

SHERIFFDOM OF TAYSIDE, CENTRAL AND FIFE AT DUNDEE

[2024] SC DUN 21

DUN-F345-22

JUDGMENT OF SHERIFF JILLIAN MARTIN-BROWN

in the cause

MB

Pursuer

against

SB

Defender

Pursuer: Anderson (Sol); Rollos Law LLP
Defender: Somerville (Sol); Kee Solicitors

DUNDEE, 16 January 2024

Introduction

[1] This was a preliminary proof on the relevant date for the purposes of fair sharing of the net value of the matrimonial property. The pursuer MB was of the view that the relevant date was May 2022 and the defender SB was of the view that it was December 2014.

Findings in Fact

[2] The parties were married on 30 March 1985.

[3] The parties jointly owned the former matrimonial home in Fife. It was subject to an offset mortgage.

[4] SB contributed to a pension plan.

[5] MB has been dependent to a degree on SB's financial support throughout the marriage.

[6] During the marriage, the parties discussed options for their retirement.

[7] The parties went on their final holiday abroad to Tenerife in December 2014.

[8] The parties removed MB's name from the parties' joint bank account in December 2014.

[9] MB suffered from migraines throughout the course of the parties' marriage.

[10] MB took medication for medical conditions she suffered during the course of the marriage, which were physical in nature and symptoms.

[11] SB took MB to and from hospital in 2015.

[12] SB took MB to and from hospital in 2017 and visited her there.

[13] MB urged the defender to get help for his depression prior to January 2017.

[14] SB attended his GP in relation to depression on 6 January 2017, reported that his relationship with MB was good and indicated that he would get MB to make a further appointment for him.

[15] SB travelled to Spain without MB in December 2018.

[16] The parties went on a trip to Aberdeen in December 2019. They shared a double bed in a hotel room and were sexually intimate.

[17] In August 2020 the parties decided to purchase a large garden cabin. The cabin was used by SB as an office during the coronavirus pandemic as he required to work from home. Prior to the pandemic, SB worked during the week in Aberdeen and returned home at weekends. Following the pandemic he required to work from home full time and had not returned to work in Aberdeen since.

[18] SB helped MB purchase a new car in October 2020.

[19] The parties attended a wedding together in summer 2021 and hosted a pre-wedding celebration in the parties' home.

[20] The parties went on a family day out quad biking in August 2021.

[21] SB sent a text message to MB joking about receiving oral sex in August 2021.

[22] MB felt suicidal on 18 December 2021.

[23] The parties' elder son's partner tested positive for covid in December 2021. MB cooked Christmas dinner. Their elder son delivered the Christmas dinner to his partner and she joined the celebrations virtually. Their elder son and his two children attended at the former matrimonial home for Christmas dinner.

[24] The parties had a verbal altercation in early 2022. SB checked on MB in light of her previous thoughts of self-harm. He expected to find MB curled up under her duvet weeping. To his surprise, MB was sitting cross legged in the centre of her bed eating food whilst watching television.

[25] In early 2022, SB told MB she was no longer permitted to use the garden cabin and confiscated the spare keys.

[26] In early 2022, SB overheard MB saying on the phone to a friend that as soon as she returned from her girls' holiday, she intended to leave him and take him for fucking everything and that she hated him. When SB queried the comment with MB, she informed him that she was angry.

[27] SB started to do some internet research into a simplified divorce in March 2022. The parties talked about a simplified divorce in early March 2022. As a result of those discussions SB spent £200 on a separation agreement and £89 on a simplified divorce on 18 March 2022.

[28] The parties ceased cohabiting on 18 March 2022.

[29] MB travelled to New York without SB in May 2022.

[30] SB offered to pay MB £60,000 in full and final settlement of all financial claims which MB could use to purchase a house of her own. He told her that the involvement of lawyers would cost them both a lot of money.

[31] SB told MB she had not contributed to the matrimonial home and he had worked all their married life.

[32] SB presented MB with an agreement, which he told her he had accessed and downloaded online.

[33] MB demanded the date on the Minute of Agreement be changed. The parties' elder son suggested to SB that he alter the date. SB duly did so.

[34] MB did not see any breakdown of assets or valuations in the Minute of Agreement before signing. On the same day that she signed it, MB also signed a simplified divorce application, which SB filled out and presented to her.

[35] The parties entered into a Minute of Agreement which was completed and registered in the Books of Council and Session on 7 June 2022, which was signed by both parties and witnessed by their elder son.

[36] MB viewed properties and initially instructed Mr David Harley of Rollos Law to submit a verbal offer to purchase a property in Arbroath.

[37] MB attended the office of Rollos Law and following advice, instructed Tony Anderson, solicitor, to contact SB challenging the validity of the agreement.

[38] MB left the former matrimonial home on 22 June 2022 and did not return to reside at the property.

[39] The parties spent most of their free time with each other until around August 2021.

[40] The parties lived under the same roof until 22 June 2022.

[41] The parties usually slept together in the same bed until the COVID-19 pandemic in March 2020.

[42] The parties had a sexual relationship until around August 2021.

