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IN THE HIGH COURT OF JUSTICE OF NORTHERN IRELAND

FAMILY DIVISION

BETWEEN:

Irene Carol Winifred Potts

Petitioner;

and

Robert James Potts

Respondent.

Miss O'Grady KC and Miss Logan (instructed by John Hoy, Son & Murphy, Solicitors for the Petitioner)
The Respondent appeared on his own behalf

Master Bell

INTRODUCTION

[1] When it comes to dividing assets after divorce, some litigants decide to appear on their own behalf. Sometimes this is based on the perception that they cannot afford to employ a lawyer to act on their behalf and, from time to time, that perception will be entirely correct and that decision unavoidable. Sometimes, however, that decision to represent oneself can be very costly. This may be one of those occasions.

[2] On the first day of hearing the husband was initially represented by Mr Toner KC and Miss Clarke. At the opening of the hearing, however, Mr Toner applied for leave for his instructing solicitor to come off record and he referred me to the decision of *Re TL* [2007] NIFam 8, a decision by Morgan J (as he then was) which set out the propositions which should inform the

approach to applications to come off record particularly where they are made late in the day.

[3] As he was present in court, I asked the husband whether this was an application which he consented to and he replied that it was. He stated that he could no longer afford to retain counsel. I emphasised the desirability of his being legally represented but he was insistent and so I reluctantly acceded to counsel's application. I asked the husband if he wished to appoint alternative representation but he declined to do so,

[4] As Thorpe J observed in *F v F (Ancillary Relief: Substantial Assets)* [1995] 2 FLR 45, ancillary relief proceedings are not purely adversarial. Likewise, in *Prest v Prest and others* [2013] 4 All ER 673 Lord Sumption said of ancillary relief proceedings:

> "… the proceedings although in form adversarial have a substantial inquisitorial element."

[5] Rule 2.64(5) of the Family Proceedings Rules states that at an ancillary relief hearing the Master shall investigate the allegation and may take evidence orally and may at any stage of the proceedings, whether before or during the hearing, order the attendance of any person for the purpose of being examined or cross-examined, and order the discovery and production of any document or require further affidavits. Nevertheless, despite the use of the word "investigate" in the Rule, there remains a significant adversarial dimension to the proceedings.

[6] Horner J (as he then was) described the role of the judge in adversarial proceedings in *Smith and another v Black and another* [2016] NICh 16:

> "It is not the role of the judge to assist one side in the common law system, even if that party has no legal representation or legal training, either because the party cannot afford legal assistance or cannot secure help from the Bar's Pro Bono Unit or simply because that party does not want any legal help. The judge has to tread carefully in the assistance he offers to a personal litigant. For the judge to be seen to be assisting one of the parties is to compromise his or her neutrality and to leave the judge open to accusations of bias. It may be difficult to draw the line over which a judge should not step in offering assistance, but it is a line which must be drawn if the adversarial process is not to be subverted."

[7] However in *Clarke v Clarke* [2022] EWHC 2698 (Fam) Mostyn J drew a distinction between purely adversarial proceedings and quasi-inquisitorial proceedings:

> "It has been stated time and again, for example in *Barton v Wright Hassal LLP* [2018] UKSC 12, that no special concessions or assistance should be given to litigants-in-person. In that case at [18] Lord Sumption stated:
>
> > "Any advantage enjoyed by a litigant-in-person imposes a corresponding disadvantage on the other side, which may be significant if it affects the latter's legal rights."
>
> On the other hand, in a financial remedy case the court exercises a quasi-inquisitorial function. It would be a dereliction of its inquisitorial duty if it allowed a case to be decided under procedural rules and customs which prevented a just decision being rendered on a particular set of facts because a litigant-in-person has, for whatever reason, chosen not to advance the relevant arguments applicable to those facts."

[8] In this application for ancillary relief the husband and the wife had been married for approximately 27 years. Their four children were all aged over 18. There appeared to be no inheritance issues which might affect the asset division. Nor were there health issues to be taken into account. Arguably, their needs were equal. Apart from one factor, that of conduct, everything else pointed to an equal division of the assets.

[9] Counsel on behalf of the wife had prepared, and served, a schedule of twenty-three items of conduct which she argued should be taken into account by the court under Article 27(2)(g) of the Matrimonial Causes (Northern Ireland) Order 1978 as it would be inequitable not to do so.

[10] A difficulty in the case before me, however, was not simply an unrepresented litigant, nor as sometimes occurs, an unrepresented litigant who wished to stray into irrelevant matters, but rather an unrepresented litigant who failed to engage with the evidence which the wife placed before the court, gave no evidence himself, and called no witnesses. He had sworn an affidavit which presented a different perspective on certain of the factual allegations. However, I could not take this into account on the basis that he was present in court and could have given evidence, and it would have been unfair simply to accept his affidavit as his evidence. To have done so would have had the effect of depriving the wife of the opportunity of challenging his evidence through cross-examination by counsel.

