband petitioned for divorce, on the ground that *'the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent'* (section 1(2)(b) Matrimonial Causes Act 1973). The facts relied upon were that (i) the wife had three times asked the husband to live away from the family home for one to three months at time, which had left him feeling unwanted and excluded; (ii) that she had at times withdrawn affection and refused to spend time with him, leaving him feeling isolated and unloved; (iii) that she had shown a lack of interest in his life leaving him feeling abandoned; and (iv) that she continually belittled him, and made it clear that the relationship was over, leading him to the *'unhappy conclusion that the marriage has no future.'*

3. The wife filed an acknowledgment of service on 31 May 2012, indicating that she did not intend to defend the petition.

4. On 30 August 2012 a certificate of entitlement to a decree was issued.

5. Decree nisi was pronounced on 18 September 2012.

6. Thereafter, neither husband nor wife applied for the decree to be made absolute.

7. There is a dispute between the parties about when the husband finally moved out of the family home. It is not disputed that since at least 1 April 2013 the parties have lived in separate properties. On any view their relationship has taken some twists and turns. There have been times when they have been actively estranged, not getting on particularly well, and in relationships with other people. There have been other times when they have been very much closer, in a sexual relationship, and been on family holidays together with the children. They have shared Christmases, attended each other's fiftieth birthday parties and socialised together, including going to concerts, meals out with friends, and on occasion weekends away together.

8. The wife asserts that the reason neither of them applied for a decree absolute was that they never really separated. She says that the marriage took a different turn after 2012, was characterised by highs and lows, but that (until February 2020) it continued to be a marriage that she and the husband were working on.

9. The husband says the marriage did effectively come to an end with the making of the decree nisi in September 2012, and that for all the time since, they have been living as ex-husband and ex-wife. He acknowledges the efforts they have made to co-parent effectively, and times of emotional closeness and affection between them. He acknowledges there have been times when they considered reconciliation. However, he maintains that reconciliation was explored, but never reached. He says despite their intentions, the reality was they were never able to make it work.

10. In February 2020 the wife joined the husband and their two youngest children on a skiing holiday, but left early following an argument. She says this is the time the marriage came to an end.

11. On 2 June 2021 the husband issued a fresh divorce petition, seeking a decree of divorce on the grounds that the parties had been separated for five years.

12. The wife filed an acknowledgement of service on 14 June 2021 in the latter of which she said she accepted the marriage had irretrievably broken down, and that she, *'was happy for the petition to go ahead but with the correct dates'*. She said, *'the applicant decided that our marriage was over on 31 August 2011, but we were still in a physical relationship trying to resolve our marriage difficulties in summer 2018 and had been a family relationship which also included sex.'*

13. On 25 November 2022 the husband applied to withdraw the 2021 petition.

14. On 9 December 2022 the wife filed a cross-application seeking an order for *'withdrawal'* of both the husband's 2012 and 2021 petitions.

15. In January 2023 the husband suffered a significant spinal and head injury while skiing, for which he was hospitalised. Fortunately, he has since made a complete recovery and is back at work.

16. On 17 April 2023 the wife applied to amend her application of 9 December 2012, clarifying that she sought the decree nisi of 18 September 2023 to be '*rescinded'*.

17. On 20 April 2023 the husband applied for the decree nisi dated 18 September 2012 to be made absolute.

18. On 7 June 2023 the wife applied for permission to petition/cross-petition out of time in relation to the husband's petition dated 2 June 2021, for a 'no-fault' divorce. At the same time, the wife issued an application for financial remedies.

19. At a directions hearing on 12 June 2023 District Judge Lynch made the following orders:

- By consent, dismissal of the husband's 2021 petition;

- directions for determination of the applications in respect of the 2012 petition;

- permission for the wife to cross-petition for divorce, but to be listed for further directions once the issues in respect of the 2012 petition had been determined;

- As the 2021 petition had been dismissed, the financial remedy proceedings to proceed with the 2012 petition reference number.

20. On 5 September 2023 the wife issued a further application; (i) seeking permission to adduce witness evidence at the hearing; and (ii) for the husband's 2012 petition to be dismissed for want of prosecution.

21. On 22 September 2023 HHJ Gibbons gave permission to each of the parties to adduce evidence from up to four supporting witnesses, and set a timetable for the three day hearing before me.

22. At the hearing I heard evidence from each of the parties, brief evidence from their supporting witnesses, and oral submissions from counsel; Mr Molyneux KC for the applicant husband and Mr Burles for the respondent wife. I reserved judgment.

Issues before the Court and parties' positions

23. The husband applies for decree absolute in respect of the decree nisi made on 18 September 2023. He asserts that the decree nisi was properly made, that nothing has happened since to undermine the basis upon which decree nisi was pronounced, and that the Court should exercise its discretion to make it absolute.

24. The wife opposes the application, and seeks rescission of the decree, on the grounds that between the time the decree nisi was pronounced and the husband's application for decree absolute, the parties have been reconciled.

25. In the alternative, she seeks dismissal of the husband's 2012 petition, for want of prosecution. The grounds are that his delay in applying for the decree absolute constitutes an abuse of process, and the Court should strike it out pursuant to its powers at rule 4.4 of the Family Procedure Rules 2010.

26. The main reason that the dispute over the date of the divorce has become so charged is that in recent years the husband has become exceptionally wealthy. His estimate of the parties' joint assets in 2012 was £3.2 million. In his Form E exchanged over the weekend preceding this hearing, he put his gross assets at £100 million. He says that this wealth was accrued through his work in private equity, that he began to accrue it

in around 2013, and the substantial body of his wealth was made in the last five years. He asserts that none of this wealth should fall to be considered within the pot of marital assets that are the subject of the wife's application for financial remedies.

27. If the decree nisi is rescinded and/or the Court finds that the husband is not entitled to decree absolute, then the wife says it is unarguable that the husband's wealth accrued since 2013 will fall to be considered in the pot of matrimonial assets. Even if the decree nisi stands and the husband is found to be entitled to decree absolute in respect of the 2012 petition, the wife does not accept that in all the circumstances of this case it would be appropriate to ring-fence the post-separation assets.

28. Those arguments are for another day. My task is to determine the issues between the parties in respect of the divorce, to enable them to proceed with the financial remedy proceedings with a clear understanding of their legal status.

The law

Application to make decree absolute

29. After a decree nisi is granted, the petitioner must wait six weeks before giving notice that he or she wishes the decree to be made absolute (r.7.32(1)(a) Family Procedure Rules 2010). The Court will not make any further enquiry into the parties' circumstances, except it must check that the respondent has not applied to appeal or to rescind the decree nisi (r.7.32(a)-(i)).

30. If the petitioner has not applied, the respondent may apply for decree absolute (section 9(2) Matrimonial Causes Act 1973). The Court must check there are no pending applications, and may *'require further enquiry'* from either party. Otherwise, the court has a discretion to make the order final, rescind the order or otherwise deal with the case as it thinks fit (section 9(1)(a) to (d) Matrimonial Causes Act 1973).

31. Once twelve months after the making of the decree nisi has passed, if either party applies for decree absolute, further enquiry is a requirement rather than at the discretion of the judge. The application (whether made by either spouse) must be accompanied by *'an explanation in writing'*. The explanation must state (i) why the application had not been made earlier, (ii) whether the applicant and respondent have lived together since the decree nisi or the conditional order was made and if so, between what dates, and (iii) whether a child has been born to the family since decree nisi (FPR 2010 r.7.32(3)).

32. Living with each other means living together in the same household and sharing a common life (MCA 1973 s2(6)).

33. Again, the court has discretion to make the decree absolute, rescind the decree nisi, or make such order as it thinks fit (rule 7.32(4) FPR 2010).

Application to rescind decree nisi

34. Alternatively, there is a power to rescind the decree nisi pursuant to section 31F(6) of the Matrimonial and Family Proceedings Act 1984.

35. This power is also found in rule 4.1(6) of the Family Procedure Rules 2010; *'a power of the court under these rules to make an order includes a power to vary or revoke the order.'* On the face of it rule 4.1(6), and section 31F(6) confer a very wide power on the court, but case law tells us that, *'although general,* [the power] *is not unbounded',* per Lady Hale, *Sharland v Sharland* [2015] 2 FLR 1367, SC.

36. In *NP v TP (Divorce*) [2022] EWFC 78, [2023] 1 FLR 270, Cobb J described how and when the Court might exercise its discretion to rescind a previous order under s.31F(6):

> *"i) Litigants should not be permitted to have 'two bites at the cherry' by applying again before the same court in relation to the same matter; there is an important public policy in achieving finality of litigation;*
>
> *ii) It is equally important for the court not to subvert the role of the Court of Appeal; if the litigants assert that the trial judge was wrong, the route for them to follow is an appellate one;*
>
> *iii) The first point of reference should be whether one of the 'traditional grounds' for proposed review has been established:*
>
> > *a) Fraud, mistake, innocent (or otherwise) misstatement of the facts on which the original decision was made;*
> >
> > *b) Material non-disclosure;*
> >
> > *c) A new event or material change of circumstances which invalidates the basis, or fundamental assumption, upon which the order was made;*
> >
> > *d) If the order contains undertakings;*
> >
> > *e) If the terms of the order remain executory."*

37. *NP v TP* was not concerned with decrees of divorce, but was expressly approved by the Court of Appeal in Cazalet v Abu-Zalaf [2023] EWCA Civ 1065, which concerned cross-applications by a petitioner to rescind a decree nisi under section

31F(6) Matrimonial and Family Proceedings Act 1984, and by the respondent for the decree nisi to be made absolute under section 9(2) Matrimonial Causes Act 1973.

38. In the leading judgment King LJ held that both applications fell squarely within Cobb J's category (iii)(c), and that in order to determine them, the court should direct itself to the question of whether there had been a *'new event or material change of circumstances which invalidates the basis, or fundamental assumption, upon which the order was made'*.