[43] The parties usually ate together until around August 2021.

[44] The parties had a social life together until around August 2021.

[45] The parties supported each other until at least early 2022.

[46] The parties communicated with each other until at least 22 June 2022.

[47] The parties were affectionate with each other until around August 2021.

[48] The parties shared resources until at least 22 June 2022.

[49] The parties shared household tasks until at least 22 June 2022.

Finding in Fact and Law

[50] The relevant date for the purposes of fair sharing of the matrimonial property is 18 March 2022.

Procedural History

[51] Parties agreed a joint minute, relevant parts of which have formed part of my findings-in-fact. Evidence was led on 22 and 23 November 2023. Written submissions were lodged with the court and oral submissions were heard on 19 December 2023.

Background Facts and Circumstances

[52] It was not in dispute that the parties were married on 31 March 1985 and had two children. MB averred that she contacted a Women's Aid support worker who facilitated her moving out of the matrimonial home and helped place her into alternative housing at a

confidential address. She had been residing there since leaving the matrimonial home in June 2022. She averred that SB had subjected her to coercive and controlling behaviour in the latter years of their marriage.

[53] SB admitted that MB left the former matrimonial home on 22 June 2022 and had not returned to reside at the property since. He denied coercive or controlling behaviour. He averred that the marital relationship started to decline in approximately 2009 and in or around December 2014, MB moved into the spare bedroom. He averred that MB abused alcohol.

Pursuer's Evidence

[54] MB was 60 years old at the time of the proof. She swore an affidavit dated 24 October 2023, which she adopted and elaborated on in oral evidence. She was a qualified staff nurse and trainer currently working for a private residential care home.

[55] The parties married on 31 March 1985 and had two adult sons. She lived with SB as a married couple until she left the matrimonial home on 22 June 2022.

[56] While not without rough patches, the parties cohabited for a good 37 years until she began to notice a gradual change in SB's behaviour towards her in or around the latter part of 2021. Things really started to go downhill around the time of her trip to New York with some girlfriends in May 2022.

[57] Until the pandemic SB worked away during the week in Aberdeen and returned home at weekends. Most of their free time was spent together at home or outside in the garden. They watched films on Netflix together. They enjoyed watching "car crash" television shows such as Married at First Sight or Four in a Bed. They always ate together, whether it was a home cooked meal or a takeaway and sometimes their sons would join

them. They would host family barbecues in the garden in the summer. MB prepared the food and SB barbecued.

[58] When SB was based in Aberdeen during working weeks, the parties had a caravan there and MB would regularly travel up to stay with SB until it was damaged by flooding in around 2017. She would cook and clean for him there.

[59] MB cooked and cleaned the matrimonial home. She did the ironing and carried out the big shop, sometimes buying SB his cigarettes. SB also cooked and carried out DIY chores. MB chose and purchased most of his clothes. SB looked after the mortgage payments and council tax while she paid for the shopping, cleaning utensils and utility bills. This financial arrangement operated without interruption until she left the matrimonial home on 22 June 2022.

[60] The parties socialised as a couple. They attended their close friend's wedding in July 2021 and hosted a pre-wedding celebration for her in their home. MB produced photographs showing how the parties socialised as a cohabiting couple until August 2021.

[61] The parties had a joint membership card for Costco which they both used and was still valid when MB left the matrimonial home on 22 June 2022. SB's cars were insured for MB to drive and vice versa right up until she left. The parties contributed towards a joint life cover policy with Aviva to cover the mortgage. MB usually bought all birthday and Christmas gifts for family and friends from the both of them. Any large purchases for the house were a joint decision, such as a television in around 2017.

[62] Until the pandemic in March 2020, for the most part the parties slept in the marital bed in the master bedroom. MB would occasionally sleep in the spare room, which she used as an overspill for her clothes and shoes, because SB was a heavy snorer and would interrupt her sleep. During the pandemic, as a key worker MB took extreme care to avoid

passing on any potential infection she contracted to SB or his elderly parents, therefore she moved into the spare room and slept there.

[63] The parties continued to have a sexual relationship until around August/September 2021. The last time was in the hot tub after a day in the garden. MB remembered they had sex on the day of Prince Harry's wedding on 19 May 2018. Sometimes if they spent the day relaxing in the garden, they would have sex or at least kiss and cuddle. When in the hot tub SB would always be naked and carried on walking around the home in the mornings or late at night unclothed. MB was comfortable with that and he continued to do it right through until she left. When she was making up the marital bed he would often position himself behind her and attempt to simulate sex. MB knew he was kidding on but at times it progressed into further intimacy right up until August/September 2021. While sex became more irregular it was never non-existent until after August/September 2021. SB took intimate photographs of MB which she wholly agreed to, usually before they engaged in sex. He kept them on his phone and laptop with her knowledge and consent. He took those photographs until around 2019/2020. MB produced a screenshot of a text message sent by SB to her on 25 August 2021 saying "That's your car ready, that'll be £30 for parts and a BJ for my time." SB was having a laugh but there was no doubt they were still sexually intimate with each other at that time.