[11] I explained to the husband that the critical issue in the case was the items of alleged conduct which the wife's counsel had served. Depending on whether any, or how many, of those items of conduct the court was satisfied in relation to, and took into account, would determine how far the asset division would move away from a 50/50 split of the assets. I invited the husband to cross-examine his wife but he declined to do so. The only evidence which the court was left with was therefore the evidence offered on behalf of the wife.

[12] The situation before me was not therefore that referred to by Mostyn J in *Clarke v Clarke*.

[13] Simply that the wife said that the complained-of conduct took place does not of course mean that her evidence was automatically accepted. The obligation that a court must assess credibility is one of the heaviest responsibilities that a court has and findings of credibility should not be made lightly. A classic articulation on the assessment of credibility is that by Lord Pearce in *Onassis v Vergottis* [1968] 2 Lloyds Rep 403.

> "Credibility' involves wider problems than mere 'demeanour' which is mostly concerned with whether the witness appears to be telling the truth as he now believes it to be. Credibility covers the following problems. First, is the witness a truthful or untruthful person? Secondly, is he, though a truthful person, telling something less than the truth on this issue, or though an untruthful person, telling the truth on this issue? Thirdly, though he is a truthful person telling the truth as he sees it, did he register the intentions of the conversation correctly and, if so has his memory correctly retained them? Also, has his recollection been subsequently altered by unconscious bias or wishful thinking or by over much discussion of it with others? Witnesses, especially those who are emotional, who think that they are morally in the right, tend very easily and unconsciously to conjure up a legal right that did not exist. It is a truism, often used in accident cases, that with every day that passes the memory becomes fainter and the imagination becomes more active. For that reason a witness, however honest, rarely persuades a Judge that his present recollection is preferable to that which was taken down in writing immediately after the accident occurred. Therefore, contemporary documents are always of the utmost importance. And lastly, although the honest witness believes he heard or saw this or that, is it so improbable that it is on balance more likely that he was mistaken? On this point it is essential that the balance of probability is put correctly into the scales in weighing the credibility of a witness. And motive is one aspect of probability. All these problems

> compendiously are entailed when a Judge assesses the credibility of a witness; they are all part of one judicial process. And in the process contemporary documents and admitted or incontrovertible facts and probabilities must play their proper part."

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[14] In this particular case there were no matters which undermined the credibility of the wife's evidence and I therefore accepted it. The fact that the husband did not in any way seek to challenge the evidence of the wife as to whether or not the complained-of conduct took place, followed by a finding of the court that the wife's evidence is credible, does not, of course, inevitably lead to the conduct being taken into account. The taking into account of conduct under Article 27(2)(g) involves a two-stage process. Firstly, the court must be evidentially satisfied on the balance of probabilities that the complained-of conduct has been proved to have taken place. Secondly, if the conduct has been so proved, the court must then assess whether that conduct requires to be taken into account under Article 27(2)(g) or disregarded. This is not to say that the court must carry out each step of the two-stage process sequentially. There may be cases where the court may decline to hear evidence in relation to certain conduct allegations because the court determines that, even if they were factually proven, they would not reach the high statutory threshold for admissibility. This was the position for example in *McCartney v McCartney* [2008] EWHC 401 (Fam), where Bennett J commented in his judgment:

> "I am satisfied that the wife's attempt to introduce the alleged conduct of the husband prior to the end of April 2006 should be disallowed. It would take many days, if not weeks, to hear and decide. It can make no difference to the result. It plainly is not conduct which it would be inequitable to disregard."

Mostyn J adopted a similar position in *AA v NA & Ors* [2010] EWHC 1282 (Fam):

> "Even though there is a statutory imperative to take into account conduct where it would be inequitable to disregard it, the court will strike out allegations of conduct where it can be satisfied that even if proved it would make no material difference to the result."

[15] There is therefore much to commend the approach adopted by Miss O'Grady in this case of serving a concise schedule of alleged conduct so that the court can take a view as to whether evidence should be led in respect of allegations or not. Because of this schedule, the court was able to direct the husband's attention to it and explain to him that he should view it,

metaphorically speaking, as something akin to a charge sheet in criminal proceedings. The allegations were what the wife sought to prove against the husband and she would be arguing that, if any of those events were proved, a greater portion of the marital assets should be awarded to her. After explaining this to the husband, I invited him to challenge the contents of the schedule of conduct by giving evidence or through cross-examination. He indicated that he would not do so.

[16] I note in parenthesis that, in England and Wales, Peel J has gone much further than simply encouraging the filing of a schedule of alleged conduct. In *Tsvetkov v Khayrova* [2023] EWFC 130 he wrote:

> "A party who seeks to rely upon the other's iniquitous behaviour must say so at the earliest opportunity, and in so doing should; (a) state with particularised specificity the allegations, (b) state how the allegations meet the threshold criteria for a conduct claim, and (c) identify the financial impact caused by the alleged conduct. The author of the alleged misconduct is entitled to know with precision what case he/she must meet."