39. The issue in that case was whether or not the relationship that the parties continued after the decree nisi could properly be viewed as a reconciliation. The wife said yes there had been. The husband accepted the relationship had been 'rekindled', but maintained it was not a marital reconciliation. He said it remained the same type of unhealthy relationship which had led to the granting of decree nisi in the first place. At first instance the husband's argument was accepted, but on appeal the decision was overturned and the parties were found to have reconciled.

40. King LJ confirmed that regardless of whether an application is made to rescind the decree nisi, or for the grant of a decree absolute, the Court '*will need to consider the explanations required by r.7.32(3) FPR 2010 and if necessary to find as a fact whether the parties have 'lived together' since decree nisi and, if so, when. A judge will also need to consider any relevant 'other circumstances' when deciding how the discretion should be exercised. He or she may make such order as they think fit, which can include rescinding the decree nisi.*

    It follows that the court has a wide discretion under s.9(2) MCA 1973 as to whether to grant a decree absolute, but I agree with the judge at [40] that it needs to be a 'structured form of discretion'.

41. I understand the structured form of discretion to mean an approach that considers the r.7.32 and r.7.33 FPR 2010 factors, having made such findings of fact as are necessary, and then determines whether or how to exercise its discretion.

42. Cazalet confirms that so far as an application to rescind on the basis that the parties had reconciled since the time of the decree nisi, the 'test' to apply is:

    "Is the evaluative exercise carried out upon the granting of decree nisi which led to the conclusion that it was unreasonable to expect the applicant to live with the respondent still valid in the light of subsequent events?"

    (per King LJ, at paragraph 54)

43. The test applies to both elements of the decree nisi, namely the decision that the husband could not reasonably be expected to live with the wife and that the marriage had irretrievably broken down.

My task

44. I have wrestled somewhat with the interplay between the wide discretion given to the Court on an application to make decree absolute, and an application for rescission of the decree nisi made on the ground that there has been a material change of circumstances.

45. The evidence and submissions in this case have been focused almost entirely on the question of whether or not the parties in this case reconciled after the time the decree nisi was made. Mr Molyneux says they did not, and the decree absolute must be made. Mr Burles said they never separated, and the decree nisi cannot stand.

46. They have both submitted that I must simply ask myself whether or not there has been a reconciliation between the parties following the decree nisi.

47. Mr Molyneux framed the questions I have to ask myself as follows:

    'Was the court wrong when it found that the parties' marriage had irretrievably broken down and that the petitioner could not reasonably be expected to live with the respondent? Did the marriage continue by virtue of a subsequent marital reconciliation such that the marriage in fact continued until 2020?'

48. I am not persuaded these are in fact the questions to which I must find answers in order to determine the applications before me. I am not carrying out a review of the court's original decision to grant decree nisi, but deciding whether the decree nisi, a conditional order, can be made absolute, having carried out an enquiry into the post-decree nisi circumstances. That enquiry involves consideration of whether or not the parties have lived together, but that is not the beginning and end of it.

49. I accept that if I find that there has been a reconciliation post decree nisi, such that the parties were found to have been living with each other in the same household and sharing a common life, that would likely lead to the conclusion that I should rescind the decree nisi. I would reach that conclusion either because I would have found the reconciliation to fall within Cobb J's category (iii) (*a new event or material change of circumstances which invalidates the basis, or fundamental assumption, upon which the order was made),* or because having regard to the r.7.32 factors, the fact of the parties having lived together since the decree was made would influence the exercise of discretion in favour of rescission.

50. A finding that there has been a reconciliation of the marriage since decree nisi describes a scenario in which a decree nisi is highly likely to be set aside. But I have not found that specific question to be helpful to me in determining this case, for the following reasons:

(i) The factual dispute in Cazalet was about whether or not the parties could be said to have reconciled their marriage, but the test for rescission approved in the case is broader; has there been a material change in circumstances which invalidates the basis or fundamental assumption upon which the order was made. There may well be circumstances that fall short of a reconciliation of the marriage, which nonetheless do constitute a material change in circumstances which invalidates the basis upon which the order was made;

(ii) The specific enquiry I am required to make by FPR 2010 is whether or not the parties have lived together i.e. lived together in the same household and shared a common life, not whether they have reconciled their marriage;

(iii) I have not been taken to a statutory or other definition of 'reconciled'. Focusing the attention of the court only on whether the parties have or have not reconciled their marriage runs a risk of embarking on an evaluation of the quality of the relationship, to impose its own views of what a marriage might look like in any number of different forms. King LJ cautioned against this in Cazalet:

'I should add that, in common with the approach of Wood J in Savage at 104B, I am firmly of the view that there should be no examination of the quality of the marriage when applying the test. For it to be otherwise would require the court to conduct an analysis of the nature of the marriage throughout the entire period both before and after the granting of the decree nisi. It would also risk importing personal judicial mores and standards into the decision-making process. As Wood J said, what should be examined is 'whether the original decree nisi was pronounced upon sound evidence and upon sound inferences to be drawn from such evidence'. In my judgement in so far as the judge imported a qualitative assessment of the parties' relationship as a means of determining whether there had or had not been a reconciliation, he was in error.'

(iv) Upon an application for decree absolute the Court must consider both the question of whether the parties have lived together, and the reason for the delay in applying. The rules do not tell the court how to exercise its discretion; no one factor is determinative. The court may be satisfied that the parties have not lived together, and the conditions for making decree absolute to be met, but may not accept the reasons for the delay in applying, and refuse to grant the application for decree absolute.

(v) The Court may well find that the parties have not lived with one another, and that the underlying basis for the making the decree nisi is sound, and still exercise its discretion to rescind. In *S v S (Rescission of Decree Nisi: Pension*

sharing provision) [2002] 1 FLR 457 (Singer J), the decree nisi was properly made, but was rescinded to enable the petition to be re-launched at a later date. This was to allow the petitioner to take advantage of recent legislation that allowed her to benefit from a pension sharing order. There was no prospect of decree absolute on the existing decree being made, and both parties wished to finalise their financial arrangements with the benefit of the new legislation. In *Wickler v Wickler* [1998] 2 FCR 304 (Bracewell J) the Court refused to allow an application for the grant of a decree absolute unless and until the party applying had complied with any orders for ancillary relief. The discretion was exercised in order to prevent prejudice to the respondent.

51. So while it is relevant for me to consider whether or not the parties have reconciled since the making of the decree nisi, I determine the application by applying the framework provided to me by the Family Procedure Rules (and see paragraph 39 Cazalet). I must consider the explanation for why the application was not made earlier, consider whether or not the husband and wife have lived together, and if so when, and then decide how to exercise my discretion.

52. In determining both applications (for rescission and making of decree absolute) I must consider whether the conditions for making decree nisi are still met. Is the evaluative exercise carried out upon granting the decree nisi which led to the conclusion that the husband could not reasonably be expected to live with the wife, and that the marriage had irretrievably broken down still valid? (Cazalet, per King LJ, at paragraph 54).

Dismissal for want of prosecution

53. As set out in Cazalet, there is an established statutory and procedural framework giving the Court the power to rescind a decree nisi and/or refuse to make the decree absolute.

54. To achieve rescission by the alternative method of strike out, without carrying out an investigation of the matters prescribed by statute and procedural rules, would appear to be a bold move.

55. It has not always been clear from the written and oral submissions whether the application is to strike out the petition, the decree nisi itself, or the application for decree nisi. I have considered all three.

56. Mr Burles submits that my power to strike out comes from FPR 2010 4.4(1)(b), which gives the Court discretion to strike out *'a statement of case'* if … *'it is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings …'*

57. I have not been taken to any case in which a petition or decree nisi or application for decree absolute has been struck out. Mr Burles took me to a number of authorities for the proposition that launching a claim and abandoning it, or launching a claim and not pursuing it until some other external event has occurred, constitutes an abuse of process. He submits that similarly, the husband in this case launched a petition for divorce and failed to prosecute it.

58. I struggle with this logic. On the facts of this case, the petition was launched in April 2012, prosecuted, proceeded unopposed, and formed the basis for the decree nisi to be pronounced in September 2012. There can be no basis for the petition itself to be struck out for want of prosecution.

59. Is the application to strike out the decree nisi itself? Rule 4.1(1) defines a statement of case as the whole or part of an application form or answer. A decree nisi is not a statement of case, nor is it an application form or answer. It is an order of the Court.

60. Is the wife's application for the court to strike out the husband's application for decree absolute? An application form can be a statement of case within the meaning of rule 4.4, but I question whether an application for decree absolute falls within that category. It is not a pleading or application form which sets out the basis of a claim, nor is it akin to a petition for divorce, which sets out grounds relied upon. It is an application for the Court to take an administrative step to make a conditional order final.

61. Mr Burles has taken me to authorities in which *obiter* remarks were made by judges urging a change to the statutory framework so as to impose a time limit on applications for decree absolute. But Parliament has not responded to that. Mr Molyneux refers me to remarks of Singer J in *S v S (Rescission of Decree Nisi: Pension sharing provision)* [2002] 1 FLR 457, reflecting that the law does not compel either party to apply for a decree absolute, and there are circumstances in which parties may have reason not to do so (at paragraph 17).

62. In Wyatt v Vince [2015] UKSC 14, Lord Wilson confirmed that FPR 4.4(1)(b) could not apply to applications for financial remedies, because in effect it would be granting summary judgment (which does not exist in Family Court proceedings) on an application which the Court has a statutory duty to determine, having regard to all the circumstances, and in particular the matters set out at section 25 MCA 1973. The determination of an application by a court which has failed to have regard to those factors is unlawful (Wyatt, at paragraph 27).

63. Applying the same reasoning, it cannot be lawful for the Court to strike out an application to make decree absolute final, or strike out the decree nisi itself, on different grounds from those set out in the statutory and procedural framework, and

without consideration of those matters which it is clear the Court must examine in all cases where there has been a delay in applying for decree absolute.

64. For all these reasons, the application to dismiss the petition, rescind the decree nisi or strike out the husband's application for decree absolute on the grounds of want of prosecution/abuse of process cannot succeed. For the reasons given above, however, the question of delay in applying for decree absolute is relevant to my task, and is further considered below.

