

SHERIFFDOM OF LoTHIAN AND BORDERS AT EDINBURGH

[2021] SC EDIN 31

EDI-F1356-19

JUDGMENT OF SHERIFF ALISON STIRLING, Advocate

in the cause

M(C)

Pursuer

against

M(M)

Defender

**Pursuer: Dewar, Advocate; Johnson Legal, Edinburgh**  
**Defender: Malcolm, Advocate; Thornton's Law LLP Arbroath**

EDINBURGH 16 April 2021

The sheriff, having resumed consideration of the cause:

FINDS THE FOLLOWING FACTS ADMITTED OR PROVED:

- [1] The pursuer was born on 8 November 1986. She is a spacecraft engineer.
- [2] The defender was born on 29 July 1986. He is a systems engineer in the aerospace industry.
- [3] The parties married on 27 June 2009 in America. They are American citizens.
- [4] The parties ceased to live together as man and wife on 31 July 2018. There has been no cohabitation between the parties at any time since 31 July 2018. There is no prospect of reconciliation.
- [5] The parties began their relationship in the summer of 2007. They were both 20 years old. It was a very intense relationship from the start.

[6] About a year after the parties married they had a serious argument. The defender had found another woman to be attractive and had told the pursuer because he felt guilty. The argument continued for months, with the defender sleeping on the floor. The pursuer gave the defender a list of things he could do to regain her trust. That list included attending therapy for obsessive compulsive disorder which the pursuer said the defender suffered from and becoming circumcised. The defender attended therapy until the pursuer told him he did not suffer from obsessive compulsive disorder. He underwent circumcision. He complied with the requests because he loved the pursuer deeply and wanted her to know that.

[7] The defender had a vasectomy so that the parties could stop using condoms. The pursuer was sure she did not want children. The defender was sure he would be with the pursuer forever and knew that she did not want children and so agreed to a vasectomy.

[8] The parties were employed by NASA. They earned good salaries. They built up substantial savings. They decided to stop work and go travelling together. During their travels they visited Edinburgh. They went back to America for some time. They moved to Edinburgh in June 2017.

[9] Up until 31 July 2018 the parties had a very close and interdependent relationship. They spent much of their time together. They were working on a business project together. They enjoyed each other's company, and spent much of their time in Edinburgh coffee shops brainstorming for the business and discussing the defender's plans for a novel. They socialised together. They shared a flat together. They slept in the same bed and had sexual relations with each other. They ate together. They supported each other, talked to each other and were affectionate to each other.

[10] From 31 July 2018 their relationship was never the same again. They never slept in the same bed again or had sexual relations. The pursuer frequently told the defender he was not allowed to stay in the flat. He stayed in hostels or with friends on many occasions, and often for several days at a time. When the pursuer did allow him to sleep in the flat, she often made him leave the flat during the day. They constantly argued. The pursuer was no longer affectionate towards him. She became violent towards him. They did not socialise together. Divorce was discussed.

[11] On 30 July 2018 an argument started between the parties because the defender left the pursuer's dinner on the stove instead of bringing it to her. The argument lasted all night and into the next morning. On 31 July 2018 the pursuer accused the defender of hiding something from her. After repeated questioning the defender told the pursuer that he had been at a conference several years earlier and had found a woman there to be attractive. The defender had felt guilty about talking to the woman at the time, and had not mentioned it to the pursuer. The argument continued, with the pursuer accusing the defender of lying and the defender trying to reassure and placate her.

[12] On 2 August 2018 after about 11 pm the pursuer told the defender he had to leave the flat. He spent the night in a hostel. The argument which had begun on 30 July 2018 had continued. The defender was devastated and unable to think about anything other than how to resolve the argument.

[13] On 3 August 2018 the pursuer allowed the defender to return home, but the parties argued constantly for the next two weeks. The defender tried to convince the pursuer that he loved her and wanted to spend the rest of his life with her. The pursuer insisted on hearing each of the thoughts that the defender had felt guilty about. She questioned him in detail over many hours. The defender tried to answer honestly, but his answers were not

good enough for the pursuer. The defender thought carefully about his answers for fear of distressing or angering the pursuer further. He wanted to resolve the argument, but the more he said the worse it got and he became unclear about what the truth actually was. The defender would be sure of what he knew, but the pursuer was sure of the opposite and repeatedly questioned the defender until he saw the truth as the pursuer saw it and accepted it. The truth as the pursuer saw it seemed to make sense to the defender, until he had time to think about it alone when he realised that what she had said made no sense at all. The defender was very distressed, and felt helpless, with no control of his life.