Although this has never been the practice in this jurisdiction, it again has much to commend it. Such a practice would bring to an end any temptation for counsel to ask questions of a witness in the witness box in the hope of eliciting vague answers in respect of bad conduct by the other party which might influence the court on a subliminal basis. It would require counsel in her consultation with the client to define exactly what the client's conduct allegations were and to clearly focus her mind on whether the allegations met reach the statutory standard.

[17] The husband's approach, adopted both in court and in his two written submissions filed after the hearing, was not to entirely bury his head in the sand. He had his accountant with him in court for some of the hearing. He made certain proposals to the wife's legal team to attempt to settle the proceedings, but these were considered insufficient to resolve the proceedings. He knew what he wanted to achieve – retaining his home and his business – and requested that outcome. However, despite warnings from the court, he utterly failed to grapple with the central issue of the conduct allegations made by the wife.

THE ASSETS

[18] The assets in this case consist of the following:

(a) A property at No. 41 Dxxxx Road.
(b) A property at No. 3b Txxxx Road
(c) Lands in Folios AR 64xxxx and AR 4xxxx

(d) 5 acres of land adjacent to 41 Dxxxx Road
(e) The family company
(f) The new haulage business set up by the husband in 2019.
(g) Various bank accounts
(h) Various shares
(i) Two small pensions, one of which in in payment

The unchallenged valuations put forward on behalf of the wife were that the parties' net assets amounted to £2,002,143.

THE EVIDENCE

[19] Because the evidence was unchallenged, only a brief summary of it is necessary. First of all, I received evidence from the wife. She explained that she had had a 50% shareholding in the family business and been the company secretary. Her duties included dealing with the accounts, VAT, and North and South banking. These duties were in addition to her parental responsibilities of raising of the couple's children. After the husband began a relationship with Judith Boyd, who is qualified as an accountant, and the parties separated, the husband gave the job of company secretary to Ms Boyd.

[20] The wife outlined that, after their separation, her husband had begun a new corporate entity which was in direct competition with the family business which she and her husband had run together, doing exactly the same business as the existing company. Her evidence was that there had been no other reason to create the new corporate entity except that it did not have her name on the roster of shareholders.

[21] The wife gave evidence that the husband had failed to comply with his discovery obligations. He refused to give permission to his accountant that the accountant could provide information to Webb & Co to allow them to prepare a report in relation to the value of the business. Things only changed each time the wife's solicitor threatened to bring the husband to court in respect of his failure to make proper discovery.

[22] The wife also gave evidence at length in respect of the breaches of the Mareva injunction whereby the husband made a considerable number of payments and withdrawals from company funds without first having sought and received her agreement. These amounted to some £33,382 in terms of cash taken out and a further £9,868 in terms of card payments for personal expenditure. In addition, there appeared to be direct debits for the benefit of the husband in the amount of £42,845. By way of comparison the wife gave evidence that she had not found it easy to live on £300 per week and does not live extravagantly. When she asked her husband for additional monies to cover matters such as car servicing or legal costs, these would usually have been refused by her husband.

[23] After I heard from the wife, I received evidence from Johnny Webb of Webb & Co. Mr Webb had prepared four reports. He concluded that the family business was now worth some £1.141 million.

[24] During Mr Webb's evidence, the husband did engage with a sparse number of brief questions in cross-examination. However, the answers he extracted did not lead to any change in Mr Webb's conclusions.

[25] In the absence of any evidence from the husband or any witness on his behalf, and in the absence of any cross-examination which undermined the evidence that I had heard, and in the absence of any finding by me that the evidence offered by either of the witnesses was lacking in credibility or inherently improbable, I was obliged to accept the evidence received as truthful and accurate. My findings of fact therefore mirror what was asserted in the schedule of conduct filed with the court and attested to by the wife in the witness box.

[26] While addressing the matter of evidence, I note that in the submissions of counsel, which were filed after the hearing had concluded, counsel stated:

> "Since the matter was last before the court, the wife has learned that the husband purchased a mobile home in Portrush at a cost of £110,000. If true, this causes her great frustration and supports her belief that the husband has access to available capital and finance when it suits him."

I take this opportunity to emphasise that evidence can only come from witnesses giving oral evidence, or whose affidavits have been admitted under Order 38 Rule 2, or from documentary material properly admitted by the court under Rules and legislation, or from facts properly taken into account by way of judicial notice. What counsel says can never amount to evidence (unless of course they abandon their role as counsel and go into the witness box to provide oral evidence). I am therefore obliged to disregard the reference by counsel to the possible purchase of a mobile home.