Fact-finding

65. The burden of proving an allegation falls on the person who asserts it to be true. The standard of proof is a balance of probabilities; disputed allegations only become proven facts if is more probable than not that they occurred.

66. Findings of fact must be based on the evidence (including inferences that can properly be drawn from the evidence), and not suspicion or speculation.

67. I must take account of all the evidence and each piece of evidence in the context of all other evidence:

'Evidence cannot be evaluated and assessed in separate compartments. A judge in these difficult cases must have regard to the relevance of each piece of evidence and exercise an overview of the totality of the evidence in order to come to the conclusion whether the case put forward by the local authority has been made out to the appropriate standard of proof.'

(Re T [2003] EWCA Civ 558 at para 33, per Butler-Sloss P.)

68. When considering the evidence of the witnesses, I must take care to identify those parts of their evidence which are part of their direct recollection, and those parts of their evidence where they are reporting what someone else has said, and to assess the relative weight of such evidence accordingly.

69. The evidence of the parties is very important, and the Court must be able to form a clear assessment of their credibility and reliability. I further remind myself that credibility alone cannot decide this case and that, if a court concludes that a witness has lied about one matter, it does not follow that he or she has lied about everything.

WhatsApp messages

70. The parties only started communicating by WhatsApp in around 2017. This is just one element of their communication. They were also at different times speaking on the phone, or in person, and although I understand they may have been

communicating by text, messenger or other means before 2017, there are no records of those communications.

71. In *Stocker v Stocker* [2019] UKSC 17, a libel case based on a Facebook post, Lord Kerr cautioned against, *'elaborate analysis of a tweet; it is likewise unwise to parse a Facebook posting for its theoretically or logically deducible meaning. The imperative is to ascertain how a typical (ie an ordinary reasonable) reader would interpret the message. That search should reflect the circumstance that this is a casual medium; it is in the nature of conversation rather than carefully chosen expression; and that it is pre-eminently one in which the reader reads and passes on.'*

72. I am asked to look at messages between private individuals, intended to engage the full attention of the reader at the particular time sent, rather than to be casually scrolled past on a twitter feed, so it is a different context from those described in *Stocker*. However, I bear in mind that WhatsApp messages sent are in the moment, without extensive thought or preparation. They are evidence of this aspect of the parties' communication, but not necessarily of all their communications, and must be read and evaluated in that context.

The evidence

73. I have read the bundle, which includes statements from each of the parties and their witnesses, applications and orders, extracts from correspondence between solicitors, and WhatsApp messages, photos, videos, and emails.

74. It is not for me to carry out a qualitative assessment of the parties' relationship. However, necessarily, in attempting to establish a set of objective facts that would establish either that the parties did or did not reconcile, there has been exploration of matters that is personal and intrusive. It cannot have been easy for either party to revisit in the relatively public arena of Family Court proceedings. It is to the credit of both husband and wife that they conducted themselves with dignity and were respectful of the other when they gave evidence.

75. The witnesses that they called in support were somewhat bemused to have been called to give evidence, to answer only a few brief questions about the sex life and relationship history of either the husband or wife.

76. The wife's four witnesses all lived very close to the wife and had known her and the husband for many years. The wife had presented to her friends that she and the husband were a married couple who lived separately. Each of the wife's four witnesses gave evidence that was consistent with their witness statements and with the evidence that the wife gave herself. They described a couple who had their issues, were often arguing, but at other times were very happy. They were aware that both husband and wife had at times explored relationships with other people, but in general

they described a functioning marriage in which the husband and wife were seen to be co-parenting their children, socialising within a group of friends locally, as well as going on family holidays and trips together as a couple.

77. The husband had presented to his colleagues and friends that he and his wife were formally separated, and that his home and life was in [city name redacted]. His witnesses confirmed in their statements that was their understanding. However, when questioned it became clear that they did not have a full picture of the husband's relationship with the wife. For example, no one of the witnesses was aware that the husband and the wife had been on a number of family holidays together over the years, or on trips away without the children. As a result, the evidence they gave was of relatively limited assistance.

78. The husband gave evidence with a certain reserve. His default position was that if he was taken to some evidence that would prove the thing he was being asked about had happened, then he would be likely to accept it. Otherwise, he was reluctant to volunteer information, or be willing to cast his mind back to try and reach a particular memory. He maintained that the parties separated in 2012, and had worked hard to maintain an amicable and functioning relationship as co-parents. This had he said on three 'brief' occasions led to conversations about them getting back together, but ultimately that had never led to an actual reconciliation.

79. In his written evidence he said that he and the wife had lived completely separate lives, had not socialised and, apart from the three brief times he described the exploring the possibility of reconciliation, they had not had sex. During the course of cross-examination and having heard the wife's evidence, it became apparent that this mischaracterised the relationship and sought to minimise the level of contact they had. While the husband indicated that he was willing to accept matters if shown proof, a number of times in his evidence he was unwilling to concede what was plain and obvious. For example, he was taken to a number of WhatsApp messages between him and the wife which clearly (and he accepted) were sexually charged, but he repeatedly said that he was not able to say they indicated anything about the nature of their relationship at that time, without being given more information 'around the context'. He was taken to a message signed off with a kiss in which they discussed going for a drink so they could have 'some time alone'. His refusal to acknowledge that this brief exchange was also indicative of a level of intimacy between them was obtuse. He said wanting time alone could very well be to discuss schooling or what was going on with exams, swapping a weekend, or to discuss something else to do with the children.

80. In his second witness statement he said that he used emojis and signed off with kisses when he and the wife were getting on well, but he did not agree that this showed love or particular emotional commitment. He suggested that some messages showed 'genuine friendliness', but otherwise were nothing more than him, *'wanting to*

*maintain a friendly 'face' with [*the wife*] even if I did not feel that way. None of that indicated that our marriage was alive. .... We had sexual relations occasionally and in particular on the three occasions where we explored the possibility of reconciliation.'*

81. Apart from the Dubai trip he was unable to identify the other two brief times he says he and the wife explored the possibility of reconciliation. He said he *'could not specifically remember.*' It was put to him that he and the wife had in fact continued to have sex with one another over a far longer period of time, and not just within three isolated and short periods when reconciliation was being explored. Again, he replied that he did not have a *'precise recollection'*. He accepted it probably was not just during the three periods he mentioned in his statement, but he did not, *'specifically know'* and so this was something that he could *'neither confirm nor deny – I don't have evidence one way or the other.'* I found these answers to be deliberately evasive. I find it is likely that he has a very good idea of the extent of the sexual relationship he and the wife have shared, but is seeking to minimise it.

82. The wife was a more reliable witness. She answered questions directly, openly and in a straightforward way. She acknowledged that she had been mistaken about some dates, but the timeline of events as she presented them in her statements was generally reliable, was consistent with the oral evidence she gave freely and without recourse to documents or other reminders, and was corroborated by the evidence of other witnesses and by the contemporaneous messages and emails.

83. I am satisfied to the standard of a balance of probabilities that in her own mind, she and the husband remained in a marriage. She regarded herself as being in a committed relationship with him, which had its difficulties, and which she would have liked to be different in many respects, but which she regarded as a continuation of their marriage. By the time of the skiing holiday in February 2020, she had come to the conclusion that there was no possibility of the relationship continuing.

84. I find that when she answered the husband's second petition of 2 June 2021, she accurately stated her own belief as to the situation:

'The applicant decided that the marriage was over on 31 August 2011, but we were still in a physical relationship trying to resolve our marriage difficulties in summer 2018 and had been a family relationship which also included sex.

I agree the applicant was living separately in March 2013.

Happy for the petition to go ahead but with the correct dates.'

85. I find that the applicant's intention in giving this response was for the official documents to reflect the position as she understood it to be. I do not consider that she

is trying to rewrite history. In June 2021 she was still unaware of the husband's more recently acquired extraordinary wealth.

86. The husband has been consistent and emphatic that since the decree nisi was pronounced, he and the wife have remained separated. He told me:

'I have lived on my own – as a single man – living in my house and [city name redacted] *flat- bringing my children up on my own at the time I have them – that is the way I have lived and lifestyle I have been in - punctuated with very short periods of trying to reconcile our marriage - they are not the dates and not the events that I have focused on over that 10 year period – what I have focused on is that I have had to run my life, bring up my children – build a business – get on with my day job of being alive and functioning – and these points have been punctuated between that to try to see if we could operate differently - and it has failed, sadly.'*

87. I have preferred the evidence of the wife in respect of some crucial facts, and have found that the husband has sought to minimise the nature of their relationship. However, I do not regard the husband as being disingenuous when he describes himself as a single man. I accept that he has seen himself and the wife as ex-partners who have maintained a relationship of some kind post-separation, rather than a married couple who have been living in separate houses.

Findings of fact: timeline

88. I have had regard to all the evidence but have not been able to record findings in respect of every detail or disputed matter. I set out below those findings which are proved to the standard of a balance of probabilities.

2010 to 2013

89. The marriage was marked by a certain amount of volatility and difficulty, but the parties were committed to one another, and to their children.

90. As well as the family home, purchased in 2001, in May 2008 they bought the house next door for the wife's parents to live in. She said this helped her with childcare and to stave off the loneliness she often felt as a result of the husband working long hours. They owned two small properties which they rented out.

91. From 2010 onwards they had discussions and arguments about the future of their marriage. They involved solicitors in their discussions.

92. The purchase of the property ("House A") in around February 2011 was the source of a number of arguments between them. It was purchased in the husband's sole name which was a bone of contention.

93. In his first witness statement the husband asserted that he rented a two bedroom cottage for six months in 2010. He was not able to produce any evidence to corroborate this. He said he paid rent in cash. The wife challenges his account. She has produced a letter from the alleged landlord who confirmed that he was the owner of the cottage, had used it as his principal residence and never rented it out to the husband. On a balance of probabilities, I prefer the wife's evidence.

94. House A needed to be renovated. Given the parties were having discussions in 2010 and 2011 about separation, it is likely that there were times when the husband's intention was to move into the House A on his own, and other times when that idea was put on the back burner. But the direction of travel seems to have been towards it becoming his own home.