[64] SB organised and ordered a new car for MB in November 2020. MB financed it from her savings but SB registered it for her and attended to the legalities, which included transferring the private number plate he had bought her previously as a gift. He also put the plate on the new car for her.

[65] The parties had a joint offset mortgage. SB had his own savings. SB always led MB to believe they were in a solid financial position and that they could look forward to a good

and possibly early retirement. Around 2014 SB took MB's name off the joint bank account. SB had criticised MB's overspending. MB accepted she did spend money on household items such as luxury bedding etc.

[66] SB presented a scenario that if MB paid for the big shop and day-to-day domestic expenses from her bank account, SB would look after the large purchases such as the mortgage, furniture, carpeting, etc. The mortgage and council tax came out of the previous joint account that she agreed to transfer over to his sole name. They went to the bank and she opened a second account to pay in savings towards retirement. MB had no reason not to trust SB back then and always signed forms that SB put under her nose without question, be it mortgage paperwork or utilities/insurance policies. SB looked after and safeguarded the parties' finances. SB would continually show MB the amount of savings they had in his account and it was approximately £100,000, which always gave MB comfort.

[67] The parties' last holiday abroad was to a villa in Tenerife in around 2014 or 2015. The parties did not go abroad on holiday much because SB was always reluctant. They enjoyed a trip to Aberdeen in December 2019 where they stayed in the same hotel room and went Christmas shopping and ate breakfast and dinner together. They had sex that weekend.

[68] The parties spent a lot of their free time in the garden. In August 2020 they decided to buy a large garden cabin. SB did a lot of the installation but MB furnished and decorated it. It was to be partially used by SB as his home office but also as a retreat in the garden. It was a project both parties enjoyed in the second half of 2020. Without consultation in early 2022, SB told MB she was no longer permitted to use it and at the same time confiscated the spare keys.

[69] Looking back with hindsight, MB could see that SB had changed from a loving husband to becoming insular and unpredictable. In December 2018 he disappeared and travelled to Spain alone. MB had no knowledge of his whereabouts leading up to Christmas and thought that he was still working in Aberdeen. She found out from their son that he had decided to go to Spain.

[70] MB refuted any suggestion she was drinking excessively in the years leading up to their separation. As a registered nurse she was extremely cautious about how much she drank in the evenings. She never missed a day's work because of a hangover or anything drink related. She accepted her drinking became more frequent in the latter part of 2021/early 2022 because she knew that her marriage was in difficulty. She was becoming increasingly anxious and afraid of SB. She would seek solace in a few drinks in the evening and remain in the spare bedroom to avoid confrontation.

[71] MB began to feel suicidal on about 18 December 2021. That Christmas was particularly horrible. When he opened his gift of clothes from MB, SB commented that at least he would have something clean to wear. Unbeknownst to MB, he had bought his own food for Christmas dinner and proceeded to eat and cook the food that he bought in front of their sons, which embarrassed her. At other times SB would ridicule MB in front of the children and other members of the family.

[72] MB went to New York with some girlfriends in May 2022. A few days before the New York trip, SB told MB that the marriage was over. SB told MB bluntly that he wanted her out of the house. MB was absolutely devastated. There was a part of her that hoped that the marriage could be saved but when she got back from New York, things took a turn for the worse.

[73] On the day of her return from New York SB told her he was going to speak to his solicitor because he wanted her out within three days. He said that she would have to consider whether she wanted to buy or rent somewhere because it was his house. He told her that the law had changed recently and she was not entitled to anything. He said he had worked it out and could give her £60,000 to move out. MB started crying and left the room. The next day, SB said that he would take their elder son away from her and would destroy her life if she did not accept his offer.

[74] A few days later, MB told SB she would accept his offer. On the same day he presented her with the Minute of Agreement. He told her he had downloaded and printed it. He did not talk through or explain it and warned her that getting a lawyer would cost her more money. He then started pestering her to sign the Minute of Agreement. Eventually, MB agreed to sign the agreement and immediately SB said that he would phone their elder son to come and witness it.

[75] SB wanted her to agree that they had separated in September 2019. That was a ridiculous suggestion and MB said she was not going to tell lies in a document. Their elder son persuaded SB to change it to 2021.

[76] After she signed the Minute of Agreement she started looking for another house. She contacted Rollos Law in early June 2022. She asked her solicitor to make an offer for a property in Arbroath and explained that SB was giving her £60,000 to part finance it. She remembered the solicitor expressing concern about the settlement she had agreed with SB and suggested that MB meet with his partner, Mr Anderson. Mr Anderson explained what MB could be entitled to from the marriage and that there had been no change in the law as SB had said. He advised her to think about contacting Women's Aid, who could help her in

finding alternative accommodation. She acted on that advice and moved into a refuge on 22 June 2022 after vacating the matrimonial home.

[77] MB was cross examined in relation to her “inability to cook” and whether she would choose something “easy” such as air frying. She conceded that she was “not the best” but continued to cook meals for her and SB until the latter end of their relationship. She acknowledged that SB did cook meals sometimes and was a good cook.