WIFE'S SUBMISSIONS

[27] Given the total assets involved in the case, and the length of the marriage, the wife's position was that the assets ought to be divided on the basis of the sharing principle. However, the submission on her behalf was that a significant adjustment ought to be made in relation to the conduct set out in the schedule of conduct served by her legal team.

[28] The wife therefore sought a sum of £1,178,592 out of the total of £2,002,143.

HUSBAND'S SUBMISSIONS

[29] After various offers had been made by him but rejected by the wife, the husband's written submissions to the court suggested the following outcome. He asked the court that he retain his dwelling (3b Txxxx Road) and retain his business.

[30] In terms of what the husband was willing to give the wife, he agreed to give her the property 41 Dxxxx Road together with a cash sum of £283,592. This came to a value of £439,564. In addition, the husband was willing to give the wife a further £500,000 which would, however, only be payable over a period of 5 years (in annual instalments of £100,000) and which would be secured against the shares in the Company.

[31] Hence the husband offered the wife £939,564 a sum which does not even reach a 50-50 division of the assets.

[32] The husband states in his written submissions that he wished to reach a fair settlement which would allow both him and his wife to move on with their lives. In his mind, this means that he retains his home and his business. His reason for retaining his home is understandable. He lives there with his daughter and with her son who suffers from spina bifida and hydrocephalus. He considers that it is important that they have a stable homelife and he believes that residing in that property provides this for them. He also indicated that he had an emotional connection to his business. He stated that his father had started the business in the 1970s and he himself had started working in it when he was aged 17. He has sought to develop it ever since.

THE ARTICLE 27 FACTORS

Conduct

[33] Because conduct is the critical factor in this particular case, I shall begin with this factor. In *OG v AG* [2020] EWFC 52 Mostyn J summarised the position with regard to conduct in the following, often cited, paragraphs :

> "34. Conduct rears its head in financial remedy cases in four distinct scenarios. First, there is gross and obvious personal misconduct meted out by one party against the other, normally, but not necessarily, during the marriage. The House of Lords in *Miller v Miller* [2006] UKHL 24, [2006] 2 AC 618 confirmed that such conduct will only be taken into account in very rare circumstances. The authorities clearly indicate that such conduct would only be reflected where there is a financial consequence to its impact. In one case the husband had stabbed the wife and the wound had

impaired her earning capacity. The impact of such conduct was properly reflected in the discretionary disposition made in the wife's favour. Mrs Miller alleged that Mr Miller had unjustifiably ended the marriage discarding her in favour of another woman. Therefore, she argued that Mr Miller should not be permitted to argue that their marriage was short. This argument was rejected by the House of Lords which held that the conduct in question, although greatly distressing to Mrs Miller, should not find independent reflection in the court's decision.

35. The conduct under this head, can extend, obviously, to economic misconduct such as is alleged in this case. If one party economically oppresses the other for selfish or malicious reasons then, provided the high standard of "inequitable to disregard" is met, it may be reflected in the substantive award.

36. Second, there is the "add-back" jurisprudence. This arises where one party has wantonly and recklessly dissipated assets which would otherwise have formed part of the divisible matrimonial property. Again, it will only be in a clear and obvious, and therefore rare, case that this principle is applied. In *M v M* [1995] 2 FCR 321 Thorpe J found that the husband had dissipated his capital by his obsessive approach to the litigation, which had included starting completely unnecessary proceedings in the Chancery Division. That dissipation was reflected in the substantive award. Properly analysed, that decision can be seen as a harbinger of the add-back doctrine rather than a sanction reflecting a moral judicial condemnation.

37. In this case the sums loaned by the husband to TT will all be added back to the matrimonial pot at full value. The husband does not resist this.

38. Third, there is litigation misconduct. Where proved, this should be severely penalised in costs. However, it is very difficult to conceive of any circumstances where litigation misconduct should affect the substantive disposition.

39. Fourth, there is the evidential technique of drawing inferences as to the existence of assets from a party's conduct in failing to give full and frank disclosure. The taking of account of such conduct is part of the process of computation rather than distribution. I endeavoured to

> summarise the relevant principles in *NG v SG (Appeal: Non-Disclosure)* [2012] 1 FLR 1211, which was generally upheld by the Court of Appeal in *Moher v Moher* [2019] EWCA Civ 1482. In that latter case Moylan LJ confirmed that while the court should strive to quantify the scale of undisclosed assets it is not obliged to pluck a figure from the air where even a ballpark figure is in fact evidentially impossible to establish. Plainly, it will only be in a very rare case that the court would be unable even to hazard a ballpark figure for the scale of undisclosed assets. Normally, the court would be able to make the necessary assessment of the approximate scale of the non-visible assets, which is, of course, an indispensable datum when computing the matrimonial property and applying to it the equal sharing principle."

