

Neutral Citation Number: : 2011 EWHC 2878 (Fam)

Case No: FD 08 D 03064

IN THE HIGH COURT OF JUSTICE

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 3rd November 2011

Before :

Mr Justice Moor

Between :

Z

Applicant

- and -

Z

Respondent

Mr Timothy Scott QC leading Mr Jonathan Tod (instructed by Levison Meltzer Piggott) for the Applicant

Mr Lewis Marks QC leading Miss Katie Cowton (instructed by Withers) for the Respondent

Hearing dates: 10th - 13th October 2011

JUDGMENT

1. This is an application dated 26th September 2008 in Form A for financial remedies by the Petitioner (hereafter “the Wife”). The Respondent is referred to hereafter as “the Husband”.
2. Both parties are French. The Wife was born near Paris in August 1961 and is therefore 50 years of age. Prior to the birth of the children, she was employed in the cosmetics industry and then in an advertising consultancy. Since the arrival of the children, she has been a full-time housewife and mother.

3. The Husband is of Armenian descent but he was born in Paris in March 1958 and is therefore 53 years of age. He worked in his family's business until 1987 when he joined VCF. He has steadily risen up the ranks and is currently Managing Partner, private equity, based in Paris.
4. Both parties are highly intelligent and very well educated. The Wife obtained an MA from Dauphine University in Paris. The Husband also attended Dauphine University where he obtained a Masters Degree in Finance and a DEA. He later obtained an MBA from INSEAD.
5. They met whilst the Husband was working in his family business. They commenced a relationship in around 1985 and began to cohabit in the Wife's flat in Paris in 1990. The relationship did not run entirely smoothly as there was a period in 1986 when the relationship was broken off and another in 1992, when the parties separated. On each occasion this was for approximately six months. These two periods of separation were both at the instigation of the Husband, who was not ready to commit fully to the relationship. I accept that this was in part because of his parents' wish that he should settle down with an Armenian girl but I have no doubt it was not the only reason.
6. Nevertheless, on both occasions, the parties got back together and on 18th February 1994, they purchased their only matrimonial home in Paris, an apartment in the 17th arrondissement in their joint names, to the acquisition of which they contributed equally. The Wife sold her flat to assist with the apartment's acquisition and the Husband additionally paid for the majority of the quite considerable refurbishment works. The property is now valued at €1,685,775 and is free of mortgage.
7. On 27th June 1994, they entered into a marriage contract under the "separation de biens" regime before two notaries and in accordance with French law (hereafter "the Agreement"). This is a very important feature of this case, to which I will return in due course.

8. They married on 5th July 1994 in a civil ceremony in Paris. Two years later, on 6th July 1996, they had a religious marriage at the Armenian Church in Paris with a Catholic Priest taking a part in the ceremony.
9. They have three children, now aged 14, 12 and 9, all of whom attend school at the Lycée in South Kensington.
10. During the marriage, the parties purchased one further property, namely an investment property in Suresnes in January 1997. The legal title and beneficial interests are held as to 85% to the Husband and 15% to the Wife. This reflects the proportions of the purchase price that each contributed. The purchase contract specifically refers to the marriage contract.
11. The family lived in the Paris apartment until the Husband was posted to Amsterdam in November 1998. After the second child was born, the Wife and two elder children joined him in the Netherlands in around May 1999. They lived in a rented property financed by VCF. The youngest child was born in Holland.
12. In May 2002, the Husband's work in Amsterdam finished and the family returned to Paris. In November 2006, the Husband was offered a promotion by VCF to Managing Partner, based in London. Nevertheless, he remained in Paris until the end of the school year.
13. In June 2007, the parties discussed separation. The Husband had formed a relationship with another woman but it is clear that he was undecided as to what he wanted for the future. The Wife, on the other hand, was keen for the marriage to continue. Nevertheless, both parties instructed French Avocats. Draft separation agreements were prepared and exchanged by the parties themselves but no agreement was reached.
14. On 31st August 2007, the parties moved to live in England. They resided in a serviced apartment in one of the premier streets in London, SW7. The rent was paid by VCF as part of the Husband's relocation package.

15. In November 2007, the parties discussed a three month trial separation, although it was not until February 2008 that the separation commenced. Even then, it was a secret separation in the sense that the children were unaware of it. The Husband moved into another apartment in the same building but returned to the family home every other week-end and, in April 2008, the family had a holiday together in Mauritius. To explain the Husband's absences, the Wife told the children that their father was travelling more than before. The Husband wanted to use the three months to decide on what he wanted to do in the future. Before he left, he signed a letter dated 4th February 2008. It is clear that there was a draft of this letter before it was signed. The signed letter is in a slightly different form to the draft. I will have to return to this letter in due course as its true meaning and importance have been in issue in the case.