[14] The pursuer had been the centre point of the defender's life for 11 years. The parties had gone into early retirement together and were starting their own business. They had attended almost all social events together and spent almost all of every day together. During the two weeks of arguing in early August 2018 the defender became extremely sad and distressed because the pursuer thought so badly of him. He felt helpless and completely beaten down.

[15] On 13 August 2018 the pursuer told the defender he had to leave the flat again. He stayed at a hostel. He sought counselling, and engaged with a psychologist for therapy from August until December 2018.

[16] By mid-August 2018 the defender was confused and not thinking straight. He kept a diary in order to try and take an objective view of what was happening. At the time he was alternating between being convinced he had been unfaithful to the pursuer and knowing that he had not been unfaithful and not understanding why the pursuer could not understand this. Some of the entries in his diary are contradictory. Sometimes they reflect the pursuer's interpretation of events and her mockery of his desires. The diary entries are

indicative of the defender's distress, inability to think clearly, and poor state of mind following the argument.

[17] For the next two weeks, the parties continued to argue for hours at a time. When they were not arguing the pursuer did not want the defender in the flat. He sat in a back alley outside the house so that the pursuer could call to him if she needed help, such as with cooking or walking the dog. The defender had no job and no other responsibilities. His priority was repairing the relationship. He had valued the pursuer's opinion of him. He became depressed, describing himself in his diary as a cheat, despicable, selfish, hurtful, a betrayer and untrustworthy.

[18] The defender continued to attempt to end the argument. Previous arguments were typically resolved by the defender adopting the pursuer's position as his own. The pursuer demanded details of every interaction the defender had ever had with any woman he found attractive. The defender tried to provide the information, but this made the pursuer less secure in the relationship and demand more details. The defender was being asked to provide details dating back many years. His inability to provide consistent details made the pursuer think he was lying. The defender was convinced he had cheated on the pursuer by finding other women attractive. The defender had never cheated on the pursuer physically. The closest he came to cheating on the pursuer had occurred several years earlier and involved taking another woman's business card at a conference, trying to contact her to meet up and being snubbed by her.

[19] The defender had assumed that the parties would be together forever. His entire identity and self-worth were wrapped up in the marriage. He was distraught at the prospect of it falling apart, especially if it was over the pursuer's fear of being cheated on. He had no work, no regular hobbies and no regular interactions with other people. He gave

up working on the business the parties were setting up. He gave up writing his novel. He had no joy in his life and was focussed on everything negative. He was sleeping in the living room on cushions on the floor while the pursuer slept in the bedroom. He did not eat properly. When the parties spoke it was usually an argument or an emotionally draining conversation. The defender had taken actions to try and show the pursuer that she could trust him such as deleting all his social media accounts and reading her his diary, but this had not ended the argument.

[20] In late August 2018 the defender found an online blog suggesting that men who had cheated could offer a post nuptial agreement with an infidelity clause to make their partner feel safe in the relationship again. The blog stated that such an agreement would be “a perfectly useless document” unless the man cheated again. He found a draft template online and told the pursuer about it, suggesting that if he were to cheat in the future she would be assured that she would get everything he owned. At that time the parties had around \$800,000 USD matrimonial assets. Both parties had earned approximately the same amount, and had saved their money in retirement accounts for their future and invested in the stock market. The defender proposed giving all the money to the pursuer and only taking \$1,000 USD himself, so that he would be able to find somewhere to stay if he were to be asked to leave the matrimonial home following infidelity. The pursuer agreed, but said the defender should have \$50,000 USD rather than \$1,000 USD. The defender saw this as his only option to save the marriage. The money represented his future plans to retire early and travel with the pursuer, and he thought it was a way of telling the pursuer that if he was not with her he had no vision for the future. The defender thought that the agreement would only apply if they reconciled and he was subsequently unfaithful. He knew that the marriage would not fail due to his infidelity. He told the pursuer that he was serious about

the agreement and that she would get everything if he cheated on her. He did not consider the possibility that the pursuer might sign the agreement and then leave the marriage.