Evidence of pursuer’s other witnesses

AW

[78] AW swore an affidavit dated 24 May 2023, which she adopted and elaborated upon in oral evidence. She was employed as a senior care assistant and was friends with MB.

[79] She struck up a friendship with MB in around 2020/2021. At the beginning of the friendship MB was quite happy in her marriage but later on there were problems and MB felt alone and isolated. When she first met MB she was a happy and bubbly person. Perhaps a year or so later she was really withdrawn.

[80] In around 2021 she was invited to MB’s house for a coffee and a chat with two other friends. She met SB and he was polite to her but she thought the way he spoke to MB was rude and ignorant. SB picked up MB from AW’s house once or twice. In cross examination, AW accepted that she did not know what went on between SB and MB in their home.

Annette Fowler

[81] Annette Fowler swore an affidavit dated 24 October 2023, which she adopted and elaborated upon in oral evidence. She was employed as a domestic abuse practitioner for Women’s Aid in Fife.

[82] When Ms Fowler met MB, she seemed shocked her marriage had ended. It was like she was grieving. MB did not say anything to her which made her think she had been in denial for many years and just sharing a house with her husband. She appeared in shock; she was traumatised; she could not think straight; she was not eating; she was not sleeping. She could not carry out simple tasks on her own and had no faith in her own ability.

[83] Having worked for Women's Aid for 15 years, Ms Fowler considered that MB appeared genuine in her presentation. She was definitely traumatised. She cried every time she spoke about no longer being in a marriage with her husband. Mrs Fowler suggested that MB speak to a solicitor and see her GP.

[84] In cross-examination Ms Fowler accepted that it was possible that two people could live in the same house but be separated for a period of seven years. However, in Ms Fowler's experience that would be unusual and it was certainly nothing she had ever come across.

Younger son

[85] The parties younger son swore an affidavit dated 19 May 2023, which he elaborated upon in oral evidence. He was 35 years old at the date of the proof. He was employed as a tree surgeon.

[86] He left his parents' house about 13 years ago and had been cohabiting with his girlfriend for about 11 years. Until a couple of years ago he was a regular visitor to his parents' house. Whenever he visited them, it was clear to him that they were a couple. They interacted with each other as they had always done since he could remember. His mum would do all the washing, ironing and cleaning. Most Saturdays they ordered a Chinese takeaway to eat together. There was nothing to suggest that his parents were not living

together as a couple up until the point that he stopped visiting them in around 2020. He stopped visiting because he fell out with his Dad.

[87] His parents used to sleep in separate rooms before he stopped visiting. He always put that down to the fact that his dad was a very bad snorer. His father also suffered from restless leg syndrome. At no point did he form the impression that his parents were no longer living together as a couple.

[88] His impression of his father was that he was controlling and selfish. At times his father was verbally abusive and generally bullying towards his mother. He saw no evidence that his mother was drinking excessively. She would have a drink at weekends and would get a little tipsy and perhaps start speaking too much. His father did not like that and would get annoyed. His mother was an experienced nurse and there was no way she would jeopardise her career by abusing alcohol.

[89] He felt that his father saying that the parties had separated in 2014 was a complete lie.

Defender's Evidence

[90] SB was 59 years old at the date of the proof. He swore an affidavit dated 23 October 2023, which he adopted and elaborated upon in oral evidence. He was employed in the oil industry and had been in his current role since January 2020.

[91] SB gave evidence that there had been a number of issues over the years and that the parties separated in December 2014. The last time that the parties slept together as man and wife was in December 2014 when they were on holiday in Tenerife. They had sex once that week and that was the last time that the parties were intimate. After the holiday, it was clear to SB that the relationship was over.

[92] During the marriage, he worked away during the week in Aberdeen and had a caravan there that he stayed in. He tended to return home every weekend but on occasion chose to stay away from the house as the separation became more difficult as time went on. He paid for everything for the family home with the exception of the gas, electricity and TV licence. MB paid for those because he was paying for the gas, electricity and TV licence for the caravan.

[93] SB denied that MB spent any time in the garden. When he came home at weekends, the grass had not been cut and he would have to do it himself. SB had a low gag threshold and would ask MB to pick up dog excrement in the garden for him but she would only do it occasionally. He denied that MB had ever made a meal for him and was critical of her cooking skills. He denied ever having sex in the hot tub due to hygiene concerns.

[94] Due to the fact that the parties were separating and MB's spending, they both thought it was a good idea to go into the local branch of the bank in December 2014 and have MB's name taken off the joint account. MB had no control over her spending and it was all just becoming a little too much. They had a loft full of clothes, shoes, hats, handbags and all different types of equipment and machines, whether that was for hair extensions, tanning systems, nails, etc. MB used the joint account regularly to make purchases from TV shopping channels, like QVC.

[95] At that time in December 2014 MB moved into the spare room. She moved all of her belongings into that room including her clothes, shoes, make-up and other personal items.