[34] Although often cited, what Mostyn J stated is not without difficulty. It may be argued that Mostyn J's comment, "The authorities clearly indicate that such conduct would only be reflected where there is a financial consequence to its impact" is an overstatement. In *S v S (Non-Matrimonial Property: Conduct)* [2007] 1 FLR 1496 Burton J observed that there were "only rare cases" reported where courts had taken into account non-financial conduct. This rarity is underlined by the fact that counsel had only been able to refer him to 13 such authorities over a 27 year period. In *H v H (Financial Relief: Attempted Murder As Conduct)* [2005] EWHC 2911 (Fam) Coleridge J dealt with a case where the husband had attempted to murder the wife by stabbing her:

> "[44] How is the court to have regard to his conduct in a meaningful way? I agree with Ms Jacklin that the court should not be punitive or confiscatory for its own sake. I, therefore, consider that the proper way to have regard to the conduct is as a potentially magnifying factor when considering the wife's position under the other subsections and criteria. It is the glass through which the other factors are considered. It places her needs, as I judge them, as a much higher priority to those of the husband because the situation the wife now finds herself in is, in a very real way, his fault. It is not just that she is in a precarious position, which she might be for a variety of medical reasons, but that he has created this position by his reprehensible conduct. So she must, in my judgment and in fairness, be given a greater priority in the share-out."
>
> [45] Obviously, as well as the conduct impacting on the wife's life, it has had direct effects. It is, as I say, not only the backdrop to the s 25 exercise; some of the consequences that will impact on her life are these. First, it has very seriously

> affected her mental health. Who knows what the long-term will bring, or how it will affect her life in the future? Secondly, she has to move home and uproot from the area where she has lived; not only herself but her children and her parents. Thirdly, it has more or less destroyed her earning capacity, and in particular destroyed her much-loved police career. Fourthly, it may affect the children in years to come. Fifthly, she will receive no support from the husband, either financially in the next few years, or with the upbringing of the children. Sixthly, it may impact on her relationship with the man with whom she has been associating now for some 2 years. If she moves away, which she intends to do, he may not follow."

In so ruling, Coleridge J clearly took into account conduct which had consequences which were financial and consequences which were non-financial. Mostyn J's general summary of what the authorities indicate may not therefore be entirely correct.

[35] There is one other statement made by Mostyn J in *AG v OG* on the subject of conduct to which I should refer. Mostyn J stated:

> "Conduct should be taken into account not only where it is inequitable to disregard but only where its impact is financially measurable."

[36] As an unvarnished statement, this goes too far in my view. A hypothetical example is necessary to demonstrate this. Suppose a couple have one child, a baby. The marriage is at breaking point and, motivated by hatred, one spouse kills the baby in front of the other spouse. Should that conduct be taken into account in the asset division? In certain instances that conduct might be financially measurable. The grieving spouse may be off work for a considerable period of time and may require private mental health assistance to work through the devastating emotional impact. In other instances, the impact may be devastating but not financially measurable. Yet it is difficult to imagine that any court would fail to take account of such conduct whether its effect was financially measurable or not.

[37] When one reads Mostyn J's statement in context one understands the goal which he was attempting to achieve, namely to encourage lawyers and judges not to impose their own moral judgments on the behaviour of a particular spouse during the division of assets upon divorce. It is noteworthy that, as senior counsel, Mostyn J had earlier argued before Burton J in *S v S (Non-Matrimonial Property: Conduct)* [2007] 1 FLR 1496 that the legislative provision allowing the court to take conduct into account was a "moral test

involving no particular science." In a similar vein, some thirteen years later, he would judicially state in *OG v AG*:

> "71. Time was that when the court exercised a discretion in relation to ancillary relief it formed first and foremost a moral judgment. Therefore, in *Constantinidi v Constantinidi and Lance* [1905] P 253 Stirling LJ held that "in the exercise of every discretion which is vested in the [Divorce] Court, the Court should endeavour to promote virtue and morality and to discourage vice and immorality". The moral judgment that was formed in those days was almost always about sex. I have not located any judgment in the old era where financial dishonesty was independently penalised.
>
> 72. But times have changed. The financial remedy court is no longer a court of morals. Conduct should be taken into account not only where it is inequitable to disregard but only where its impact is financially measurable. It is unprincipled for the court to stick a finger in the air and arbitrarily to fine a party for what it regards as immoral conduct."

[38] Mostyn J's restriction on the circumstances where conduct can be taken into account has not met with universal approval. In *DP v EP (Conduct; Economic Abuse; Needs)* [2023] EWFC 6, Judge Reardon found that "too narrow an interpretation of s 25(g) would render the provision nugatory."