16. On 2nd July 2008, the Husband told the children that their parents had separated. This marked the end of the marriage. The Husband moved to rented accommodation in Chelsea in August 2008. The Wife had already instructed solicitors in May 2008 in case they should ever be needed. On 3rd July 2008, she issued a divorce petition here. This led to a contested jurisdiction dispute. The Husband filed an answer on 18th August 2008 pleading that there was no jurisdiction as both parties were domiciled and last habitually resident in France.

17. The matter came on for hearing before Ryder J on 21st October 2009. The judgment is reported as Z -v- Z [2010] 1 FLR 694. It was held that the parties were both habitually resident in this jurisdiction on the date on which the Wife presented her petition, as it had been both parties' intention to reside in London at the time of the family's move here, even though the Husband had subsequently changed his intention. Although there was no order as to costs, Ryder J indicated that he would have ordered the Husband to pay the Wife's costs had he not already done so and that, in consequence, the amount of the costs should be added back to his assets for the purpose of the hearing I am now undertaking. Following on from this order, a Decree Nisi was pronounced on 4th March 2010. It has not, as yet, been made Absolute.

18. The Wife's application for financial remedies, which had been stayed pending determination of the jurisdiction dispute, was restored and, on 28th April 2010, Roberts DJ transferred it to the High Court for determination.
19. Fortunately, there is complete agreement as to the capital position of the parties. This is a great tribute to both the parties and their advisers. If only this was the situation in every case. An Agreed Schedule of Assets has been prepared by the Husband's junior counsel, Miss Cowton. It shows total assets of £15,088,419. Of this total, the wife has £1,285,488 with the husband having the balance, namely £13,802,930. The Schedule can be summarised thus.

	Husband	Wife	
Matrimonial Home	£723,509	£723,509	
Investment Property	£234,936	£41,459	
Banks	£399,065	£19,432	
Investments	£11,176,072	£329,592	
Debts	-£136,305	-£3,465	
Unpaid costs	-£184,122		
Costs add back	£157,845		
Deferred Compensation	£324,802		
Co-investments	£587,060		
Inherited Properties	£520,069	£174,961	
Overall Total	£13,802,930	£1,285,488	£15,088,419

20. Of the Wife's total, over half comprises her one-half interest in the former matrimonial home in Paris (£723,509). Her 15% share in the investment property in Suresnes is worth £41,459.
21. The remainder of her assets consist almost entirely of various savings and French properties that she inherited during the marriage. The properties are subject to French usufruct (effectively a life tenancy) in favour of her mother and her late father's girlfriend. Whilst these are clearly non-matrimonial assets that would be excluded from a sharing division, the Husband has also inherited a French property which is subject to usufruct for the life of his mother. Although the value of the Husband's inheritance is slightly greater than that of the Wife,

they effectively balance each other out and can be ignored for all practical purposes.

22. The Husband's assets are, of course, considerably more extensive and diverse than those of the Wife. Other than his half share of the Paris apartment, his 85% of the Suresnes apartment (worth £234,936), and his inherited property, the rest of the assets form the fruits of his work at VCF. The remuneration arrangements for senior management in private equity and venture capital businesses are fiendishly complicated. They consist of a mixture of salary, bonus, carried interest schemes and co-investments in the various companies acquired by the private equity business. In good economic times, the rewards can be very high indeed.
23. The Husband reached sufficient seniority to participate in the various carried interest and co-investment schemes in November 1993, before the marriage but after the parties began to cohabit. The period of investment ended in 1997 and the scheme paid out between 2001 and 2005. Inevitably, there have been further such schemes. The proceeds are held in various investments and structures as shown in the Assets Schedule. In addition, the Husband has a significant number of shares in VCF. The recession has not been kind to the VCF share price which has reduced dramatically during the course of the proceedings. Indeed, the reduction in the share price, along with an across the board fall in stock markets over the past few months, has reduced the assets from around £18 million to its current figure of just over £15 million. It is, of course, impossible to say what will happen hereafter.
24. There are a number of illiquid assets. These consist of co-investments that have not yet matured and deferred VCF shares. They have been given a combined value of £911,862 net of tax but are clearly inherently volatile both ways. The Husband has a French State Pension into which he has contributed since 1982. It is estimated that it will produce €72,654 pa when he is aged 65. Roberts DJ gave the Wife permission to instruct a pension actuary to assess the value of this pension but she has not done so. It is suggested to me that it may be worth £1 million. This is entirely speculative but it is clearly a valuable asset.

25. The Schedule (as summarised above) does not include a number of contingent liabilities. These come into three categories. First, there is potential French tax totalling £3,239,292. As I understand the position, this would only arise if the French authorities successfully challenged the Husband's tax status during the period he was working in this country. Second, there is potential UK tax if the Husband was deemed not to have had 'Not Ordinarily Resident' status during his time here, totalling £902,078. Third, there is a potential liability for tax on offshore funds if remitted to the UK. It has not been quantified. It would clearly make a very serious difference to this case if £4,141,370 or more had to be paid to the tax authorities. The matter has, however, been presented to me on the basis that it is pretty unlikely that any of these liabilities will accrue. Again, I will return to this in due course.