95. The correspondence between solicitors reveals a fairly constant cycle of separation and reconciliation. There was a pattern of investing in 'test' events, particularly holidays, whereby the parties would assess whether or not they could make a reconciliation work. For example, in a letter from the wife's solicitors to the husband in July 2011:

'However our client has advised us that as recently as last week, indeed after your letter of the 7 July the parties have had sexual intercourse. In addition they regularly go out as a family and make arrangements to see other people as a family, eat family meals almost on a daily basis, and have booked a family holiday for the 8th August 2011. In light of this we have advised our client that taking into account these factors neither party can illustrate to the Court at this stage that there has been an irretrievable breakdown of the marriage.

In light of this our client has confirmed that she considers the holiday to be the last attempt at reconciliation and if not successful then she will be sad but will not oppose a petition issued by your client …'

96. This holiday was not successful, and consistent with the wife's account in her response to the 2021 petition, I find that the husband did reach the conclusion that the marriage had come to an end in August 2011. He instructed his solicitors to prepare and issue divorce proceedings on the basis of the wife's unreasonable behaviour.

97. In correspondence the wife's solicitors indicated that she did not accept she had asked him to live away from the family home. By December 2011 it would appear that the husband had cooled on the idea of divorce, but it was the wife who asked him *'again to commence divorce proceedings asap'.*

98. I accept from contemporaneous emails and the evidence of the husband that at this point he had created a space for himself on the top floor of the house where he slept, and that he also stayed with his sister. There were however evidently times during this period when they were resolved to work on the marriage where he was sleeping downstairs.

99. The husband was still living in the family home in February 2012. On 29 February, the wife's solicitors wrote to him to say that it was not the wife's wish to separate, she wished to repair the marriage and she did not wish under any circumstances the husband to leave the matrimonial home.

100. I accept the wife's evidence that a part of the pattern of the relationship was that when things were going badly the husband would present financial or official documents to her, and this would then prompt further discussions. This pattern seems to be reflected to an extent by the solicitor's correspondence, which frequently notes receipt of an official letter or a request to agree financial arrangements, and thereafter more discussions between husband and wife about their relationship and whether or not they really should separate.

101. The husband's petition was issued in April 2012. The grounds would appear to be consistent with what was happening on the ground in that there were periods when the husband and wife were together, and periods when they were apart.

102. The wife accepts she signed the acknowledgment of service on 31 May 2012, although she has no direct memory of doing so.

103. The husband signed his statement in support of his application for decree nisi on 27 July 2012 and his solicitors sent it off on 13 August 2012.

104. I accept the wife's evidence that, notwithstanding the lodging of the petition, the parties had once again decided to attempt a reconciliation. I find that the petition itself is likely to have been a catalyst for this decision. The wife says they had a conversation in their kitchen. If this was around the time the husband had the paperwork for the divorce in his possession, it is consistent with the patterns of their behaviour that this would have prompted intense and focused discussions. I accept the wife's evidence that they spoke about not wanting to divorce, that they loved one another, had four children together, made a good team and were always drawn back to one another. She recalls that they discussed how they wanted their future grandchildren to know them as a married couple.

105. A few days later, and as a result of this discussion, the wife booked a family holiday in Scotland. I find, to the standard of a balance of probabilities, that this was

a continuation of the pattern of them setting up a holiday as a means of testing out the marriage.

106. In his written evidence, the husband initially asserted that they had not taken any holidays together for about five or six years after the decree. However, he has since conceded this was not the case. He accepted the whole family had gone on holiday to Scotland, to see his daughter perform in a show.

107. In his witness statement the husband suggested that he and the wife had not had sex between 2011 and 2018. But in cross-examination he was less firm about whether or not he and the wife had shared a bedroom in the caravan holiday in August 2012. He said he could not recall, *'I can't remember exactly the format – whether we did or not – or it might have been me with one of the children'*. Having initially sought to deny it happened altogether, he remained vague about this holiday.

108. By contrast the wife is very clear that this holiday was intended as an attempt at reconciliation. She is supported to an extent by the husband's witness H1, who says in his statement that he was aware of an early reconciliation of the marriage *'on at least one occasion within the first few years after their separation'*. In oral evidence he thought this might amount to spending time together and having a holiday, but he was unsure as to the details. H1 said that within one or two years his recollection was that the husband and wife were separated.

109. I find that the husband's recollection of when he moved out is less reliable than the wife's. On a balance of probabilities, I find that after their return from the holiday in Scotland, the husband moved back to the family home. I find that this was because the parties had reconciled.

110. I find that the husband then lived in the family home with the wife for a further seven months until 31 March 2013.

111. I find that the husband and wife continued to have arguments and sometimes the husband would go to House A to stay. I accept her evidence that gradually over that period of time he spent more time at the property and that on 31 March 2013 he moved into it as his permanent residence.

112. The reasons I have come to this conclusion are as follows:

- I have accepted the wife's evidence about their discussions in July 2012 leading to their decision to have a holiday together with a view to reconciling;

- The husband has not been consistent about the date he moved out. In a letter from solicitors it was asserted on the husband's behalf that he moved out in spring 2012. In his witness statement the husband says it was summer 2012;

- The husband asserted 31 March 2013 as the date they separated in the petition of 2021, which specifically asked for the date of separation;

- The parties registered with the local authority as being single occupants of their homes for the purpose of council tax payments from 31 March 2013. The forms would have been filled in on or around that time, so this can be taken as a reliable indicator of what was happening on the ground at the time;

- In a letter written to solicitors in October 2013, the husband stated that they had been living in separate houses since April 2013, *'and agreed a settlement date and asset split* ***as of that date and at the time of our agreeing to live separately****.'* Again this letter was written close to the event, and is more likely to reflect what was happening on the ground – that the reconciliation had been tried, but by April 2013 had not succeeded and the husband was seeking to put the relationship on a different footing;

- I place more weight on the evidence from closer to the time than to assertions made much later for the purpose of the present application;

- H1's evidence that there was an early reconciliation and then separation within a year or two arguably fits with the husband moving out of the property on 31 March 2013;

- There is evidence of the husband and wife socialising together in autumn 2012. The wife gave evidence that they were at a party on 25 October 2012, returning to the family home together. This evidence is corroborated by a photograph of the husband smiling in front of a drinks fridge, which she recalls was taken at that time;

- In December 2012 they went to a curry night at the parish hall, hosted by their friend [the wife's witness W1]:

  '[the wife] *borrowed an Indian outfit from me for the event and she looked beautiful. I remember laughing about how* [the husband] *was looking at her and couldn't keep his hands off her. We said something along the lines of 'save it for later!' I also recall that at* [the husband's] [birthday party] *at* [House A]*,* [the wife] *and* [the husband] *were dancing together romantically. At social events it would be normal for* [the husband] *to have his arm around* [the wife] *and I was often aware they were holding each other's hands under the table. They always appeared to be physically close.'*

- The husband said he had no memory of this. I found W1 to be a straightforward witness, her description is detailed and consistent with the wife's memory. I accept her account as reliable.

- The husband and wife spent Christmas 2012 together in the family home with all their children.

113. The Court will have sent out a notice around mid-September 2012 informing the parties that the decree nisi had been pronounced. Neither party wrote to the Court to try and halt this process in advance, nor thereafter apply to set it aside. This is consistent with them having agreed to separate.

114. On the other hand, neither party followed up by applying for the decree to be made absolute, nor did they get in touch at that time with the solicitors they had been in contact with to try and progress an agreement concerning their financial affairs. The reason for the six week pause before a petitioner is allowed to apply for decree absolute is to provide a period of reflection and discussion.

115. Ultimately, I do not find the fact of the decree nisi having been pronounced to displace the weight of the evidence that has led me to conclude that the parties did reconcile after the holiday in August 2012.

116. By this time the husband was no longer paying the wife's credit card bills every month, and he was paying her an allowance of £750 per month for each child under eighteen. I have not seen evidence of the actual date this took place but believe the wife may have accepted in cross-examination that this change happened 'from 2012'. This evidence may point to things having changed earlier than spring 2013. However I have not seen documentary evidence to make any clear findings in this respect.

117. Again, considering each piece of evidence in the context of all the evidence, the fact of the changed financial arrangements weighs in the balance, but has not been sufficient to displace the conclusion I have reached. On the balance of probabilities, I find that the parties were reconciled, living together and sharing a common life between August 2012 and 31 March 2013.

2013 to 2020

118. Both the wife and husband told me that their relationship improved once the husband had moved out to House A.

119. It is difficult to define what the parties' relationship was after this time. They appeared to live with their relationship in a state of limbo for the next seven years. They were still married as a matter of law. Neither of them ever took any step to

apply for decree absolute or ever mentioned it as a step to be contemplated. Where before they had been fairly regularly in touch with solicitors, after the letter written by the husband in October 2013, they did not take any further steps towards finalising the divorce or sorting out their finances.

120. The husband was establishing his new career in private equity. From around 2014 he rented a property [the "city flat"], with his friend and business partner [the husband's witness H2]. He was spending about one or two nights a week [at the city flat].

121. I find however that even after the husband had moved into House A, he and the wife continued to spend a lot of time together. He spent time with the wife, [child C] and [child D], and they continued to attend social events together. The wife's friend [her witness W2], gave evidence that they were still functioning as a married couple at that time:

'I recall speaking to [the wife] (I am not confident when) and she told me [the husband] had moved into House A because they were always arguing. Despite this, sometime later, it could have been a matter of weeks or months, I noticed that [the husband] was always going round to see [the wife] and it was not just to see the children, because they spent a lot of time on their own and they stayed over regularly at each other's properties.'

122. I accept W2 as a reliable witness, and find that this continued throughout 2014.

123. In 2014 the husband and his daughter ran a marathon. I accept that on the day the wife was unwell and could not go to [*redacted*] to support them.

124. I accept her evidence that on a night in 2014 at a time when he was training for the marathon and not drinking alcohol, he and the wife went out for dinner at a pub called the [*redacted*] and stayed the night together in accommodation attached to the pub. The husband said in evidence he could not remember who they might have gone to meet for dinner, but did remember staying overnight with the wife.