[39] Judge Reardon observed:

> "Recent cases where it appears that conduct without a financially measurable consequence has impacted on the distribution exercise are rare, but exist. In *K v L* [2010] EWCA Civ 125 the husband had been imprisoned for offences of sexual assault of the wife's grandchildren. Wilson LJ, as he then was, refused him permission to appeal a decision of Moylan J (as he then was) which had awarded him a minimal sum to meet his needs out of the wife's substantial resources. There were other factors that justified the low award in that case, but Wilson LJ nevertheless observed at the end of his judgment that:
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> > "On any view [the husband's] treatment of [the wife's] family was… so appalling and its legacy of misery has been so profound as plainly to have entitled the judge to reach what, in their absence, might well,

> notwithstanding the source of the wife's wealth and even his promise in 1993, have been an appealable determination." "

[40] Judge Reardon went on to find that:

> 'There must be some scope for conduct which has had consequences to be reflected in the ultimate division of assets, even where those consequences are not financially measurable. In this case, there has been a negative impact on H's overall financial position, even if it is impossible to determine what that has been.'

[41] In *Tsvetkov v Khayrova* [2023] EWFC 130 Peel J had a similar difficulty with the view of Mostyn J that in order to be taken into account, conduct had to be "financially measurable". Peel J opined:

> "A party asserting conduct must, in my judgment, prove:
>
> (i) the facts relied upon;
>
> (ii) if established, that those facts meet the conduct threshold, which has consistently been set at a high or exceptional level; and
>
> (iii) that there is an identifiable (even if not always easily measurable) negative financial impact upon the parties which has been generated by the alleged wrongdoing. A causative link between act/omission and financial loss is required. Sometimes the loss can be precisely quantified, sometimes it may require a broader evaluation. But I doubt very much that the quantification of loss can or should range beyond the financial consequences caused by the pleaded grounds. This is stage one.
>
> If stage one is established, the court will go on to consider how the misconduct, and its financial consequences, should impact upon the outcome of the financial remedies proceedings, undertaking the familiar s25 exercise which requires balancing all the relevant factors. This is stage two."

[42] In *Goddard-Watts v Goddard-Watts* [2023] EWCA Civ 115, subsequent to a consent order, it was found that the husband had, first, misrepresented his assets and, second, failed to make appropriate disclosure of likely significant capital accumulations in the foreseeable future. The wife appealed the order made. In the Court of Appeal Macur LJ stated:

"71. A supplementary bundle of authorities was consequently agreed and filed, including *Akintola v Akintola* [2002] 1 FLR 701; *Ezair v Ezair* [2012] 1 FLR; *H v H (Financial Relief: Attempted murder as conduct)* [2006] 1 FLR 990 and *OG v AG (Financial Remedies: Conduct)* [2021] 1 FLR 1105 (decided 29 July 2020). In summary, the principle and accepted view to be derived from these authorities is that the misconduct envisaged by section 25(2)(g) must necessarily be quantifiable in monetary terms rather than seen as a penalty to be imposed against the errant partner, and that the 'orthodox approach' to litigation misconduct is to be met by an award of costs. The case of *OG*, in which Mostyn J summarises the manner in which "conduct rears its head in financial remedy cases" had not been reported and was not cited in the latest Court of Appeal authority on the point, *TT v CDS* [2020] EWCA Civ 2015, decided in September 2020.

72. In *TT*, Moylan LJ acknowledged the "general approach is that litigation conduct within the financial remedy proceedings will be reflected, if appropriate, in a costs order. However, there are cases in which the court has determined that one party's litigation conduct has been such that it should be taken into account when the court is determining its award". Notably, however, the cases which he subsequently reviewed mostly concerned the dissipation of assets in unnecessary cost wasting exercises which depleted the available resources and predicated a departure from equality in allocating the remainder of the assets having regard to the section 25 criteria in the 1973 Act.

73. The husband relies upon these authorities to differentiate his fraudulent non-disclosure from the 'conduct' referred to in Section (2)(g). The wife makes clear that 'conduct' as such is not the foundation of her case but draws our attention to Coleridge J's judgment in *H v H* [2006] 1 FLR 990 that "the proper way to have regard to the conduct is as a potentially magnifying factor when considering the wife's position under the other subsections and criteria. It is the glass through which the other factors are considered"; at [44]. Further, although there are "numerous cases decided in relation to conduct" in the end they are so fact specific to provide very little guidance. The provisions of Section 25 "rules the day".

74. I agree with the husband that there is no direct financial consequence to his fraudulent misconduct so as to enable its

> monetary evaluation. However, I take the view that the husband's fraud is 'conduct' for the purpose of subsection 2(g) in that it provides 'the glass' through which to address the unnecessary delay in achieving finality of the wife's overall claim, including her unanticipated contribution to the welfare of the family post 2010. I make clear that I do not suggest that this necessarily means that she will receive an increased award, whether on the basis of a 'sharing' or 'needs' approach, but that she is entitled to seek to make her case on a blank page approach."

[43] It appears therefore that the Court of Appeal for England and Wales in *Goddard-Watts v Goddard-Watts* has left the door slightly more open to conduct being taken into account than Mostyn J pronounced in *OG v AG*.