26. The Husband's income has been very high for many years. Mr Marks and Miss Cowton produced a schedule of his income, including salary, bonus, carried interest income and carried interest capital but excluding co-investments. These receipts are taxed partly as capital gains and partly as income. The gross figures are:-

2006/2007	€4,110,502
2007/2008	€5,793,252
2008/2009	€3,299,445
2009/2010	€1,780,963
2010/2011	€2,282,414

27. The table makes projections for the likely future gross income. These give an indication of what may be received but are no more than that. After this tax year, they obviously cannot include any figure for bonus at all. I have also excluded receipts from deferred shares, as they are included in the Schedule of Assets. The projections are:-

2011/2012	€1,467,367
2012/2013	€622,397

28. As I have already noted, the Husband is aged 53. He is a member of the main board/leadership team of VCF, which consists of 17 people. He told me that only one is older than him, being aged 57 (although I think he may have forgotten the Chairman). His case is that he would be lucky to survive beyond his 55th birthday. There is some chance that he may get a two year assignment to run the Asia operation based in one of the Asian offices. Whilst I cannot be certain as to his future, I accept that he is coming towards the end of his career with VCF. He does, of course, have skills that could, if he so wished, enable him to undertake other work in the future, perhaps as a Non-Executive Director but I am satisfied that his earnings would be far lower than in the past. Moreover, the current economic difficulties suggest that he is unlikely to return to the sort of levels of remuneration enjoyed in the period before the recession although I consider the projections for the future to be conservative so long as he remains at VCF.
29. I turn now briefly to consider the parties' open positions. They can be stated simply. The Wife's case is that everything should be shared equally. She says that it was all earned during the marriage and there should be no departure from the starting point of equality. She says that it would be unjust to hold her to the French "separation de biens" marital property Agreement for reasons I will expand on in due course. She accepts that there should be Wells v Wells [2002] EWCA Civ 476; [2002] 2 FLR 97 sharing (ie she should get half the VCF shares so that she takes on half the risk of any further falls in the price but benefits correspondingly from any increase). This would give her approximately £7.5 million. She also seeks a further £250,000 as compensation for loss of the Husband's French State Pension. She accepts that, if she is to share the assets equally, she should share any liabilities as well but she says that there should be a nominal maintenance order to protect her in the event that she had to pay out substantially pursuant to this indemnity. Finally, she says that the Husband should pay the girls' school fees and pay her general maintenance for each child at the rate of £40,000 per annum per child.

30. The Husband's position is equally clear. He says that the "separation de biens" marital property Agreement excludes sharing of the assets. Following the decision of the Supreme Court in Radmacher v Granatino, [2010] UKSC 42; [2010] 2 FLR 1900, he says that it is fair to hold the Wife to the Agreement. He concedes that the "separation de biens" regime does not exclude maintenance claims. As with the Inheritance (Provision for Family and Dependants) Act 1975, he interprets "maintenance" widely and argues that the Wife's case should be dealt with on the basis of a pre-White v White [2001] AC 596 needs assessment. He quantifies the Wife's needs at £5.28 million (approximately 35% of the assets) on a clean break basis. On this basis, he accepts sole liability for any tax that may arise. He offers to pay the children's school fees plus £24,000 per annum per child.
31. This was a 14 year marriage with three children and a period of around 4 years of pre-marital cohabitation (subject to one six month period of separation). All the assets were, in effect, generated during the marriage. In so far as assets have been inherited, each party has contributed roughly equally. Applying the non-discrimination provisions of the House of Lords decision in White v White, each party has contributed equally to the marriage. I am satisfied that, applying section 25 of the Matrimonial Causes Act 1973, giving first consideration to the welfare whilst minors of the three minor children and applying the checklist in section 25(2), this would undoubtedly be a case for equal division of the assets absent the "separation de biens" marital property Agreement.
32. The question I therefore have to address is whether or not the marital contract takes the case out of "sharing". If I decide that it does, it follows that I will have to assess those reasonable needs. The authorities indicate that I should do so generously.
33. Before turning to the evidence, I will deal with the law as to pre-marital agreements. There has, of course, been a seismic shift in this area since the case of Radmacher v Granatino was decided by the Supreme Court. Until Radmacher, the law in this area was vague albeit moving gradually towards paying more regard to such agreements. It will be remembered that as recently

as 1994, a German agreement was almost entirely ignored in the case of F v F [1995] 2 FLR 45.

34. Radmacher, however, changed the position fundamentally. The majority of the Supreme Court held at Paragraph 75 that:-

“The court should give effect to a nuptial agreement that is freely entered into by each party with a full appreciation of its implications unless in the circumstances prevailing it would not be fair to hold the parties to their agreement”.