125. In his statement the husband denied that he and the wife had socialised at all post separation. That is clearly not the case. The wife has proved to be a more reliable witness and her friends have supported her with evidence backed up by looking through their own calendars or photographs of holidays or events. By contrast, when confronted with the wife's recollections of particular events, or documentary evidence corroborating her account, the husband has had to concede that the narrative he has put forward is wrong. The impression is that he has consistently sought to minimise the extent of the relationship.

126. I prefer the wife's evidence about them going on holiday to Cornwall to stay with their friends [the family of the wife's witness W3]. W3 gave evidence to me that these trips had happened both before and after 2012, and she has a definite memory of one time being in 2014. She gave evidence that on these occasions the husband and wife shared a bed.

127. The husband's evidence about whether or not they had been on holiday to Cornwall was unconvincing. He said he did not recall, then repeated, *'I don't specifically recall', 'I do not believe so but do not specifically recall'*. He said he was close friends with [*W3's husband*] and had been to the house on his own and with the children, but repeated again, that he could not *'specifically remember'*. This was a long way short of an outright denial and came across as somewhat shifty. Compared to the clear recollection of W3 and of the wife, I found his evidence to be unpersuasive, and I find that he did in fact go on holiday with the wife and their children to the home of [W3 and her husband] in 2014.

128. I accept the wife's evidence that in August 2014 she and the husband went to a concert, on 23 October 2014 she and the husband stayed overnight for a break at [*a luxury hotel*]. The husband said he did not recall being there and did not remember anything about it.

129. On 24 October 2014 the husband organised an evening out for him, the wife, and three other couples with whom they had been friends for over twenty years. They travelled to [city name redacted] for cocktails and dinner. On 28 October they had dinner with three other couples at a local pub for a birthday celebration. In November 2014 they invited friends to dinner at their family home.

130. The husband now says he was in a relationship with someone called HA between July and December 2014. Of course, it is conceivable that he was seeing HA throughout the period described when he was spending a lot of time socialising with the wife, although it is perhaps unlikely that it was a relationship of any kind of intensity in or around October.

131. I accept the evidence that the wife did go to House A on a date in 2014 and discover that HA was there. I accept her evidence that this was the first time in her marriage that she discovered the petitioner had slept with someone else, and was deeply distressed, being physically sick. She says that following this, the husband apologised profusely and told her he and HA had broken up. The husband says that this could have come as no surprise to the wife given they had separated, and displays some anger at the wife having entered his house uninvited. Given the amount of time they were spending together, and the absence of any evidence that the wife had been aware of any previous sexual partners of the husband, and their lengthy marriage, it is surprising that the husband was not able to acknowledge the potential impact of this incident.

132. Despite this, the wife says they reconciled their differences. I accept her evidence, corroborated by evidence of her friends, that the husband and wife continued to socialise with local friends throughout 2015. [The husband's witness W3's] evidence was that there was no such socialising, but a text message would suggest his memory is incorrect.

133. The wife's fiftieth birthday was [*during this period*] and she had a big party, attended by friends and family. I have been shown a video in which the husband is there with the children and records a message telling her he loves her. Other guests in the video comment jokingly on her patience for putting up with him for all these years.

134. In 2015 the husband took [child C] and [child D] on a trip to the west country in a camper van. The wife came to meet them on the first day of the trip.

135. In summer 2015 they went to Scotland again to see their son [child B] perform. They went without their other children. The husband did not mention this is in his witness statement, but when asked about it, said that this was again an example of successful co-parenting as separated parents.

136. In September 2015 they were emailing each other, discussing difficulties in their relationship. In one email the wife wrote:

'Thank you … it's not that I am no longer interested … I would and always will think that a future together is what I would most want, it just seems that the past gets dragged up and makes the future impossible …. I am always willing and wanting to talk through possible options to finding a way to rebuild our lives to be a couple and a family together again xx'

137. The husband's response is that he wants to try and find a way through their difficulties.

138. These exchanges indicate that the relationship is not in a state of happy reconciliation. However, they are an indication of the parties continued to be emotionally involved and engaged with one another.

139. In 2016 and 2017 the parties were spending much less time together. The relationship was not functioning well at this point.

140. The wife told me around this time she tried to explore relationships with other men but ended up becoming friends with them. She had a very brief (one night stand) with a man called WA but then became friends with him. She had a relationship with a man who she knew as WB in 2016. The relationship was sexual for about four or five months but thereafter developed into a friendship. The wife said she was helping him find a girlfriend, he was aware that she didn't love him and wanted to make her

marriage work. At around the same time she met a man called WC on a dating app, they had sex *'once or twice,'* but he realised her heart wasn't it, it did not become a relationship, and they lost contact. She said she then bumped into him in Sainsburys around the end of 2019 and their friendship resumed.

141. Between March 2016 and October 2017 the husband had a relationship with a lady called HB who was introduced to the children. She went on a holiday with the husband and [child D].

142. Towards the end of October 2017 the parties became closer again. The wife attended the husband's fiftieth birthday party. The husband invited her to a charity dinner.

143. In February 2018 the wife went on a skiing holiday to [*redacted*] with the husband and the children.

144. Sometime in 2018 the husband started a relationship with a woman called HC. In his witness statement he said the relationship lasted from January 2018 to April 2020.

145. He accepted in cross-examination that in fact her name was different from the surname he had given in his witness statements. None of the witnesses upon whom he relied mentioned her as a girlfriend of whom they were aware. I found the wife's evidence more convincing that through her local network she had become aware of a brief relationship between the husband and HC, and of it having ended in summer 2018. A friend of hers had seen the husband and HC together at the station around that time, and HC had been crying. The wife told me in evidence that in June or July 2018 she and the husband had a conversation in which she asked him if they could become 'exclusive' and not see other people, and he had agreed.

146. On 8 July 2019 the parties were having an argument over WhatsApp. The husband wrote:

'I see you want to drag up last week again and Wimbledon. I thought we did that yesterday in a conversation? I think you were rude and disrespectful to me but let's leave it shall we. Because believe me it won't go well if I tell you again how I feel but with more punch.

Other women??? What the hell???? You are a joke I haven't seen another woman even for a drink for over a 1 year!! What are you going on about??? You live somewhere in your head which I have no idea about or where it is.'

147. This fits with the wife's timeline that the relationship with HC ended in or around June or July 2018.

148. In February 2020 HC came up again in an argument between the parties through WhatsApp. There is a certain amount of irritation about an old argument being revived, there is no sense that this is a continuing relationship. I do not regard the husband as a reliable witness about HC, and prefer the wife's evidence on this issue.

149. I accept the wife's description of the pattern of their weeks during this time. She said that the husband would tend to go to work on a Monday morning, stay in [the city flat] until Wednesday evening, when he would return to spend time with [child D]. He would often cook supper for him, the wife and [child D], and she would sometimes buy the ingredients, or sometimes she would cook. She said she would often spend the evening with [child D] and the husband at his house and stay the night with him, but not always. She said the husband would tend then to stay in [city name redacted] on Thursday night.

150. The wife's clear recollection of events is supported by a large number of WhatsApp messages which make clear that they were indeed in a sexual relationship throughout this period, popping in and out of one another's houses, spending time together. I accept the wife's evidence that they were spending weekends together, playing tennis or games with [child D], or [child D] would be with the wife while the husband played golf, they would watch television and share meals together. The fact of them being in a sexual relationship is not the start and end of a finding about the nature of their relationship as a whole, but the fact that the husband has repeatedly sought to minimise and deny this does raise significant questions about his reliability as a witness to the court.

151. In August 2018 the husband invited the wife to come on holiday with him, [child C] and [child D]. They travelled [around North America]. He says that they did not share a bedroom.

152. In October 2018 the husband took the wife to the theatre. She sent him a text the following morning asking him to look in his bed and by his bed to see if her earring was there, *'I've woken up this morn and it's gone and it's very possible it could have come out at yours Xx'*. A message on 17 October is intimate, checking whether the wife is coming round later, reassuring her he will plan his evening round her and asking her to pop to the shops on the way home to bring bread, orange juice and eggs.

153. In November 2018 they travelled to Dubai together and stayed in a luxury hotel. They sent a video to their children (which I have seen), giving a guided tour of their suite, which included a large bed, sitting room area and shared bathroom. In his witness statement, the husband emphasised that their attempt at reconciliation at this time was not public, *'we certainly did not tell the children what was going on, nor did*

I say anything to any friends or family.' The video clip plainly undermines this evidence. It was made for and sent to the children, for the purpose of showing them the suite that their parents were staying in together.

154. In January 2019 the wife sent a message telling the husband she felt lonely, that although she had thought she could cope with the *'imbalance of how our lives seem to work I do feel alone'*, and while she had believed they could do this, *'we didn't manage it!'* She offers not to come on the half term skiing holiday. The argument appears to be about events from the previous day, the husband having been at the family home from 9am in the morning until 12.30 a.m., and although he had brought his toothbrush, had not received an invitation from her to stay the night.

155. He responded, *'I think your 'poor old* [me] *story has run dry. None of your unhappiness is reasonable.'* The argument expands into issues around the dynamics of the relationship, the wife feeling criticised, feeling that she irritates the husband and feels put down and told off by him. The wife told me in evidence she was trying to articulate in the messages that if he had an issue with her, she did not want him to speak to her and make her feel small, not say what he had to say in a bullying way. The husband says she is never happy, *'America, Dubai,* [city name redacted]*, X's party, Y's party, New year's eve, there are enough data points where for whatever reason you were unhappy.'* At the same time the dynamics of these types of debate which are repeated throughout the correspondence is the wife giving up, saying she is defeated, and the husband appears to be the one who then reminds the wife of his love and appreciation of her, of good times they have had, and his desire for their relationship to work. In a message sent in mid-January when he is away skiing, he says to the wife that for the last few hours, days, months, in fact for all the seven years since they separated, he has been thinking to himself why can they not get on? He reassures her of his love for her, that she is smart, attractive, interesting, and none of the women who are with him and his friends compare to her.