[44] In the light of Macur LJ's comment that the provisions of section 25 (our jurisdiction's Article 27) "rules the day" it is useful to return to the seminal decision of *Miller v Miller; McFarlane v McFarlane* where Lord Nicholl's observations on the consideration of conduct were:

> "Parliament has drawn the line. It is not for the courts to re-draw the line elsewhere under the guise of having regard to all the circumstances of the case. It is not as though the statutory boundary line gives rise to injustice. In most cases fairness does not require consideration of the parties' conduct. This is because in most cases misconduct is not relevant to the bases on which financial ancillary relief is ordered today. Where, exceptionally, the position is otherwise, so that it would be inequitable to disregard one party's conduct, the statute permits that conduct to be taken into account."

[45] In my view therefore, an argument cannot be made that a valid purposive interpretation of Article 27(2)(g) is that Parliament intended to rule out the taking into account of conduct which may have been morally repugnant but was not financially measurable. Rather, Parliament simply left the door open for conduct to be taken into account if the conduct is such that it would be inequitable to disregard it. The discretion therefore appears to be wider than suggested by Mostyn J in *OG v AG*.

[46] Turning to the specific conduct alleged by the wife in this case, I am satisfied that there are a number of instances of conduct which have had a financial impact on the wife and which it would be inequitable not to take into account. I refer to the following portions of the wife's conduct schedule:

"(xi) When the husband removed a substantial amount of money from the bank account without her knowledge or agreement, the wife was forced to apply for a Mareva injunction in May 2019. O'Hara J granted a full injunction Order on 28 June 2019. This was not enough to dissuade the husband. Still, he breached the injunction Order by continuing to divert money and work away to his new company. The wife then had to bring committal proceedings in early 2020 and arising from those, on 7 February 2020, O'Hara J added additional clauses to his original injunction Order. Whilst the husband did cease trade of his new company following the committal proceedings, he has continued to flagrantly breach the other terms of the 7 February 2020 Order."

"(xii) Periodically, the wife had to make additional drawings from the company to cover holidays, Christmas and other necessities, including a car. Post-separation the husband refused to permit the replacement of the wife's car through the business, notwithstanding he continued to upgrade his vehicles, including a £70,000 Range Rover, post separation through the business. The wife's need for an update car was the subject of much solicitor's correspondence and was only agreed by the husband during the committal application in the High Court in February 2020."

"(xiii) Under the 7 February 2020 Order, the husband is not to make any withdrawals in excess of £2500 from the company bank account without the wife's written consent. These withdrawals are only to be in connection with the business. In fact, the husband has continued to make huge personal withdrawals from the company bank account. These withdrawals have escalated significantly since late 2021."

"(xiv) He has also written large cheques for new tarmac at the matrimonial home in April 2021 amounting to £25,200."

"(xv) Between late 2021 and early 2022, he has spent almost £12,000 from the company bank account on fine furnishings and expensive clothing. This expenditure comes after the accounts and records provided to Webb & Co. for the update company valuation. It appears the husband is recklessly spending and drawing on company funds with little thought for the wife or indeed, the future viability of the company."

"(xvi) Post separation, the husband had been taking £500 per week in wages – the additional £200 over and above the wife's £300 was accepted as covering the mortgage repayments and other outgoings on 41 DXXXX Road. Since August 2021 however, and once again ignoring the court's clear indication, the husband unilaterally increased his weekly wages to £750."

"(xix) In the years post separation, it had been customary for the wife to withdraw £3000 at Christmas with the husband doing the same. At Christmas 2019, 2020 and 2021, however, the husband refused to agree this payment to the wife and she has gone without."

"(xxii) Danske Bank company a/c [XXXX] - This is the main company bank account operated by [XXXX] Ltd. It is subject to the 7 February 2020 injunction Order. The husband is not permitted to withdraw £2500 without the prior consent of the wife, but he has serially breached this."

"(xxiii) The husband's spending and cash withdrawals from the company bank have been huge. Effectively he has been draining the company of money in breach of a High Court injunction and in an attempt to frustrate the wife's claims against the business.

- In January 2022, the husband withdrew £7750
- In February 2022 he withdrew £3435
- In March 2022 he withdrew £6234.50 "

"(xxv) As further evidence of his financial control over the family business, the husband has had a number of top of the range cars post separation, all paid for through the company and without consultation with the wife. His latest is a new Range Rover purchased in spring 2023. The husband also has a fishing boat and caravan with an estimated value of. £40,000. The parties have valuable paintings kept at TXXXX, which despite requests from the wife, the husband has refused to have jointly valued for the purpose of these proceedings. In contrast, the wife has a 7-year old Range Rover bought in or about 2020 on finance for £49,000 with a deposit of £8,000 from the sale of her old car. It is being paid off at £677.94 per month over 5 years as the husband refused to allow any shorter time than that."