35. Although the Court declined to lay down rules as to the circumstances in which it would not be fair to hold the parties to their agreement, saying it would not be desirable to fetter the flexibility that the court requires to reach a fair result, it is fair to note that Mr Granatino was, in effect, held to an agreement that most English family lawyers prior to Radmacher would have considered unfair.

36. Moreover, the Court clearly took the view that it would be easiest to show that an agreement was not unfair if it excluded sharing but did not prevent the court from providing for the reasonable needs of the applicant. At Paragraph 81, the majority say that it is “...needs and compensation which can most readily render it unfair to hold the parties to an ante-nuptial contract”.

37. At Paragraph 82, they add:-

“Where, however, these considerations do not apply and each party is in a position to meet his or her needs, fairness may well not require a departure from their agreement as to the regulation of their financial affairs in the circumstances that have come to pass. Thus it is in relation to the third strand, sharing, that the court will be most likely to make an order in the terms of the nuptial agreement in place of the order that it would otherwise have made”.

38. Indeed, Lady Hale, agreed at Paragraph 178 in a judgment in which she otherwise dissented, saying:-

“In the present state of the law, there can be no hard and fast rules, save to say that it may be fairer to accept the modification of the sharing principle than of the needs and compensation principles.”

39. Before I turn to the facts, there is one more point of law with which I should deal. Mr Marks QC and Miss Cowton for the Husband say that this is a French case and that I should take into account what the Wife would have got in France. They rely on the decision in Otobo v Otobo [2003] 1 FLR 192. Mr Scott QC and Mr Tod for the Wife says that I cannot do so, relying on the decision of the Court of Appeal in Dart v Dart [1997] 1 FCR 21.
40. In this regard, I prefer the submissions of Mr Scott and Mr Tod. There is no doubt that in this jurisdiction, when dealing with an application for financial remedies in English divorce proceedings, the court will normally apply English law, irrespective of the domicile of the parties, or any foreign connection (see Paragraph 103 of Radmacher). Nevertheless, Paragraph 108 of Radmacher makes it clear that issues of foreign law are relevant to the intentions of the parties (eg whether or not they intended that the ante-nuptial agreement should be binding upon them). It follows that it is relevant to the issue of fairness to know what the position would have been in France but not to reduce the award simply because the Wife would have got less there.
41. I will now deal very briefly with the parties. Both gave oral evidence to me. I take into account that English is not the first language for either although they are both now very proficient in the language. I agree entirely with the findings that Ryder J made when he heard the jurisdiction dispute. Both spouses were doing their best to be honest to me, although at times I consider their respective recollections were in error. At times, they recollect what occurred in such a way as to fit in to their respective cases. The Wife is clearly far more emotional than the Husband. I have no doubt that this has been a very painful process for her. The Husband gave his evidence with great care and thought and displayed far less emotion. Where their evidence conflicted, I find that it was because each interpreted the position of the other at the time differently to what it really was.

This will become clear later when I consider the evidence they each gave in relation to the Agreement.

42. In France, as in many other European countries, every married couple is subject to a matrimonial property regime, either by express agreement or by default. The default regime is community of goods but agreements that provide for separation of goods are very common. In this particular case, the agreed evidence was that both parties' parents and the majority of their friends entered a separation of property agreement prior to their marriages. In effect, this was the norm for these families and it would, in my view, have been very surprising if they had not entered such an Agreement.
43. The Husband tells me that he would not have married the Wife had she not agreed to do so. I accept this evidence. He would have viewed it as bad faith if the Wife had not agreed. At one point, Mr Scott put it to him that he wanted to share his life with the Wife but not his money. That is, of course, true but it is true in virtually every case where there is such a regime and is certainly not considered "bad form" in France, even if it might be so considered here.
44. The Wife told me that she was told that the only reason for the Agreement was to protect her assets from creditors in the event that the Husband went into business on his own account and the business failed. It is of course true that Article 5 of the Agreement provides her with protection from such debts and that there would have been no such protection without the Agreement. I accept that the Husband mentioned this to her but I do not accept that it was the overriding reason for the Agreement. The Wife may well have since justified it to herself on this basis but I believe that, at the time, she knew that entering such an Agreement was what was expected and she went along with it. I do not accept that the Husband told her before she signed that he would not rely on the Agreement if they separated. This did not feature in her written evidence and is, in my view, erroneous recollection based on her perception of what is fair.
45. There is no dispute that the Agreement was entered by both parties freely and with full understanding of its implications. It is in proper form and it would

have been binding if the divorce had proceeded in France. This is confirmed by the Husband's expert, Laurent Chambaz in his report dated 14th March 2011, which is not challenged by the Wife. M. Chambaz says:-

“Under general contract law, parties to an agreement may terminate the same by mutual agreement or for causes permitted by law. In contrast, marriage contracts may only be modified by way of a new notaire deed, where the spouses agree to modify their marriage contract by way of a notarised deed, which, in certain cases, requires a court decision.”