156. I do not regard this as proof that the parties had separated seven years earlier and had remained separated. This is not a legal document, but a text written at 11.30 p.m. after an evening out on a skiing holiday. Given that they did first separate around seven years earlier, the husband petitioned for divorce, and subsequently moved out of the family home, it is not a controversial statement.

157. Shortly after this exchange, the husband and wife went to a concert together with they both thoroughly enjoyed. Messages show that they were spending time in each other's houses for drinks, and staying over.

158. In February 2019 the wife did go on a skiing holiday together with the husband and the children. Thereafter there were more arguments about the nature of their relationship, about the husband's plan to buy a property in the Alps, when the wife was not so keen on skiing. Again, the wife is saying that no matter how she feels

about the husband, she is not sure that she can be happy with the type of relationship they have, she feels she does not bring out the best in him, and is then blamed for this. The messages show them to be emotionally entangled and invested in explaining their viewpoint to the other. The husband reminds her that he pays her monthly money, has left her with two investment properties and two houses, pays her an allowance, and she does not need to work, whereas he cannot think of anything she does for him, she does not help him with anything really and does not remove the stress from his life, and instead just has issues with what he does and tells him she is unhappy.

159. H2 said he recalled meeting the wife only on one occasion at a charity concert in February 2019 where [child A] and [child B] were singing. He accepted the gist of the conversation as described by the wife – that he had spoken to her about tensions in managing his own relationship with his wife as well as a relationship outside of that marriage. He accepted that her recollection of that discussion was very possibly correct, and they may have discussed difficulties arising from his partner wanting to meet his children. However, he was not prepared to accept that the conversation then developed into a discussion about the husband and wife's relationship, or that he had expressed a view that he was pleased for them their relationship was working and they had avoided such difficulties. On a balance of probabilities, I find that if the wife's memory of the first conversation is correct, then so is her memory of the second part of the conversation likely to be.

160. H2 accepted he had then seen the wife and husband at House A in April 2019 and noted that they were getting on very well. He knew nothing about the trip to Dubai or that the wife had joined the husband and the children on any skiing holidays.

161. In March 2019 the husband and wife had a romantic weekend at [a luxury hotel]. They were sexually active and sending affectionate and flirtatious messages to one another.

162. In April 2019 the husband and wife again were on a skiing holiday with the children. Throughout this period the affectionate and sexually charged messages continued, *'What's [child D] doing tonight? Tell me he is at a sleepover and come and have dinner date with me in [city name redacted]! Oh and stay over ....'* The wife responded that [child D] was not on a sleepover but reassured him that they would have their own room next week, *'apart from the luxury cabin night!'*.

163. In April 2019 the husband shared by email a link to a property in [*city name redacted*] and was suggesting that if he was 'not allowed to live in [*city name redacted*], they could have a place for them to spend time there, going to restaurants and the theatre, and with space for their children to stay with them. In cross-examination the husband accepted that they were discussing future plans at the time. He repeatedly demurred when asked if he and the wife were in a sexual relationship at

the time, saying he could not say, he had no information to enable him to answer the question.

164. On 2 May 2019 they went to a concert at the O2 together.

165. Throughout spring and summer 2019 they were spending time at each other's properties, in a sexual relationship, they were making arrangements to socialise together with friends; *'are you free on 13th. I gifted* [friend's name redacted] *a meal out from us for his 60th....'* The husband spent £3,000 on taking her to Wimbledon for her birthday.

166. There were also arguments and lengthy discussions about the relationship.

167. In May 2019 the wife told the husband of a conversation she had with a life coach who had asked her if they were, *'a separated couple or a couple who live separately'*. She said that she had tried to think of them as a couple who live separately, but had come to feel that was not the case. Given (i) the fluctuating nature of the relationship throughout the whole period, and (ii) the need for me to identify objective factors to describe the relationship rather than rely on subjective statements made by the parties, I do not regard this as giving me a definitive answer to the nature of the relationship. The statement is an indication that the relationship was beginning to reach its end point.

168. The trip to Wimbledon had not been blissfully happy, and led to a row. The wife said that she had felt, '*berated and the way you spoke to me a few times was for me upsetting.'* This is the exchange that ended in the husband exclaiming that he had not even had a drink with another woman for over a year, referred to above.

169. At around this time the idea that the relationship was not going to work was beginning to crystallise in the wife's mind:

'Tbh [the husband] I think a conversation would be better than a text but what I have realised in the time I have spent with you is that no matter how much I wanted things to work between us or how much I love you I am unhappy while trying to have a relationship with you. I think the problem is I don't bring out the best in you and the result is how you then speak to me. I don't believe that would be the case if you were with another lady as I have evidence to suggest otherwise.'

170. In August 2019 the wife joined the husband, all four of the children, and child A's fiancé on holiday in the south of France.

171. There continued to be some shared events, but things were dwindling. They went to a concert together.

172. The wife bumped into WC in Sainsbury's and began to spend time with him.

173. The wife joined the husband and children on a half-term skiing trip in February 2020, but this was when the relationship finally came to an end, so far as she was concerned. The husband reported in his statement that the wife had become angry. He said, *'the reason was unclear and may simply have been because she is a less competent skier than me and the children) and decided she wanted to leave early.'*

174. I find it wholly unlikely that the reason the wife left the skiing holiday was because she was feeling angry about being a less competent skier than the husband. I prefer the wife's evidence, supported by a WhatsApp message in February 2020, that the reason she left was an argument about their relationship itself, in particular that the husband was unhappy that she had been seeing WC:

'I think as of August we both decided (led by your date with a foreign lady which you tried not to disclose) I then decided to move on myself (a conversation we had in my lounge) I told you WC *had been back in contact and following on from the 'august disclosure' I have been seeing him. Yes it was he that took me to* [city name redacted] *... but like you said to me .. how much information do you want!!!'*

175. The husband began a relationship in June 2020 with his current partner HD.

176. In August 2020 the wife came [on holiday] with the husband, their children and all their partners. The wife does not assert that this was anything other than as a separate couple.

177. The husband sold House A in 2021.

178. The husband issued his further petition for divorce in June 2021.

Why was the application for decree absolute not made sooner?

179. In evidence the husband said to me that he did not appreciate the significance of applying for the decree absolute at the time. He said he thought the decree nisi was *'a court event that established the position'*, and there was no need to apply for the decree to be made absolute where they had reached their own agreement. He referred to the agreement he says they had reached, which left the wife with the former matrimonial home, the house her father lives in, and two rental properties:

'Her children were paid for at university, I paid for school fees for [child D] entirely myself ... and she had £400k of cash she should have transferred to me but didn't .... I went on with my life, established a new business and started again financially .. I

was able to leave it as it was and leave her with everything she had and the children were happy with that situation as well – so why keep pressing the button and forcing her to go down a situation she didn't want to go down.'

180. This mirrors what he says in his written statement in which he says both that he regarded applying for the decree nisi as, *'merely a final administrative task to be done'*, and at the same time said that the reason he did not apply for it was because he *'did not want to upset the delicate situation which [the wife] and I had arranged, for the sake of formalities.'*

181. This is contradictory. Either the application for a decree absolute is a mere formality, and of little consequence, or it is something more nuclear, capable of rocking the boat, disturbing the equilibrium of their lives.

182. The contemporaneous documents, and the husband's evidence to me, would in fact suggest that the husband was well aware that decree absolute was a significant step to bring a final end to the relationship, and that properly it could only come once all arrangements had been finalised. In October 2013, he wrote a letter to the wife's solicitors which was said to be on behalf of both him and the wife, as follows:

'we are writing to inform you of the agreement that we have reached between us as to the full and final financial settlement of our divorce. We would like you to document this agreement for us so that we can finalise and achieve decree absolute as soon as possible.'

183. In the event there was no application for decree absolute, and the terms of the agreement set out in the October 2013 letter were not put into effect. (The wife does not accept that these were terms she did in fact agree to). The former matrimonial home, the house in which the wife's father lives, and a rental property all remain in joint names, rather than having been transferred to the name of the wife as had been proposed (I believe one rental property is in the wife's name). The wife was to transfer £370,255 to the husband, which represented half the funds in a shared bank account, but this never happened. In the event this was a capital sum she used to fund her living expenses.

184. While they remained married, and the decree had not been made absolute, there was no need for the parties to have discussions in respect of their financial arrangements. The husband never disclosed the extent of his more recently acquired wealth to the wife.

185. The husband issued a petition in June 2021 based on five years' separation. He accepted that at that time the wife would not have had any idea of the extent of his wealth, it having nothing to do with her. He said they spoke on the phone while he

was filling in the form, and he told her, let's do it personally rather than drag in lawyers, and she had agreed to the dates.

186. The wife says the application for decree was never made because the parties had reconciled, effectively abandoned the 2012 petition, not pursued the financial proceedings, and not sought to make decree absolute.

187. The husband's position would appear to be that in his judgment it was best to maintain the delicate equilibrium that existed between 2012. This maintained the parties in a state where they were both separated and yet still married. Their living and financial arrangements were as he designed them, but not formalised either by agreement or steps taken to transfer ownership of properties in line with the original proposals.

188. That the husband issued a fresh petition in 2021 would suggest that he regarded the 2012 petition as effectively having expired.

Have the applicant and respondent lived together since the decree nisi or conditional order was made, and if so between what dates?

189. I find that the parties did live together in the same household and shared a common life in the period immediately after returning from their holiday to Scotland in August 2012. I find that they continued to live together as husband and wife until the husband moved out at the end of March 2013.

190. I have then considered the period between 1 April 2013 and February 2020 by which time there is no dispute that they were living in separate houses. The wife says nonetheless, they shared a common life, the husband says not.