[21] The defender instructed Charles Brown, solicitor, to review the agreement to make sure it would stand up in court. Mr Brown was not aware of the argument between the parties. Other than a brief initial telephone contact, contact with Mr Brown was by email on 5 September 2018. The cost of the services provided were £200 plus VAT.

[22] On 5 September 2018 Mr Brown emailed the defender acknowledging receipt of the draft post nuptial agreement. He commented on various drafting issues, checking what the defender intended by the drafting. He did not give advice on the legal effect of the document. The defender responded by email the same day, copying in the pursuer, seeking Mr Brown's input into the drafting exercise and whether changes were required to make the intention clearer. Mr Brown responded to those queries. The defender sent a further reply that day, copying in the pursuer, letting Mr Brown know of a change the defender had made to the agreement and asking if the agreement was complete and best protected against challenge by the parties. There was no discussion about fair sharing and Mr Brown did not advise on fairness. Nor was there any assessment of what the matrimonial property was or its value.

[23] On 5 September 2018 the parties signed the post nuptial agreement. The agreement was witnessed by Eluned McHardy, Solicitor, Fergusson Law, Edinburgh. Her role was simply to witness the agreement. The defender paid the cost of notarising from an American credit card, which debited \$51.94 from his account. During the execution of the agreement Eluned McHardy told the defender he was signing his life away.

[24] In terms of the agreement as signed, on separation, divorce or annulment of the marriage the defender would be entitled to \$50,000 USD together with his personal effects.

The pursuer would be entitled to all remaining property, including any jointly held property or in either party's sole name. The total value of all the property was noted to be approximately \$812,000 USD on 5 September 2018, and comprised investments and cash.

The agreement also noted that the pursuer was expected to receive approximately \$450,000 USD from the sale of her ownership in a company, and listed this as property to go to her. The pursuer obtained custody of the dog (with the defender having no right of contact), the lease of the flat and the contents of the flat. Debts were to be shared equally.

There was no infidelity clause specifying that the agreement would only have effect if the defender were to be unfaithful to the pursuer. There was no reconciliation clause specifying that the parties were to reconcile.

[25] On 5 September 2018 prior to revising and signing the post nuptial agreement, the defender had attended his GP and was tested for various sexually transmitted infections.

[26] The power within the relationship was one-sided. The defender was in the subservient position and at risk of manipulation. The pursuer's control over the defender became more evident after 31 July 2018, when the pursuer refused to sleep with him and refused to allow him to stay in their flat. The defender did not put up a fight, but sought the pursuer's forgiveness. At times he was not able to stay at home, was wandering about outside trying to make his marriage work, not functioning very well, not in contact with his friends and family, not in work and not eating or sleeping properly. He was very vulnerable. He was feeling helpless. He was tearful. He was not able to concentrate. He was suffering from a depression which was generally increasing in the period up to 5 September 2018 and continuing thereafter. At the time of signing the agreement the defender's mental state had deteriorated significantly and his decisions were affected by his depressive illness. He met the criteria for Severe Depressive Disorder ICD-10 Diagnostic

Classification F32.2. It was an abusive relationship in which the defender was the person being controlled, threatened at times, made to do what the pursuer required of him, and with a constant threat that she would end the relationship.

[27] The pursuer was well aware of the defender's state of mind. She did nothing to dissuade him from entering an agreement which was highly advantageous to herself and highly disadvantageous to the defender. She took advantage of him.

[28] On 6 or 7 September 2018 the pursuer asked the defender to leave the flat again following another argument. This argument had involved the pursuer asking the defender to rate her looks out of ten, the defender refusing to do so as it was demeaning, the pursuer insisting that he did so, and the defender giving the pursuer a low rating because he was angry at repeatedly being asked to do so. The pursuer then demanded that he wrote out a list setting out the reasons for her rating. The defender did so, because he was used to doing what he was told and because she threatened to make him leave the house if he did not do so. The pursuer questioned him about the list and then asked him to leave because she thought he was lying.

[29] On 6 September 2018 the defender added tracking to his mobile phone so that the pursuer could see all his texts and messages. He gave her the passwords to all his accounts to show her he had nothing to hide.

[30] The defender slept on a friend's couch from 6 or 7 September 2018 until 12 or 13 September 2018.