46. The Agreement was witnessed by two Notaries. I am told that one of them was the Wife's family's Notary. I accept that there was no formal advice given by the Notaries and no formal disclosure but neither point affects my decision. The Wife knew exactly what the Agreement entailed and there was, of course, no advice given by the Notary in Radmacher. Equally, there was no need for disclosure as both parties knew the financial position of the other. The Wife may not have known the full details of the Husband's carried interest and co-investment schemes but she knew he was doing well at VCF and making ever greater amounts of money.

47. The relevant parts of the Agreement are Articles 1 and 4. Article 1 provides that, inter alia:-

“The future spouses adopt as the basis of their union the regime of SEPARATION OF ASSETS.... Accordingly:

They respectively retain ownership of the movable and immovable assets which belong to them personally and those which may subsequently become theirs in any respect whatsoever.”

48. Article 4 provides, among other things, that:-

“At dissolution of the marriage, the spouses or their heirs and representatives will recover all articles of which they substantiate ownership by title, use, make or invoice; articles and assets over which no ownership right is substantiated

will be deemed automatically to belong undividedly to each of the spouses half each, irrespective of their value and composition.

Real estate, receivables and registered securities will belong to whichever of the spouses is the titular holder. Any assets of such a kind that are in the name of both of the spouses will be deemed to belong to each of them to the extent of half unless the relating documentation indicates otherwise.”

49. Apparently, it was not necessary to include Article 4 in the Agreement, although the parties may not have known this at the time. The Notaries, however, would have known. Its inclusion therefore provides some support for the proposition that this Agreement was not simply being entered to provide protection to the Wife from any creditors of the Husband.
50. The Wife says that on a number of occasions the Husband promised her that he would not enforce the Agreement and thus argues that it would be unfair now for it to be enforced. The Husband denies ever having said any such thing.
51. I am not going to decide whether or not it could ever be possible to vary such an Agreement orally such that it would be unfair to enforce it. Mr Marks argues that, in accordance with the case of Edgar v Edgar [1980] 1 WLR 1410, you would need to have legal advice and comply with the test laid down by Ormerod LJ as to whether or not the court should uphold the agreement. I am not sure he is right about that as the test set out in Radmacher is simply fairness, although I accept that the Edgar considerations would be relevant to fairness.
52. It is, however, clear that the burden on someone raising the argument that the agreement has subsequently been varied whether orally or in writing is a heavy one. It is a bit like Child Abduction cases where any consent to removal of a child has to be clear and compelling. In my view, there has to be the clearest possible evidence of such an oral agreement before a court could even contemplate using this as a reason not to enforce an agreement. Any other approach would encourage false testimony and potentially drive a coach and horses through the need for such agreements to be varied formally. Of course, there is an argument that there is written evidence in this case and I will deal

with that later. All I will say, at this stage, is that there was not a clear and compelling oral agreement that the Husband would not rely on the Agreement. Indeed, all the evidence points to the contrary.

53. First, the Agreement was never formally varied by Notaries, although it could have been. Second, when the parties bought the property in Suresnes in 1997, the Agreement is specifically referred to in the contract. I accept that the Wife may not have paid close attention to this legal document but the Husband must have brought the contents of the Agreement to the attention of the conveyancers. Third, the 2007 draft separation documents refer to the Agreement. I accept entirely that these were merely drafts that were not finalised. Equally, I accept that they do not follow the Agreement blindly as they provide for the transfer of both Paris properties to the Wife. Nevertheless, no-one was suggesting in these negotiations that there should be community of property. Finally, throughout this marriage, these parties arranged their financial affairs in a way that was entirely consistent with the Agreement. There was no mingling of resources. The Husband did transfer his income into the joint account but that was because the Agreement did not cover maintenance. His bonuses were paid into the joint account but very swiftly thereafter transferred into assets in the Husband's sole name. The proceeds of his carried interest and co-investment schemes were all paid direct into accounts and structures in his sole name.
54. I conclude that the Wife hoped that the Husband would alter the Agreement. He led her to believe that, at some stage in the future, he might do so but he did not do so and she knew he had not done so. It follows that both parties knew that the Agreement was still operative and that it had not been varied orally.
55. This brings me to the letter signed by the Husband on 4th February 2008. It is clear that the Husband had been thinking about such a letter for some time and that he had prepared a draft to which the Wife had made some minor amendments. It is also clear that he added some additional words to the final version that he signed and left for the Wife. I have no doubt that he added these words deliberately. The letter was in French. The translation of the signed version reads as follows:-

“Commitment protocol

4 February 2008

As agreed, I confirm to you that if after three months of thinking time from today I decided not to return with you to the family home, I undertake at the time of our legal separation (if I take the initiative thereof), notwithstanding the regime of separation [of property] under which we married, to pay to you, for you and the children, half of my total after-tax net earnings, past and future (apart from any compromise indemnities that would be paid to me if I was dismissed). This sum payable over time might represent (in the present state of my estimates) of the order of 7 million euros. “€2m” will be paid to you as a priority, €6m will be paid to me, €4m to you and the balance 50/50.