191. There are elements which support the husband's case that the parties were separated:

- They lived in separate houses. The husband furnished his to his taste, kept all his clothes and possessions there and arranged for its maintenance and upkeep himself. The wife did not keep any personal items at his house. I find that the parties did have keys to one another's property (and/or access to keys through their children), but went round to the other's only if requested to do so as a favour (to let in a tradesman, take a delivery) or invited to (to spend time with [child D], to spend time with one another, or to socialise with family and friends);

- The husband paid the wife maintenance. He stopped paying off her credit card bills every month. She became financially responsible for the utility bills and upkeep and maintenance of the properties she and her parents lived in, and for the rental properties. They paid council tax on the basis of single occupancy. Their

older children received a level of financial benefit at university as the children of separated parents. They would go halves on expenditure to do with the children including Christmas presents and activities;

- There was a significant period of time between the end of 2015 and 2017 when the relationship was not functioning, the parties were living separate lives, not getting on well, and either having, or exploring the possibility of relationships with other people.

192. The husband sought to rely upon some further factors to which I have not given weight, or less weight, because I find they reflect highly subjective views of what a marriage is, or should be. For example, it was put to the wife that as she no longer did the husband's laundry, bought his clothes, did housework in his property, or cooked for him regularly, then they could not have been sharing a common life. A marriage should not be marked by the level of domestic chores that one party may do for another. In any event, the wife's evidence was that even before 2012 they rarely had meals together, as she would more often than not have eaten with the children before he got home, and he would usually come home and go straight upstairs to exercise on gym equipment.

193. It is suggested by the husband that the lack of practical and emotional support he was given by the wife post 2012 was an indication of their independent lives and of their separation. Again, I must be cautious before importing into my assessment a test of mutual emotional or practical support. The wife does not accept this characterisation of the relationship, but having regard to Cazalet, I note that the quality of the relationship does not determine the application; a dysfunctional and unhappy marriage may well remain a marriage.

194. Similarly, in respect of the husband's assertion that he was a free agent throughout the relevant period and made his own choices about his schedule, his day to day commitments, where he stayed any given night, who he spent time with, who he had a relationship with, I must be careful not to impose a subjective view. But in any event, I have set out above the interactions between the parties which I have found indicate that – not consistently – but for significant periods of time, the husband and wife did hold the other accountable in respect of choices they were making about relationships with other people. There were times when they had an expectation of being 'exclusive', there were arguments and jealousy about other partners, and a significant body of evidence that they were – for significant periods of time – careful to check with the other about decisions they were making around holidays, shared activities, and how they spent their daily lives.

195. It is asserted that the parties' separate financial arrangements, the payment of 'maintenance' for the children and the wife's lack of knowledge of the husband's finances is an indicator of their more complete separation. Against the context of

them not having reached a concluded financial agreement and not applied to make the decree absolute, it is arguable that rather than an indicator of the finality of their separation, these arrangements served to maintain the marriage in a state of limbo.

196. They were still married as a matter of law. They had resolved financial matters to the satisfaction of the husband, but they had not entered into a financial arrangement that was based on full disclosure of all information. They had not executed any form of agreement, at this time the wife remains co-owner of the former matrimonial home, of her father's home, owns one investment property outright, and I believe receives rental income from another property that is in joint names. She did not receive a share of the proceeds of House A, which was a property purchased during the lifetime of the marriage.

197. From the wife's perspective the relationship was a functioning marriage, with many of the features of its previous incarnation:

- The husband continued to work very long hours away from home, and the wife remained in the family home, focused primarily on the day to day needs of her children;

- The dynamic of their relationship appeared to continue in much the same vein as it had done since adolescence, with repeated patterns of closeness, sexual attraction and having sex, enjoyment of each other's company above all others, but at the same time frequent arguments around how one or the other made the other feel, recriminations and despair at not being able to live with or without one another, and high stakes occasions set as tests for the viability of the relationship, then pored over and analysed, fault found on both sides, attempts to pull away but being pulled back in;

- They socialised on their own, and with friends and family. Their local friends regarded them as a happily married couple. They spent time together in each other's homes, and took holidays together and with family.

198. Drawing all these threads together, I find that after 1 April 2013 and until February 2020 the parties did not live together, but they did share a common life.

199. Although they were not living together, and their relationship was in flux, their relationship was one in which they consistently contemplated their future together. They were in a sexual relationship and spent significant periods of time together, not just on holidays or weekends away, but on a weekly basis, in each other's houses, sharing the care of their youngest child, eating meals together, and spending leisure time together. They socialised as a couple and within their family.

200. The wife genuinely regarded this as a continuation of their marriage.

201. The husband sincerely regarded this to be a period when they were separated.

202. Their relationship was one where they remained married as a matter of law. It was a relationship that sustained and from which they had not extracted themselves in the way that they did after February 2020. Throughout all this time they had not yet got divorced.

Has a child been born to the family since decree nisi?

203. No.

Any other circumstances that ought to be brought to the attention of the court?

204. There was no application to the court pursuant to r.7.33 FPR 2010 and neither party has brought any other circumstances to the court's attention.

Conclusions

205. In the weeks and months leading up to the husband's petition for divorce they had been living in the same house but on separate floors and the husband had spent months away from home. They had resolved to separate. At the time she signed the acknowledgement of service, the wife agreed that the marriage had broken down irretrievably. The husband's petition was pleaded on the basis that the wife had asked him to leave the family home for long stretches of time, and she not taken an interest in him. He felt abandoned and rejected and he found it intolerable to live with her.

206. Thereafter the position changed. The parties had discussions and resolved to reconcile. At the time the decree nisi was pronounced in September 2012 and lived in the same household and share a common life until at least 31 March 2013, when the husband moved out to House A.

207. This constitutes a material change of circumstances which invalidates the fundamental assumption upon which the decree nisi was made. From the time the husband could have applied for the decree absolute the conditions to make it were not met. It could not be said that the marriage had broken down irretrievably, nor that it was unreasonable to expect the petitioner to live with the respondent. This establishes the ground for rescission pursuant to s.31F(6) of the 1984 Act, and is a factor that has magnetic weight in the court's consideration of the application for decree absolute.

208. The fact of the husband issuing a fresh petition in 2021 is consistent with the parties sharing a belief that by their subsequent actions the 2012 petition had become redundant.

209. There has been a long delay, the status of the parties' relationship since 2013 has been uncertain, and there has been a lack of incentive or motivation on either side to apply for decree absolute. Further there has been an absence of a process of formal disclosure of information or formal, informed negotiations towards financial settlement at the conclusion of the marriage. Even if the conditions for making the decree absolute had still applied, the reasons for the delay in applying in my judgment weigh heavily against making the decree absolute, and in favour of rescission of the decree nisi.

210. Further, in addition to the time they were living together between September 2012 to 31 March 2013, and notwithstanding that the parties were living in separate houses thereafter, I find that there were periods (April 2013 to end 2015, late 2017 to February 2020) when the parties were sharing a common life.

211. From the parties' actions throughout the whole of the period from decree nisi to February 2020 (conducting a functional relationship, acting as though the petition had effectively been abandoned, not taking any steps to discuss or to finalise financial arrangements, having an exclusive sexual relationship, socialising together and with family and friends, regularly contemplating and discussing plans for their future lives together) it cannot be inferred that the marriage had irretrievably broken down.

212. Nor can it be said, in light of subsequent events, that it was unreasonable to expect the petitioner to live with the respondent, because as a matter of fact, their relationship was such that they spent considerable time with one another, including having a sexual relationship and a public-facing relationship, and they continuously discussed and ruminated on their shared hope of living together.

213. I find that their conduct towards one another throughout the whole period constitutes a material change of circumstances which invalidates the basis, or fundamental assumption, upon which the decree was made.

214. Although the parties did not live together after 31 March 2013, in my judgment these circumstances would also be sufficient to lead me to exercise my discretion by refusing to make the decree absolute and to rescind the decree nisi.

215. I decline to exercise my discretion to make the decree absolute. I shall rescind the decree nisi. In short, for the following reasons:

(i) there was a material change of circumstances after decree nisi which invalidates the basis upon which the decree nisi was made, namely:
- the early reconciliation; and/or
- the parties' actions and conduct towards one another throughout the whole period;

(ii) having regard to the FPR 7.32 factors, including whether the parties' lived together, and the reasons for the delay in applying, I do not consider I should exercise my discretion to make the decree absolute in respect of the 2012 petition.

216. The divorce and financial remedy application should proceed on the wife's 2023 cross-petition.

HHJ Joanna Vincent

Family Court, Oxford

Draft judgment sent by email: 20 November 2023

Approved judgment handed down: 30 November 2023

This approved judgment was handed down by the Judge remotely by circulation to the parties' representatives by email. The time and date of hand down is deemed to be 2.00 p.m. on 19 December 2023.

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. 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.

IN THE FAMILY COURT AT OXFORD

IN THE MATTER OF THE MATRIMONIAL CAUSES ACT 1973

Date: 19 December 2023

Before: HHJ Vincent

Between:

RN

Petitioner

and

DA

Respondent

Nicholas Bennett, instructed by Mishcon de Reya solicitors for the petitioner husband
David Burles, instructed by Belmont & Lowe solicitors for the respondent wife

Hearing date: 30 November 2023

ADDENDUM JUDGMENT

HHJ Vincent:

217. I handed down judgment on 30 November 2023. The husband was represented by Mr Bennett, the wife continued to be represented by Mr Burles.

Anonymisation

218. The parties agreed the judgment should be published. There was an issue between them as to the extent to which it should be anonymised.

219. I had regard to (i) guidance on publication of judgments issued by the current and previous Presidents of the Family Division[1]; (ii) to the April 2023 report of the Transparency Implementation Group led by HHJ Farquhar; and (iii) the judgment of Peel J in ***Tsetkov v Khayrova*** [2023] EWFC 130, in which Peel J summarised the arguments for and against anonymisation. At paragraph 117, he identified four categories of case where judgments would be published without being anonymised:

'i) Where there has been litigation misconduct; ***Lykiardopulo*** *was just such a case.*

ii) Where anonymisation would be effectively impossible because of the prominence of one or both of the parties, as in ***McCartney v Mills McCartney*** *[2008] 1 FLR 1508.*

iii) Where material in the financial remedy proceedings is already in the public domain, as in ***Crowther v Crowther*** *[2021] EWFC 88 where the case had travelled up to the Court of Appeal on a contested freezing injunction which had been heard (as is the practice in the Court of Appeal) publicly.*

iv) Where one or both parties court publicity.'