[96] The marriage had started to decline in around 2009. MB had a difficulty with alcohol. SB denied being coercive or controlling during the marriage. He believed that MB had defamed his name, character and reputation. He believed that she had distanced herself

from her older son and his family in a bid to gain a better financial settlement under the pretence of vulnerability.

[97] Things in the household became exceptionally difficult after the separation in December 2014 because there was an atmosphere in the house. SB would only see MB once or twice in the evenings through the glass door they had in the living room if she was in the kitchen getting food or drink. Other than that she would use the shared bathroom but she very much stayed in her room. It was easier for SB to go out and see family than expect them to come to the house because MB would not socialise with them and stayed in her room.

[98] SB believed that MB did very little housework and was not good at cooking. Often SB had to do domestic chores at the weekends.

[99] SB had a physical and mental breakdown in around 2017. He contacted his GP and was told that he had classic depression. His GP prescribed medication, which he was still taking. MB never offered any sympathy or empathy during the whole thing.

[100] In around October 2018 MB bought SB a pet cam due to the unexpected recent birth of six puppies, to allow him to log in and check the dogs when he was in Aberdeen. On 22 October 2018 he overheard MB speaking to her friend over the pet cam, saying that she hated him and that she was going to take him for everything. SB felt that despite the fact that the parties had separated four years previously, there was no way out of the relationship.

[101] On 20 December 2018 SB travelled to Spain on his own. He felt so low due to what he had overheard that he contemplated suicide whilst in Spain. On 31 December 2018 MB called him and said she would change. SB did not want to discuss it with her on the phone

and said they could discuss it when he was back home. On 3 January 2019 he flew back to Scotland.

[102] In December 2019 SB won a night away in a newly opened hotel in Aberdeen. MB suggested they could go and use the prize to enjoy a night away from the house and the hospitality. SB had tried to maintain an amicable relationship with MB throughout their separation so he saw no reason not to go. There was no intimacy between them. They stayed at the hotel, had dinner, went shopping for Christmas food at Costco the following morning and then went home.

[103] As a result of the coronavirus pandemic, SB had to work from home from 17 March 2020. He therefore purchased a garden cabin. SB was given an expensive gilet from his work which he liked and wore a lot in the cabin to keep warm. After an argument the gilet mysteriously disappeared. He eventually found it soaking wet in the washing machine. MB said she thought it needed a wash. SB decided it was best to lock the cabin thereafter.

[104] At some time in 2022, SB sat in the garage after a verbal altercation with MB, thinking that she must be hiding in her room upset and hurting as much as he was after such an upsetting quarrel. He decided to check on her to ensure she was not doing anything silly as she had previously intimated she may self-harm. He fully expected MB to be curled up under her duvet weeping. To his surprise MB was sitting cross legged in the centre of her bed tucking into a large plate of food whilst watching her iPad and television at the same time.

[105] In March 2022 SB started to do some internet research into a simplified divorce. The parties talked about a simplified divorce in early March 2022. As a result of those discussions SB spent £200 on a separation agreement and £89 on a simplified divorce.

[106] In April 2022 SB discovered that MB was planning to go on a girl's holiday to New York. He had not been told anything about it during the lead up to it. The parties were actively discussing separation of the finances and divorce at that time. He overheard MB saying on the phone to a friend that as soon as she returned from her girls' holiday she intended to leave him and take him for fucking everything and that she hated him. That really hurt him as he had always given MB everything that she wanted. She was the type of woman that did not want for anything.

[107] On her return from New York, SB told MB they would need to agree the position regarding finances before they could apply for the divorce. SB suggested from his reading of Scottish Divorces Online that they should reach a fair agreement and use the website to save legal costs for them both. He explained that if they went down the conventional route of divorce they would spend most of their personal savings on lawyers and would be left with virtually nothing due to the long and costly process. MB said all she wanted was enough money to buy a home outright. SB thought that was fair as it would give both of them their own home and some savings to start again. Initially the parties agreed a sum of £50,000 but later increased that to £60,000 in cash in order to allow her to buy a place of her own.

[108] On 2 June 2022 SB received the Minute of Agreement in draft from Scottish Divorces Online. MB demanded he amend the date of separation to 6 September 2021. He asked her why and she provided him with no reason. The parties signed and dated the agreement and returned it.

[109] On 3 June 2022 SB printed off the document and went over it line by line before meeting with their elder son to witness it. After they all signed it, the Minute of Agreement was posted off by recorded delivery and officially registered on 7 June.

[110] In cross-examination SB accepted that he had sent a text message to MB in 2021 saying "That's your car ready, that'll be £30 for parts and a BJ for my time." with a smiley face emoji at the end. He accepted that was a reference to receiving oral sex from MB but maintained that was just his sense of humour and he would make similar comments to work colleagues. He denied that it was disrespectful to send a message to his wife asking for oral sex after separating from her for seven years.