> "(xxvi) The husband buys his cars through SJ Davidson Motors, where the wife also gets her car repaired and serviced. Yet again, in December 2022, the husband caused the wife embarrassment by not discharging her very modest bill which was sent to him to be paid via the Company at the same time a repair bill for his car was sent. He discharged his bill only, resulting in unnecessary charges for the wife's repairs. "
>
> "(xxvii) He refused to permit the previous valuer from Mallon & Co. entry to re-value the properties in early 2022, leading to the additional expense to the parties of having to engage a new estate agent, Maneely & Co."

[47] I consider that each of these instances of alleged conduct by the husband, adopted by the wife in her evidence and unchallenged by the husband either by cross-examination of the wife, or by his own direct evidence, or through submissions, are instances of conduct which have had a financial impact upon the wife and which it would be inequitable to disregard.

Financial needs of the child

[48] The parties have four children, each of whom are over the age of 18 and therefore there is no minor child of the marriage whose position falls to be considered.

Income and earning capacity

[49] The evidence before me was that both parties derive their income from the family business. The wife has an income of approximately £1285 per month. The husband draws an income far in excess of the wife's.

Financial needs, obligations and responsibilities of the parties

[50] The husband resides in the former matrimonial home with his new partner who effective took the wife's role as company secretary in the family business. The wife has had no settled accommodation since the parties separated some 11 years ago.

The standard of living enjoyed by the family before the breakdown of the marriage

[51] The parties enjoyed a comfortable standard of living during the marriage.

The age of each party to the marriage and the duration of the marriage

[52] The wife is aged 62 and the husband is aged 61. The marriage lasted 27 years until the separation.

Any physical or mental disability by the parties of the marriage

[53] There was no evidence that either party suffered from any such disability.

The contribution made by each of the parties to the welfare of the family

[54] The evidence before me was that the contribution made by each of the parties to the welfare of the family was equal.

Value of any benefit which by reason of dissolution of the marriage a party will lose

[55] This factor also does not arise for consideration in this case.

Other matters taken into account

[56] Article 27 of Order requires the court to have regard to 'all circumstances of the case'. There are therefore matters which do not fall within the ambit of Article 27(2) (a) to (h) but which may unquestionably be relevant in a given case.

CONCLUSION

[57] In the light of the evidence presented to the court, I consider that the wife should receive £1,150,000 and the husband should receive £852,143 from the total net assets of £2,002,143.

[58] In *M v M* (Financial Provision: Evaluation of Assets) (2002) 33 Fam Law 509, McLaughlin J stated:

> "Where the division is not equal there should be clearly articulated reasons to justify it. That division will ultimately represent a percentage split of the assets and care should be exercised at that stage to carry out what I call a 'reverse check' for fairness. If the split is, for example, 66.66/33.3 it means that one party gets two thirds of the assets but double what the other party will receive. Likewise, if a 60/40 split occurs, the party with the larger portions gets 50% more than the

> other and at 55/45 one portion is 22% approximately larger than the other. Viewed in this perspective of the partner left with the smaller portion – the wife in the vast majority of cases – some of these division may be seen as the antithesis of fairness and I commend practitioners to look at any proposed split in this way as a useful double check."

[59] Applying the reverse check commended by McLaughlin J., I consider this to be a fair division of the assets in the light of a consideration of the Article 27 factors despite the departure from equality.

[60] I therefore order that the husband shall pay to the wife the sum of £1,150,000 within a period of 3 months. As he is a personal litigant and will not understand the way matters operate, I note for his information that in the event that he does not do so, he will almost inevitably face an application for consequential directions where the wife will ask the court to order his assets sold so that the amount owing will be paid to her. An alternative option for the court would be to appoint a receiver to under section 91 of the Judicature (Northern Ireland) Act 1978 and Order 30 of the Rules of the Court of Judicature for the purpose of running the business and then selling it. The receiver's costs would, in such circumstances, almost certainly be ordered to be paid out of the profits of the business.

[61] This is one of those ancillary relief cases where a party agrees to a divorce but wants life to go on pretty much as before. The husband wants to keep his home and his business exactly as before but this in entirely unrealistic. Unfortunately, when parties divorce and when the court must divide the couple's assets it is frequently the case that one party will have to give up certain assets in order for their spouse to receive their fair share. In this case, to give the wife her entitlement, the business will almost certainly have to be sold. There would appear to be no alternative. The retention of the business by the husband and the receipt by the wife of her due entitlement under the law would appear to be mutually incompatible.

Costs

[62] The wife submits that she should have an order for costs against the husband for two reasons. Firstly, he has paid at least £26,000 of his own legal costs out of the "matrimonial pot" already while refusing the wife access to any of the monies to fund her costs. Secondly, she submits that because of the husband's litigation conduct, there should be an order of costs against him. I agree. Consequently, I order him to pay the sum of £50,000 in respect of the wife's costs.