As regards maintenance allowance, I also undertake to pay a minimum 120k euros per annum (which should represent about 50% of my net salary) and up to 200k euros per annum (this depending on my bonus paid in cash), according to arrangements to be defined, and provided that my present remuneration is maintained.

Before any possible legal separation, your standard of living will remain unchanged.

In return for my commitments, you undertake to employ your best endeavours to ensure that our separation takes place in the best possible manner for the children (there is then an illegible part that has been crossed out) and for me (notably in the management of my interactions with them).

Signature...”

56. The words that were added by the Husband in the final signed version related to a legal separation and were the words in brackets “*if I take the initiative thereof*”. The Husband did not take the initiative in relation to divorce and therefore the terms he offered in the signed letter did not come into play as a

matter of strict contract law. Mr Scott and Mr Tod are therefore forced to rely on the draft rather than the signed letter but I cannot find that, if there was a contract, it is to be found in the draft rather than the signed letter. The Husband had not signed the draft, which has a number of crossings out and amendments to which I have not referred. This was nothing more than a draft. In so far as he made an offer capable of acceptance by the Wife, it has to be the signed letter.

57. In fact, I do not find it helpful to think of this in terms of pure contract law. These were negotiations between two spouses in emotional turmoil. The Husband didn't know what he wanted apart from wanting to keep his options open. The Wife desperately wanted the marriage to continue.
58. The Husband accepted in evidence that he was asking a lot of the Wife to keep the separation secret from the children but she said that she would have done this anyway even if he hadn't written the letter.
59. The terms in the letter are, of course, far more generous than could ever have been obtained from a court, given that, if taken at face value, the letter provides that the Husband should pay the Wife one-half of all his net earnings past and future without time limit (other than any redundancy payment) as well as maintenance of up to €200,000 pa.
60. I do consider that the Edgar guidelines are relevant to consideration of this aspect of the case. The letter fails to satisfy Ormrod LJ's test. There was no legal advice on either side, let alone competent legal advice. The Husband was undoubtedly under significant pressure (as was the Wife). Although I am not prepared to find that the Wife took advantage of this or was responsible for the pressure, it cannot be right to hold someone to anything offered in such circumstances in the absence of legal advice.
61. Mr Marks is right when he says that, if this had been a wife having an affair who agreed to make no claims against her husband, the court would never hold her to the offer. Indeed, I have formed a clear view of this letter. This was the Husband saying to the Wife "You don't have to worry. I am not going to take

advantage of this three month period and run off to the court to divorce you. To prove my bona fides, this is what I will give you if I break my promise”. When seen in this light, the letter is not a good reason for departing from the terms of the Agreement.

62. Finally, in terms of evidence, it is said that the Husband wrote “50/50” on the hand of one of the children when they raised with him the question of this litigation. Quite rightly, both counsel were very cautious in relation to this aspect. I do not intend to make any findings as to whether or not the Husband did do so and, if so, how it came about. It is not right for any litigant to involve the children in the detail of these financial cases. If children do raise the matter, it puts their parents in a very difficult position and it would not be right to rely on anything that transpired as a result.
63. Mr Scott raised three other points in relation to fairness. I can deal with each quickly. First, he said the Wife gave up her job. She did indeed do so but this will form a part of her needs case. Second, she had children. Again, this forms part of her needs case. Moreover, in both regards, it is right to note that Mr Granatino had given up his job and the marriage had led to the birth of children. Third, Mr Scott says that the Wife followed her husband to London even though the marriage was already in difficulties. This is also true but this has been to her financial advantage as she is now able to bring this application before the English courts, it being accepted that the approach here to needs is more generous than it would be in France.
64. I therefore reject all the arguments raised to say that it would not be fair for me to uphold the Agreement in so far as it excludes sharing. It might have been very different if the Agreement had also purported to exclude maintenance claims in the widest sense but the Agreement does not, of course, do so.
65. I therefore now turn to the wife’s reasonable needs. She has decided that she wishes to remain in London with the girls. She is perfectly entitled to do so and I accept her evidence in this regard. It is right to note that this means that suitable property for her and the girls will be considerably more expensive in

London than it would be in Paris but, conversely, the cost of general living here is lower than in Paris. According to Table 31 of “At A Glance”, Paris is 21% more expensive at the moment. This is a reflection of the current Euro exchange rate but Paris has for the last few years at least been more expensive, although not always as high as 21%.