[111] He accepted there was a photograph of MB sitting on his knee in 2021 and a photograph of him in the hot tub in 2021, as well as a photograph of the parties at a quad biking event in 2021. He denied those photographs contradicted that there was a bad atmosphere at that time or that the parties were no longer living together as husband and wife. He conceded that in 2015 he had taken MB to and from hospital in relation to a skin condition. He accepted in 2017 he had taken her to and from hospital and visited her there. He accepted that he had helped her get a new car in October 2020. He denied that supported what a married couple did for each other and maintained that was just something that normal human beings would do for anyone else. He denied watching television with MB. He denied that MB was doing his laundry, even though he had discovered she had washed his gilet.

[112] SB denied that it was a bizarre reaction to say that things became too much for him and he developed a physical and mental breakdown in 2017 for a marriage where parties had already called it a day three years ago. He denied that he had hoped the marriage could be salvaged and they carried on. SB denied that taking umbrage at a conversation between MB and her friend in October 2018 contradicted that the parties had separated for four years. SB denied that his surprised reaction in 2022 to MB eating food after a verbal altercation was an indication that they were still in a relationship at that time.

[113] SB conceded there was an entry in his medical records dated 6 January 2017 indicating that his wife had urged him to seek help. He conceded he had described the relationship as good at that time. He conceded that the GP recorded he would ask his wife to make an appointment for him. SB denied that was typical of a married couple living together and supporting each other and indicated he had just said that to the doctor so that he did not have to come back. He conceded that his GP records showed that he did go back to the GP a month later in February 2017, when it was noted that his wife had noticed he was less grumpy and he reported no domestic problems.

[114] SB denied that MB suffered from fragile mental health but conceded that he was not medically qualified in that area.

[115] When SB won the night in a hotel in December 2019, he conceded that he shared a double bed with MB but maintained that they did not have sex and did not even kiss or cuddle or hold hands. He accepted he had dinner with MB that evening and took her to Costco the next day.

[116] SB accepted he had signed a separation agreement indicating a date of separation in September 2021 rather than December 2014 as he claimed. He had originally inserted September 2019 in the document and then changed it to 2021 under duress. He conceded that that was a lie and that he was seeking to enforce an agreement based on a lie. He had not spoken to a solicitor about the consequences of a relevant date and the impact on matrimonial property until after the minute of agreement had been completed and registered.

Evidence of defender's other witnesses**HB**

[117] HB swore an affidavit dated 16 October 2023 which she elaborated upon in oral evidence. She was the mother of SB and was retired.

[118] The relationship between the parties became quite stormy after the children were born. She noticed MB was often curt and bad tempered with her son for no apparent reason. MB would openly display her anger towards her son even at family gatherings.

[119] MB very seldom did anything in or around the house and SB very much looked after her. Things in the relationship had started to sour gradually but things sped up very quickly towards the end. The date of separation was definitely long before June 2022 when MB left the matrimonial home. She remembered an occasion when her husband was diagnosed with cancer and went to see their son to explain the news. They knocked on the door and walked in and MB was there with one of her friends. SB was in his bedroom in tears and seemed at the end of his tether.

[120] In cross-examination HB accepted that her son used to work away five days per week and she did not see the parties very often. She accepted she was not a regular visitor to the marital home until 2019. She thought the relationship broke down when her husband had cancer in 2014. She later conceded that the cancer diagnosis was spring 2017. She denied that what she meant by things speeding up towards the end was a reference to things speeding up in 2021 into 2022. She knew that the parties had split their bank account before that. She thought it was common courtesy for two parties living in the same house to notify the other if they were going on holiday and that MB ought have done so when she went to New York.

[121] HB conceded that she could not say on oath that the parties separated in 2014.

Elder son

[122] The parties elder son swore an affidavit dated 20 October 2023 which he elaborated upon in oral evidence. He was 37 years old at the time of the proof and was the parties' elder son. He was employed offshore as a rigger.

[123] He thought that the relationship between his parents had been quite rocky for at least a few years, going back as far as 2012 or 2013 when he started to notice things going wrong. He thought that his Mum moved into the spare bedroom around 2017. Prior to 2017 he hoped things would get better. He really started to notice that the parties drifted apart around winter 2018. He thought the final nail in the head for his parents was when his father told him he overheard a conversation his mother had with her friend before her trip to New York saying that she was going to take him for all he had.

[124] At Christmas 2021 he and his partner visited his parents but his mother stayed in her room.

[125] When his parents broke up, his father wanted to do the separation as amicably as possible so he made an offer to buy her out of the house. He thought that was the best way forward for them both because they were living separate lives for so long.

[126] In cross-examination he accepted the parties had spent time together at a go karting event in August 2021. He had persuaded MB to come.

[127] He accepted that the trip to New York was the straw that broke the camel's back.

[128] He was put in an awful position witnessing the Minute of Agreement. He did not know why MB wanted to change the date, she was just adamant.

Conclusions from the evidence

[129] I found the pursuer MB to be a reasonably credible and reliable witness. Though she believed that she lived with SB as a married couple until she left the marital home on 22 June 2022, with the benefit of hindsight, she acknowledged that her marriage had been in difficulty from around August 2021 and had really started to go downhill around the time of her trip to New York in May 2022. Though she had hoped that her marriage could be saved, it was evident on her return from New York that it could not. She was also candid that her drinking became more frequent in the latter part of 2021 and that she had suicidal thoughts in December 2021. MB conceded that her cooking was not the best and praised the cooking skills of SB. She accepted she did spend money on household items such as luxury bedding etc.