220. In ***Tsetkov v Khayrova***, Peel J found that all the categories applied to a lesser or greater extent. In the case before me, none of the categories apply. There is no benefit to the parties in naming them. By contrast, there is potential disadvantage to them, their children, and to their witnesses, because of the intrusion into their personal lives that public knowledge of their involvement in this case would be likely to bring.

221. For these reasons, I decided that the judgment should be published in a redacted form so that the name of the parties, their children, and the witnesses should be anonymised, and so that other details, including place names, should be redacted to prevent inadvertent identification.

---

[1] Practice Guidance (Family Courts: Transparency) [2014] 1 WLR 230, Practice Guidance: Family Court – Anonymisation Guidance, December 2018, President's Guidance as to reporting in Family Courts, 3 October 2019

222. The parties' representatives produced a redacted copy of the judgment for publication, highlighting some issues between them. I have made a few adjustments; in a couple of places the amendments seemed to be going further than anonymisation and were editing out facts that are intrinsic to the case. I will publish the finalised version of the anonymised judgment on the National Archive.

Costs

223. The wife applied for her costs of the application (save for in respect of the application to strike out for want of prosecution), to be summarily assessed on the indemnity basis in the sum of £188,221.80, together with £5,737.52 being 73% of the total interest of £7,859.61 incurred by the wife on her litigation loan. Total £193,959.32.

224. Mr Bennett accepted that in the most basic terms, the wife had won, and the husband had lost. He accepted that costs should follow the event, so the starting point is that the husband should pay the wife's costs. However, he submitted that an order that the husband pay only fifty percent of the wife's costs would be appropriate in all the circumstances. In particular, he submitted that the Court should have regard to the following:

- The wife had lost on the application to strike out for want of prosecution. This had been a pointless distraction and she should not recover costs in respect of litigating this issue;

- The 'Cazalet' issue had proved to be finely balanced, and while the court had found the husband's evidence to be unreliable in places, ultimately it had accepted that he was sincere in his belief that the parties had separated. It was not unreasonable for him to have taken the stance that he did;

- The application for additional witnesses brought by the wife led to the husband also seeking to rely upon further witnesses. This added a layer of unnecessary complexity to determining the case, extended the hearing time, and built in additional costs;

- The husband had made proposals in September 2023 intended to avoid the need for the issue to be litigated, to the effect that the husband's application for decree absolute should be allowed to proceed, but it would be recorded that the wife was entitled to raise arguments in respect of separation within the financial remedy proceedings.

225. Further, Mr Bennett submitted that the wife's application for her costs to include repayment of interest incurred as part of a litigation loan was not an

appropriate exercise of costs discretion and should properly be dealt with as part of an application for maintenance pending suit or for a legal services payment order.

226. Mr Burles did not have time available to reply to these submissions, and asked to submit further brief written submissions.

227. I determined that the bill was not appropriate for summary assessment. This was due to the limited time I had available, the amount of costs claimed, and the need to ensure that costs relating to the application for strike out are stripped out.

228. I made an order (by consent) for payment of £50,000 of costs in the interim, and reserved judgment, once I had time to consider Mr Burles' brief further written submissions.

The law

229. The divorce applications are not financial remedy applications to which the no order for costs regime applies. The starting point is that costs follow the event.

230. In order to decide whether there should be a reduction in the level of costs the husband should pay, I must consider:
- Who is the successful party?
- What attempts did the parties make to resolve the issue and avoid the need for trial?
- Did the parties litigate reasonably?
- In respect of the amount of costs, is the amount sought proportionate?

Analysis

231. It is right to note that the husband made an offer to settle. But his offer was in line with the position he advanced at trial, which ultimately did not succeed. The wife's offer was much more in line with the eventual outcome. She proposed that the decree nisi be rescinded, and the parties should proceed on the basis of her no-fault divorce cross petition. In the circumstances, it would be unfair to reduce her costs on this basis. She did make attempts to resolve the dispute and avoid the need for trial. It was not unreasonable for her to reject the husband's offer.

232. I did conclude that the husband sincerely believed that between 2013 and 2020 he and the wife were living as ex-partners. However, I also concluded that:

- the husband's evidence was misleading, at times evasive, and mischaracterised and sought to minimise the nature of the parties' relationship;

- by contrast the evidence of the wife and her witnesses was reliable;

- the wife sincerely believed herself still to be married;

- the parties had reconciled immediately after the making of the decree nisi, contrary to the husband's assertion that they had not.

233. There is no basis for reducing the wife's costs based on my remarks about the husband's belief as to the status of his marriage. I found that the marriage had remained in a state of limbo, the parties had remained married, done nothing to progress the divorce, or financial arrangements, and conducted themselves as if the decree nisi had effectively expired. These were all objective reasons for refusing to make the decree absolute, regardless of the parties' own beliefs about the status of their marriage.

234. The application for additional witnesses was heard by HHJ Gibbons and was granted. I do not understand the husband to have applied at that time for the wife to bear additional costs relating to these witnesses, and no order to that effect was made. In the event I found the wife's witnesses to be credible and to have supported her case. She should recover the costs of obtaining their statements and for them attending Court to be cross-examined.

235. There is no evidence to suggest the wife sought to litigate the applications unreasonably or conducted the litigation unreasonably.

236. In the circumstances, I conclude that the husband should pay all of the wife's costs, save for those relating to the application for strike out for want of prosecution, on which she did not succeed.

237. Those costs will be limited to the costs of the application itself, correspondence relating to the issue and some element of counsel's fee for preparation of written and oral submissions on the point. The issue took up some time in submissions, but did not require any additional evidence, nor lead to additional cross-examination. I had to consider the reasons for the delay in applying for the decree absolute as part of the application to make the decree absolute.

238. It was not submitted on behalf of the husband that the costs bill was disproportionate, given the potential level of assets in the case. The husband has not demurred when it has been suggested that his own costs are likely to have significantly exceeded those claimed by the wife. I understand the wife will argue that she was drawn into expending these sums in response to the way in which the husband conducted the litigation.

239. But on any view the sum of £188,221.80 is a very significant bill to rack up for a three-day hearing with no expert witnesses, and limited documentary evidence.

The question of proportionality will no doubt be further explored in the detailed assessment process.

Standard or indemnity basis?

240. It is not necessary to have a finding of dishonesty or fraud before an indemnity costs order is made. The making of a costs order on the indemnity basis is appropriate where the conduct of the parties or other particular circumstances of the case take it 'out of the norm'. Per Roberts J in ***AB v CD*** [2016] EWHC 2482:

'[65] in this context, I bear in mind what Coulson J said in Noorani v Calver (no 2/costs) [2009] EWHC 592 (QB) at paragraphs 8 and 9:

'Indemnity costs are no longer limited to cases where the court wishes to express disapproval of the way in which litigation has been conducted. An order for indemnity costs can be made even when conduct could not properly be regarded as lacking in moral probity or deserving of moral condemnation: see Reid Minty v Taylor [2002] 1 WLR 2800. However such conduct must be unreasonable 'to a high degree. 'Unreasonable' in this context does not mean merely wrong or misguided in hindsight': see Simon Brown LJ (as he then was) in Kiam v MGN Ltd (No.2) [2002] 1 WLR 2810'

241. Mr Burles submits that the indemnity principle is appropriate in this case because of:

- *'The wife's comprehensive success and the husband's comprehensive failure;*
- *The husband's unreasonable refusal to adopt the wife's proposal as to the 2023 cross-petition with a neutral recital;*
- *The husband's poor evidence as a witness, his false presentation of key facts and his inability to be a witness of truth, unlike the wife.'*

242. I have considered these points, but on balance, I consider these matters were relevant to the question of the principle of payment of costs, but do not take the case out of the norm. I will direct detailed assessment of costs if not agreed, on the standard basis.

Further interim payment

243. Mr Burles invites me to order a further interim payment of £100,000, in addition to the £50,000 already ordered. This would represent 80% of the total claimed.

244. In considering the appropriate level of interim payment, I have had regard to the principles set out by Clarke J in Excalibur Ventures v Texas Keystone [2015] EWHC 566 (Comm). Factors to consider are, *'the likelihood (if it can be assessed) of the claimants being awarded the costs that they seek or a lesser amount and if so what proportion of them; the difficulty, if any, that may be faced in recovering those costs; the likelihood of a successful appeal; the means of the parties; the imminence of any assessment; any relevant delay and whether the paying party will have any difficulty in recovery in the case of any overpayment.'*

245. In this case, the husband accepts that he has the means to pay any interim award I make without suffering a detriment.

246. I have refused permission to appeal. Permission to appeal may be sought from the High Court, but that is not a good reason to defer an order for interim payment of costs.

247. In the event of overpayment the husband has a remedy as the liability can be taken account of in the financial remedy proceedings.

248. However, I do approach the request for a further interim payment on account of costs on a conservative basis because, as I say above, the amount of costs claimed by the wife in relation to a three-day application may well be subject to arguments on proportionality at detailed assessment.

249. In all the circumstances I will order that an additional £60,000 is payable on account. Added to the £50,000 already directed, the total of £110,000 is 58% of the £188,221.80 on the bill.

Order for payment of interest on litigation loan

250. The husband was asked to provide the wife with resources to litigate the applications, but he refused. It is submitted that she was thereby forced to take out a litigation loan at high rates of interest. Mr Burles argues that the costs order should include the interest payable by the wife on the sums she has borrowed to defend the husband's applications.

251. I have not been taken to any procedural rule or case authority to tell me whether interest on a litigation loan counts as a billable item. If not properly characterised as costs, I have not been shown the basis upon which it is recoverable, or what factors the court should take into account when deciding whether or not to order a paying party to meet this liability. It seems to me at the least, I would need to know what the available options for litigation funding were, whether it was

reasonable to incur interest at this level in all the circumstances, or if credit could have been obtained more cheaply.

252. For these reasons, I am not persuaded that the interest on the litigation loan is recoverable as an item of the costs payable.

HHJ Joanna Vincent
Family Court, Oxford
19 December 2023