66. I will deal first with the issue of housing. The Wife produced a number of property particulars in the range of £4,950,000 to £6,250,000 in the Kensington/Chelsea area. I accept that these particulars were obtained when it was thought that the assets were around the £18 million mark but it is accepted that they are not affordable now. I do not, in fact, consider that they were ever affordable.
67. The Husband has obtained particulars in the range of £2,300,000 to £2,995,000. They are in a somewhat wider area of London stretching from houses in Brook Green to apartments in Kensington.
68. The houses in Brook Green include nicely refurbished homes in Applegarth Road and Caithness Road. The Wife made a number of comments about the size and layout of the properties and the area in which they were situated although I notice that they are close to St Paul’s Girls School and the Ecole Francaise. Although it is impossible to say that they are unsuitable, I must take into account a number of other factors, including the overall resources in the case, the proximity to the French Lycée since the family have been in this country (albeit initially paid by VCF), the quality of the Husband’s likely accommodation in Paris and the Wife’s wishes.
69. Slightly unusually, the Wife would prefer to live in an apartment, much closer to the Lycée. Again, a number of such flats were produced by the Husband. They included a flat in Campden Hill Court on the market for £2.6 million which everyone agreed in the end was not suitable both in terms of layout and overall size and a flat in Phillimore Court advertised at £2.9 million, which again was small at 170 sq metres even though it did have five bedrooms.

70. I did not, of course, have any particulars between £3 million and £5 million. I have formed the view that the Wife should be able to acquire a flat within a reasonable distance of the Lycée with at least four good sized bedrooms and sufficient space for three growing children. I consider a reasonable budget to be £3.25 million. The Wife can then decide whether or not she goes for a slightly larger property further out or a smaller property closer to the school. It will be a matter for her but I am satisfied that she will be able to find something reasonable with that budget.
71. She will then have stamp duty (£162,500) and the costs of purchase (say £7,500). I assume she will have the majority of the furniture from the Paris apartment but that is only a two and a half bedroom property. She will undoubtedly need a budget for redecoration/additional furniture. I consider £80,000 to be reasonable.
72. I now turn to the question of income. With one notable exception, this family lived relatively frugally throughout the marriage, given the money available to them in the latter years of the marriage. I have seen a 2004 summary of spending totalling €221,301, with an objective for 2005 of €170,000 and a cash-flow analysis for 2007 of €182,470 excluding taxes. The latter included a housekeeper at €22,560 plus the housekeeper's social security payments at €11,200.
73. The one exception where the family spent freely was in relation to holidays. The 2004 figure was €51,172 and the 2007 allowance was €50,000. In fact, in 2006, the parties had a particularly extravagant year when they spent in the region of €70,000 including an expensive additional trip to Mauritius.
74. Since the separation, the Wife has not gone on expensive holidays but the Husband has. In successive years, he has taken the children to Las Vegas at a cost of around €50,000; to Tanzania, also at a cost of €50,000 and this year to Armenia/Russia, again costing €50,000. In between, he asked the children if they would like to go on a cruise or to India. The girls chose a cruise. This was not, however, two weeks on the QM2 but rather a private charter on a luxury

cruiser at €100,000 for two weeks. This year, he has had two further expensive holidays with his girlfriend in Morocco and Mauritius, although I entirely accept that the Husband works very hard and also that he goes on holiday with the children for only limited periods.

75. The Wife's budget for herself and the children is £301,168 pa. This is far higher than the standard of living enjoyed during the marriage at any stage. The Wife has in fact been managing on only £7,000 per month plus her rent and school fees. I do not however take this into account. First, I do consider that the Husband was misleading about his income when he put the Wife on this regime. Second, just as over-spending should not be rewarded, under-spending should not be penalised. Having said that, the Wife's budget is demonstrably wrong in a number of particulars and just too high in others.
76. Taking into account the standard of living during the marriage, the overall resources in the case and the cost of living in Central London as well as the other relevant section 25 factors, I have concluded that an appropriate budget for the Wife and children going forward is £175,000 per annum.
77. This will enable the Wife to have nice holidays (although I strongly suspect that as the children get older and have to revise for examinations, it will be less easy to get away for the amount of time enjoyed hitherto) and to afford some paid assistance in the home. Indeed, such a budget broadly reflects the 2004 and 2007 budgets up-rated for inflation.
78. The next issue is the correct level of child maintenance. I accept Mr Marks' submission that the figure of £40,000 per annum per child is too high and only really suitable in cases where the levels of income are far higher than the Husband's income is likely to be in the years ahead. I take into account that his best years are behind him, that he is likely to have to retire from VCF sooner rather than later and that he must pay the school fees (and extras on the school bill) and the costs of University tuition. On the other hand, he is highly likely to have considerably more resources than the Wife and a higher income than her.