[31] On 10 September 2018 he joined a Sex Addicts Anonymous group because he assumed he must have had a problem making him unfaithful to the pursuer. He attended the group for a month or two. In discussions with his therapist he concluded that he was not a sex addict and never had been.

[32] From 12 or 13 September 2018 the defender slept in his friend Mr Au's living room for about 5 days. The defender was very unhappy and was not in a good state of mind. Mr Au offered him food, but he could not eat. He just kept looking at the floor the whole time. The defender did not speak. Mr Au tried to support him by cooking, buying things from the supermarket, and speaking to him to try and bring him back to a good state of mind. The defender refused Mr Au's offers. The defender appeared soulless, totally lost and as if he had just suffered a bereavement. Mr Au was very worried about the defender. Mr Au thought he was "super depressed".

[33] From 17 to 25 September 2018 the defender stayed in Airbnb accommodation.

[34] On 22 September 2018 the defender had a video call with his friend Mr Jones. The defender looked unkempt, unshaven and with long hair and a beard. He sounded depressed and desperate to do anything to get the pursuer back. Mr Jones was worried about him.

[35] On 25 September 2018 he stayed in a hostel. He felt worthless and spent his time thinking about how to repair the relationship.

[36] He followed an online marriage fitness course for a few weeks, but that advice made his relationship with the pursuer worse.

[37] On 26 September 2018 the pursuer contacted the defender to say that he could come home provided he stayed in the living room. The pursuer told the defender that she had obtained legal advice and she could still divorce him if he lived in a separate room. In the autumn of 2018 the pursuer told the defender on several occasions that she wanted a divorce.

[38] On 18 October 2018 the defender shaved his head and beard in order to make himself unattractive to other women, hoping that this would show the pursuer how much he loved her and that he would not speak to another woman again.

[39] The pursuer became physically violent and abusive towards the defender.

(i) On 20 October 2018 the pursuer attacked the defender and pushed him backwards over a dog cage, causing him to land on his tailbone. He was in pain. He attended at Accident and Emergency at the Royal Infirmary of Edinburgh and was found to have a soft tissue injury. He told the nurse that there had been in an altercation with the pursuer and they had fallen. The pursuer was upset and afraid about what the defender had told the hospital in case her UK visa was revoked because of domestic abuse. The defender wrote a letter to the hospital claiming to have lied when he had told the nurse the pursuer pushed him and asking for the records to be amended. He wrote the letter to make the pursuer feel safe. What he said in the letter of retraction about having lied was not true.

(ii) The pursuer threatened to show the police bruises on her arms if the defender told anyone she had been violent to him. The bruises to the pursuer had been caused when the defender restrained her to stop her from hitting him during the incident on 20 October 2018.

(iii) The pursuer locked the defender out of the house in the winter without a sweater.

(iv) The pursuer poured a pot full of water over the defender's bedding when he was trying to fall asleep, forcing him to sleep on a blanket on the hard floor.

(v) The pursuer cut up the defender's tee-shirts with a large kitchen knife.

(vi) The pursuer attacked the defender with salad tongs, cutting his finger as he tried to keep his hands between her and his torso and face. He tried to grab her arms to stop her. The pursuer lifted a bar stool and hit the defender with it. The defender grabbed the pursuer and pushed her so that he could get away.

(vii) The pursuer threw a bowl of the defender's food on the floor. She threw cups at him on multiple occasions.

(viii) She forced the defender out of the house and denied him access to their dog.

(ix) She told the defender she wanted to stab his eyes out.

(x) She smashed the defender's prized model train engines.

(xi) She ripped apart, page by page, a cherished book given to the defender by his late grandfather.

(xii) She smashed the defender's mobile telephone, computer screen and a framed drawing.

(xiii) On 12 December 2018 she punched the defender repeatedly, causing him to have pain in the area of his kidneys for several days.

[40] On 4 November 2018 the pursuer told the defender to leave the flat. He stayed in a hostel until 15 November 2018. When he returned home the arguments continued.