[130] By contrast, I did not find the defender SB to be a credible witness. Though he initially gave evidence that after 2014 he would only see MB once or twice in the evenings through the glass door they had in the living room if she was in the kitchen getting food or drink, he later conceded that he had taken MB to hospital in 2015 and 2017; shared a double bed with MB in a hotel in Aberdeen in December 2019; helped her buy a car in October 2020; gone on a family day out quad biking in August 2021; and joked about receiving oral sex in 2021. His answers to questions in cross examination were at times evasive. At other times, he spoke at length about irrelevant matters despite my repeated explanations to him that the court was only concerned with determining the relevant date, for example criticising MB's cooking and gardening skills. I did not accept his evidence that he and MB were simply housemates from December 2014 onwards, being generally civil to each other. I did not accept that his sharing of a double bed with MB during a trip to Aberdeen in 2019 was entirely platonic. I did not accept his evidence that his text message joking about receiving

oral sex in 2021 was just his sense of humour and that he would make similar comments to work colleagues. His reactions to arguments and his expectations of MB subsequent to 2014 contradicted the parties having separated in December 2014. His own evidence demonstrated that the decision to remove MB from the joint bank account in December 2014 was due to his concerns about her overspending, rather than the parties deciding to separate.

[131] I found all of the other witnesses to be credible and reliable overall. HB struggled to remember some dates but was able to tie them to significant life events, such as her husband's cancer diagnosis. It was clearly distressing for the parties' sons to give evidence but both of them answered the questions put to them and made concessions where appropriate.

Legislation

[132] Section 10 of the Family Law (Scotland) Act 1985 provides:

Sharing of value of matrimonial property.

- (1) In applying the principle set out in section 9(1)(a) of this Act, the net value of the matrimonial property or partnership property shall be taken to be shared fairly between persons when it is shared equally or in such other proportions as are justified by special circumstances.
- (2) Subject to subsection (3A) below, the net value of the property shall be the value of the property at the relevant date after deduction of any debts incurred by one or both of the parties to the marriage or as the case may be of the partners –
 - (a) before the marriage so far as they relate to the matrimonial property or before the registration of the partnership so far as they relate to the partnership property, and
 - (b) during the marriage or partnership,which are outstanding at that date.

- (3) In this section “the relevant date” means whichever is the earlier of—
- (a) subject to subsection (7) below, the date on which the persons ceased to cohabit;
 - (b) the date of service of the summons in the action for divorce or for dissolution of the civil partnership.

...

- (7) For the purposes of subsection (3) above no account shall be taken of any cessation of cohabitation where the persons thereafter resumed cohabitation, except where the persons ceased to cohabit for a continuous period of 90 days or more before resuming cohabitation for a period or periods of less than 90 days in all.

[133] Section 27(2) of the Family Law (Scotland) Act 1985 provides:

27 Interpretation

...

- (2) For the purposes of this Act, the parties to a marriage shall be held to cohabit with one another only when they are in fact living together as man and wife.

Authorities

[134] I was referred to the following authorities:

Bain v Bain 2008 Fam LR 81;
Banks v Banks 2005 Fam LR 116;
Brown v Brown 1998 Fam LR 81;
HS v FS 2015 S.C. 513;
McLeish v McLeish 2022 S.L.T. (Sh Ct) 67; and
 Clive, *The Law of Husband and Wife in Scotland* (4th edn, 1997), pp. 401 - 402.

[135] Parties were agreed that in light of the authorities, the determination of the relevant date was a matter of fact, depending on the particular circumstances of a given case. There was no fixed check list and no one factor was determinative. The intention of the parties and any communication of them to each other may be relevant factors in the equation.

Submissions for the pursuer

[136] The pursuer's agent adopted his written submissions, which he elaborated upon in oral submissions. On the balance of probabilities the relevant date was not December 2014. The evidence supported a more realistic and logical timeline between September 2021 and May 2022, failing which March 2022 when SB started to do some internet research into a simplified divorce.

[137] The parties' joint mortgage remained the same, they lived in the same home and their insurance remained the same. They socialised as a couple until around August 2021. There was sexual intimacy continuing between the parties until August 2021.

[138] Had there been a genuine separation in December 2014, SB would likely have inserted that date in the Minute of Agreement. Originally he had it at 2019 before altering it to 2021 and he now claimed it was 2014. He was attempting to have his cake and eat it.

[139] SB's reactions to certain episodes after December 2014 were not proportionate or legitimate behaviour of someone separated from his wife. He remembered sitting in his garage feeling hurt after another altercation in early 2022. He expected to be told about his wife's trip to New York in May 2022. Life would simply not play out like that if the couple had already separated for eight years.