79. I take the view that the correct figure is £25,000 per annum per child (i.e. a total of £6,250 per month) until each child completes full-time tertiary education to first degree (with provision for a gap year) and on the basis that one-half continues to be paid to the Wife in tertiary education.
80. This means that the budget for the Wife is £100,000 per annum. I take the view that this is a suitable budget for her for the rest of her life and that it would not be reasonable to reduce it once the children are off her hands.
81. A Duxbury calculation for a woman aged 50 shows that a capital sum of £2,283,126 is required to produce £100,000 per annum net index linked for the rest of this Wife's life. Mr Scott questions whether the Duxbury assumptions remain good in the current economic climate. Having considered the matter carefully, I do not propose to go behind the Duxbury figures save in one respect. There is clear authority that it is appropriate to use Duxbury Tables in such cases as a guide. Indeed, the assumptions have been revised downwards on a number of occasions albeit not since 2003. It is important to remember that we are looking at a life expectancy of over 38 years in this case. During such a long period, market fluctuations should iron themselves out.
82. The one respect in which I am prepared to make a concession relates to the Wife's usufruct properties. These were inherited in any event. It is therefore impossible to see why they should be amortised. In addition, she has a portfolio of shares which was inherited. Rather than attempt a complicated calculation, I have formed the view that the simplest approach is to exclude the usufruct properties from the Duxbury calculation but include the portfolio. In effect, this means that I will exclude £174,961 from the calculations of the Wife's reasonable requirements.
83. I have also considered whether or not it is appropriate to factor into my award a trade down in properties by the Wife once the children are off her hands. I have concluded that it is not reasonable to do so. She will have a choice. She can either continue to live in the same property and spend at a rate of £100,000 per annum or, if she so chooses, she can sell up and buy somewhere cheaper, which

would enable her to live at a standard closer to the £175,000 per annum which she will have whilst the children are fully dependant upon her.

84. Finally, the wife has outstanding costs totalling £45,000. Mr Marks suggests that this should be reduced somewhat for the fact that the case has taken only four days rather than original estimate of seven. On the other hand, there are always further costs incurred in obtaining and implementing the order. I propose to allow the full £45,000.

85. It follows that my assessment of the Wife's reasonable needs, generously assessed plus her usufruct properties is:-

Housing	£3,250,000
Stamp duty	£162,500
Costs of purchase	£7,500
Refurbishment/furnishings	£80,000
Outstanding costs	£45,000
Duxbury Fund	£2,283,126
Usufruct properties	<u>£174,961</u>
	£6,003,087

86. I have decided that sharing is not appropriate in this case. Nevertheless, it is appropriate to perform a cross-check against the overall assets if only to make sure that the award is not in excess of half the assets. On the basis that the overall assets are £15 million, this award amounts to 40% on the assumption that the no tax is payable. In my view, that is a suitable departure from equality to reflect the Agreement. Nevertheless, it is possible that there will be a tax liability and I entirely accept that it is not appropriate for the wife to have more than half the assets.

87. I have come to the conclusion that the appropriate way to proceed is to give the Husband a choice. He can assume all liability for any tax debts, in which case there will be a clean break. However, if he is really concerned about tax, the Wife must provide him with an indemnity for one-half of any tax over £3

million that he has to pay in relation to obligations relating to income/capital gains as set out in the report and updates from SJ Berwin and Deloitte in the bundle. If he has to pay £3 million, each party will have £6 million but if the liability goes above that amount, the Wife will have more than half the assets unless I make this provision. In such circumstances, the Wife might receive less than the amount I have assessed as necessary for her reasonable needs. It would follow that she would then have a nominal maintenance order solely to cover the possibility of such a shortfall and there would be a recital in the order to that effect. The choice is the Husband's as only he can really assess the true likelihood of these tax liabilities coming to pass. For my part, I would have thought that the clean break would be preferable, particularly as the Husband does additionally have the French pension but it is a matter for him.

88. The Husband's proposal is that the property in Suresnes be transferred to the Wife, and that the Paris apartment be sold and the net proceeds paid to her provided it happens this year. If it does not, his case is that both French properties be transferred to the Wife to avoid any French Wealth Tax. I agree but it follows that, if the Wife sells either property for a net sum less than the amount in the Asset Schedule, he must make the shortfall up by an additional lump sum. It follows that he must consent to any such sale but with liberty to apply.
89. The balance of the award will be payable by a lump sum. The Husband offered to pay within 28 days. I assume he can pay the higher figure within this period but, if necessary, I would be prepared to allow him slightly longer if he so requests. He must, however, continue to pay the sum of £7,000 per month (rather than the reduced sum of £6,250) until he has paid the entire lump sum.
90. I believe it is agreed that the lump sum will be paid off-shore and that the Wife will undertake not to bring any of it onshore until after Decree Absolute. This should obviate any possible tax problems in relation thereto but the Husband must indemnify the Wife against any tax charged to her solely as a result of her bringing the money on shore after pronouncement of Decree Absolute.

91. I have not dealt with chattels. The Husband made a proposal in his Open offer. I don't know if this is acceptable or not to the Wife but I very much hope the parties will be able to sort this out themselves.
92. The Husband will undertake to leave by will to the children at least a sufficient sum to meet any obligations to them under the terms of this order in the event of his death.
93. Costs have already been taken into account so there will be no order as to costs.
94. I am very grateful to all counsel for their great help in dealing with this case. I assume that junior counsel will draft the resulting order. If there are any further aspects that require adjudication, I am happy to deal with them by email.