[41] The pursuer did not want the defender in the flat during the day. At times he had to ask permission to be allowed to return to the flat. On 24 November 2018 at about 1pm the defender asked to be allowed to come home to make lunch and apologise. The pursuer agreed, but the defender was told to leave again. At about 5.20pm on the same day the defender asked to be allowed to come back and make dinner and apologise some more. The pursuer agreed. The defender cooked her what she had requested. He had to leave again. On 25 November 2018 at about 1pm the defender again asked to be allowed to come home

and make berries and cream for lunch. He was allowed to do so, but was told to leave again. At about 3pm he asked to be allowed to come back to bath the puppy, was allowed to do so, but had to leave again. At about 7.45pm he asked to be allowed to come home and make dinner, was allowed to do so, but had to leave later. On 26 November 2018 at about 3pm the defender asked to be allowed to come home, make hot chocolate and talk, and was allowed to do so. On 30 November 2018 at about 9pm he asked to be allowed to come home and cook for them both. On 12 December 2018 at about 5.15pm the defender asked to be allowed to drop the puppy off following a trip to the vet and was allowed to do so, but had to leave again. At around 7.30pm the same day he asked to come home and make dinner but was not allowed.

[42] On 4 December 2018 the defender attended his GP with anxiety and depression. He told his GP his behaviour had changed over the previous four months and that he was saying hurtful things to the pursuer that he did not mean. He said that his mood had changed and he had been depressed in recent months. He referred to attending hospital and said that the pursuer had hit him. He said he had thoughts of self harming. He sought a referral to a psychologist. The GP referred him to Relationship Scotland for advice. He was prescribed antidepressants.

[43] On 19 December 2018 the defender left the flat permanently.

[44] Between 4 January 2019 and 24 April 2019 the defender saw a counsellor every week about the difficulties he had had in his marriage. At that time the counsellor thought the defender appeared depressed. His mood was flat and he was quite unkempt, with a sense of hopelessness about him. Most of the time he could articulate the issues coherently, but there were times when he struggled greatly to explain things, and could be quite "muddled".

[45] On 23 May 2019 the defender calculated a fair split of the parties' assets as at 31 July 2018 and removed \$174,700 USD from the joint account to protect his share. The defender calculated the total value of the parties' assets as at 31 July 2018 to be \$1,215,293.50. He deducted from this \$374,542.76 representing a gift from the pursuer's father to her. He deducted \$10,635.01 representing his own living costs from August 2018 to May 2019. He calculated the shared assets to be worth \$830,115.73. A half share of this is \$415,057.87. He removed \$174,700 from the joint account which, when taken together with the assets in his own name, left him with 46.99% of the assets with the pursuer having 53.01%. He allocated \$50,000 USD more to the pursuer, because he could not access some of the values as at 31 July 2018 and he wanted the pursuer to see that the split was fair for her.

#### **FINDS IN FACT AND LAW**

1. This court has jurisdiction.
2. The marriage has broken down irretrievably as established by the non-cohabitation of the pursuer and the defender for a period of two years or more.
3. The parties ceased to live together as man and wife on 31 July 2018, which is the relevant date in terms of the Family Law (Scotland) Act 1985.
4. The post nuptial agreement between the parties was not fair and reasonable at the time it was entered into.
5. The order for payment of a capital sum to the pursuer by the defender is not justified by the principles set out in section 9(1) of the Family Law (Scotland) Act 1985 or reasonable having regard to the defender's resources.

**THEREFORE:**

1. sustains the pursuer's 4<sup>th</sup> plea in law; sustains the defender's 1<sup>st</sup> and 2<sup>nd</sup> pleas in law; *quoad ultra* repels the pursuer's 2<sup>nd</sup>, 3<sup>rd</sup>, 5<sup>th</sup> and 6<sup>th</sup> pleas in law;
2. divorces the defender from the pursuer;
3. makes an order setting aside the agreement between the parties dated 5 September 2018;
4. reserves the question of the expenses of the cause to a hearing on a date afterwards to be fixed.

**NOTE**

[1] This is a divorce action in which the main issue between the parties is whether a post nuptial agreement entered into by them should be set aside as not being fair and reasonable at the time it was entered into. Parties were agreed that if the agreement were not to be set aside, decree for the capital sum sought by the pursuer should be granted. If the agreement were to be set aside, they were agreed that no further sums were due to either party.