[140] There was a significant amount of variance between the parties' version of events. The assessment of credibility and reliability of witnesses was a matter for the court. Where the parties' evidence was in conflict, MB should be preferred. SB's GP records noted him as having reported to his GP in January 2017 that his relationship with MB was good and that she would arrange a follow up appointment for him. That was an example of the supporting each other as husband and wife. The removal of MB from the joint bank account could not be looked at in isolation.

Submissions for the defender

[141] The defender's agent adopted her written submissions, which she elaborated upon in oral submissions. No two marriages were the same and each case required to be considered on its own facts. Consideration needed to be given to an obvious or radical alteration in the relationship. MB admitted that being removed from the joint bank account was a significant change from what had operated previously.

[142] MB accepted it was possible for housemates to have joint memberships together such as Costco and for car insurance to be in both names. Neither suggested the people involved were a couple. MB accepted she would like the assistance of SB on matters she could not do herself, like arrangements for a car. It was not illustrative of a continuing relationship.

[143] MB accepted she had fallen out with her elder son. The facts she put forward were different to those put forward by him. That affected her credibility and reliability.

[144] AW was unfairly critical of SB given she did not know him. Similarly, Annette Fowler was unfairly critical of SB given she did not know him and had never met him.

[145] The parties' younger son was neither credible nor reliable. He did not have a good relationship with his Dad and admitted to having fallen out with him. He was not impartial. He accepted separate couples could live in the same house.

[146] SB was credible and reliable. He answered all questions fully, albeit sometimes with emotion. Whilst at times he felt the need to give more information than he was being asked for, that may have been due to nerves and emotion running high on the day.

[147] The marriage had been in difficulty as far back as 2009. The holiday in December 2014 was the last time SB was intimate with his wife. It was clear MB found separation and life after separation from SB difficult. He wanted what was best for her and wanted to ensure she was financially secure.

[148] December 2014 was the time when a radical change in the parties' relationship occurred. The bank account was returned to SB's sole name and MB removed herself to the spare room. The factors suggesting the parties were residing as husband and wife post 2014 were circumstantial, done to aid general civility between the parties or outwith their control. Their actions could be seen as those of housemates.

[149] In the event that parties were unable to agree on whether the settlement was fair and reasonable after determination of the relevant date, a further proof would be required in terms of the pursuer's crave for setting aside the Minute of Agreement. However, parties would require time to consider the figures and arguments available.

Decision

[150] There was very little that the parties could agree upon in this case. On the one hand, MB presented a picture of a long marriage which limped along in its final years. On the other hand, SB presented a picture of a marriage that ended in 2014, after which the parties lived as housemates for almost eight years.

[151] In light of my findings on credibility and reliability, I preferred the evidence of the pursuer MB. Looking at the evidence objectively, I considered that the parties cohabited until at least August 2021, when there was evidence of them socialising as a family and having sufficient sexual intimacy that SB felt comfortable joking about receiving oral sex from MB in exchange for sorting out her car repairs.

[152] December 2021 was clearly a difficult time for MB and I considered that between December 2021 and June 2022, the parties' relationship was, similar to the situation in *Brown v Brown*, in a poor and declining condition. While SB was hostile to MB during Christmas 2021, thereafter the parties continued to communicate with other, share resources

and support each other into 2022. SB's evidence of being upset after a verbal altercation and worrying about MB's reaction was at some point in early 2022. I therefore determined that the parties were still cohabiting after December 2021 and into early 2022.

[153] It was not possible to ascertain the precise dates when: (i) SB discovered that MB was going to New York on a girls' holiday in April 2022; (ii) he overheard MB saying on the phone to a friend that as soon as she returned from her girls' holiday, she intended to leave him; (iii) SB told MB she was no longer permitted to use the garden cabin and confiscated the spare keys; and (iv) SB told MB the marriage was over. They all took place between in early 2022. MB acknowledged that SB told her the marriage was over before her trip to New York in May 2022 and though she hoped the marriage could be saved, on her return from New York things took a turn for the worse. The parties discussed financial arrangements on divorce as soon as MB returned from her trip to New York in May 2022. I therefore determined that the parties ceased to cohabit prior to her trip to New York in May 2022.

[154] SB indicated that in March 2022 he started to do some internet research into a simplified divorce and that the parties talked about a simplified divorce in early March 2022. On 18 March 2022 SB took the step of purchasing a separation agreement online. Looking at matters objectively, I thought it was realistic to conclude that the parties ceased to cohabit on 18 March 2022 when SB took that step. In my view, that step was an obvious and radical alteration in the relationship. It demonstrated the intention of SB to end the marriage at around the same time that MB was overheard telling her friend that she intended to leave SB. It also followed some discussion between the parties about simplified divorce. Though the parties did not discuss financial arrangements on divorce until her return from New York in May 2022, I considered that the parties has ceased to cohabit prior to that point. On

the balance of probabilities, I considered that they ceased to cohabit as husband and wife from 18 March 2022 onwards.

Further procedure

[155] Having determined the relevant date, parties needed time to consider whether the settlement agreement was fair and reasonable. I fixed a procedural hearing in order to determine whether a further proof would be required in relation to the pursuer's crave for the setting aside of the Minute of Agreement and reserved expenses meantime.