[2] On 2 November 2020 the cause called before me for an options hearing. I refused the pursuer's motion to sist for arbitration and repelled the pursuer's first plea in law on the basis that the pursuer's actions since the lodging of the defences on 29 June 2020 indicated a desire to have the dispute resolved by the legal proceedings rather than by arbitration: Arbitration (Scotland) Act 2010, section 10(1)(d)(ii). No motion had been enrolled by the pursuer to sist, and instead she had continued to adjust and had enrolled a motion to continue the options hearing to allow further adjustment.

[3] Counsel had initially considered seeking a preliminary proof, but having been referred by me to *Noble v De Boer* 2004 SC 548, and the possible overlap between a

preliminary proof on setting aside the agreement and a further proof on both unreasonable behaviour and on financial provision on divorce, together with the dispute over the relevant date, both counsel accepted that a proof before answer with all pleas standing was the appropriate procedure.

[4] On 14 December 2020 the cause called before me for a pre-proof hearing. Due to the pandemic I refused the joint motion for the parties to give their examination in chief by parole evidence and ordered that the examination in chief of all witnesses, including the parties, was to be by way of affidavit evidence or adoption of their report. Many of the witnesses lived abroad, and arrangements were made for productions and steps of process to be sent to them in sealed bundles so that they could adopt their affidavits and be cross-examined by video link.

[5] The cause called before me for proof on 1 March 2021 and the three following days. Counsel for the defender formally objected to the admissibility of paragraphs 46 to 49, 61 and 72 of the pursuer's affidavit on the ground that there was no basis on record and they were irrelevant. I allowed that evidence under reservation. During the examination in chief of the pursuer I allowed the ground of divorce to be amended from unreasonable behaviour to two years' separation. For pragmatic reasons I was prepared to treat the minute of amendment as if it were a fresh initial writ commencing the action.

[6] The pursuer gave oral evidence in person and adopted her affidavit (number 30 of process). She led Francesca Ratner and Charles Brown as witnesses through a remote link, and both adopted their affidavits (numbers 29 and 33 of process). The defender gave oral evidence in person and adopted his affidavit (number 28 of process). He led Lynn Hunter, Pang Chun Au, Zachary Louis Jones and Armin Ellis as witnesses through a remote link and they all adopted their affidavits (numbers 6/1/1, 26, 27 and 6/1/2 of process respectively). He

led Dr Hargreaves, who gave evidence in person and adopted her report (number 6/2 of process). The pursuer lodged affidavits from Azul Carmen Hernandez Miras and Raydine Espinosa Prado (numbers 38 and 39 of process respectively) during the course of the proof, without objection. The principal affidavit of Raydine Espinosa Prado was not lodged until 16 April 2021.

[7] Parties had also entered into a joint minute of admissions (number 36 of process).

[8] On 4 March 2021 having heard submissions I made avizandum.

## SUBMISSIONS

### **Pursuer's submissions**

[9] Counsel for the pursuer spoke to his outline written submissions and supplemented these orally. He invited me to grant decree of divorce and make an order for the payment of a capital sum of \$338,700 USD by the defender to the pursuer reflecting the terms of the agreement. He invited me not to set aside that agreement. He advised that the pursuer's second and third pleas in law were no longer insisted upon.

[10] Counsel relied on *Gillon v Gillon* (no 3) 1995 SLT 678 for the proposition that unequal division of matrimonial assets between parties was not *per se* evidence of unfairness and unreasonableness. He referred to *McAfee v McAfee* 1990 SCLR 805 at 808 where Lord Cameron of Lochbroom held that "the court has to look at all the circumstances prior to and at the time that the agreement was entered into and relevant to its negotiation and signing, to see whether there was some unfair or unconscionable advantage taken of some factor or of some relationship between the parties which enables the court to say that an agreement was not truly entered into by one party or the other as a free agent and that the agreement or any term of it was not in the circumstances fair and reasonable at the time it

was entered into." He relied on *Bradley v Bradley* 2018 SC (SAC) 7 for the proposition that issues of fairness and reasonableness were to be resolved by reference to all the facts and circumstances. A party who made an informed choice not to take legal advice could not later rely on his failure to take advice to set aside an agreement. The mere fact that an agreement might become inconvenient or a matter of regret did not mean it was unfair or unreasonable at the time it was entered into.

[11] Counsel invited me to find the pursuer a credible and reliable witness. He accepted that at times she was emotional and possibly prone to giving tangential responses, but having regard to her evidence as a whole and her demeanour, she was rigorous, thoughtful, had a formidable memory and showed an unusually good attention to detail. When faced with the defender's allegations of 17 or more incidents of domestic abuse, her response was one of genuine shock and abhorrence at the idea. Her response to the question of circumcision was impassioned, with a speech about bodily autonomy. That lent credence to her position that at no point would she have required her spouse to undertake that. She had heard reference to prenuptial agreements in pop culture, but did not know about post nuptial agreements. The communications between the parties when "negotiating" the agreement were important. In the original draft the defender had only proposed keeping \$1,000 himself, which he said would have allowed him to find somewhere to stay that night. It was the pursuer who had urged him to take \$50,000. Dr Hargreaves had focussed on the domestic abuse by the pursuer of the defender, but the pursuer urging the defender to take \$50,000 as opposed to \$1,000 was not consistent with an abusive relationship where the pursuer took all that she could from the defender. The pursuer had given her evidence in a clear way, but she was prone to being side tracked. That showed an

effort on her part to be thorough, and an enthusiasm for setting out the full picture to the court.

[12] Counsel submitted that in contrast the defender's evidence was "muddled". The most important adminicle of evidence from the defender came when he was asked by counsel if he had been coerced into signing the agreement. The defender had said he did not believe that he had been. There was no shred of evidence from the defender eloquent of undue influence or unconscionable advantage. Counsel submitted that there were a number of instances indicating the defender's dishonesty. There was a conflict between what the defender had told the Royal Infirmary of Edinburgh when he attended on 20 October 2018 with a bruised tailbone and his letter claiming to have lied and seeking to retract an allegation that the pursuer had pushed him. Both accounts emanated from the defender and they could not both be true. This indicated that the defender had the capacity and ability to mislead those in a position to assist him and that he must have done that at least once regarding the hospital visit. Some of his diary entries indicated he could not be trusted. He had apparently admitted being a compulsive liar (the pursuer's affidavit refers: paragraph 22). Great care needed to be taken with his evidence.

[13] Counsel referred to the defender having removed \$174,000 from the joint account in May 2019 without discussing this with the pursuer. The electronic messages made it clear that the pursuer had been surprised about this. The defender had told her to expect a letter from his lawyer, but no letter came. There was an inference to be drawn from this. In cross-examination the defender said that he had been behaving rationally at the time. He had therefore deliberately removed the money into an account of his own, knowing that there was an agreement in place. This was a clear attempt to defeat the agreement. The defender's position about the valuation of the Virgin Hyperloop account had changed

during his evidence from having estimated it himself at \$50,000 but with him not disagreeing with the pursuer's estimate of \$926.67. The pursuer had given evidence that the defender had said that he wanted to look after his own future. This provided considerable insight into why the defender wanted to set aside the agreement. In terms of *Bradley* an agreement which became inconvenient was not necessarily unfair at the time it was entered into. Subsequent regret was not a ground for setting aside an agreement.

[14] Counsel submitted that the agreement was the defender's idea. He obtained a draft and revised it and instructed a solicitor to make sure it was enforceable. Two solicitors had provided advice to him. Mr Brown's email had referred to setting aside agreements which were not fair and reasonable at the time they were entered into, and to coercion being a possible factor to be taken into account. This went far beyond mere drafting advice. The defender had been clear about what he wanted done, and there was nothing else Mr Brown could have done. Ms McHardy had told him he was signing his life away. There had been legal advice, and Mr Brown had referred to the statutory tests.

[15] Counsel submitted that Lynn Hunter's evidence was of limited value. She was not qualified to diagnose the defender as having Asperger's. It was accepted that the defender was depressed when he attended her in January 2019.

[16] Mr Au's evidence was clear that he had spent time with the defender in the aftermath of an explosive matrimonial argument which took place on 12 or 13 September 2018. Counsel submitted that there was a very clear deterioration in the marriage after this time.

[17] Mr Jones's evidence was largely hearsay and added little to the rest of the evidence.

[18] Counsel challenged Dr Hargreaves's evidence. She had been open in examination in chief, but became defensive in cross-examination. She had been provided with a letter of

instruction and carried out a video conference call, and produced a retrospective diagnosis of the defender in 2018. She did not appear to accept that if she had been provided with contemporaneous medical records these might have helped. In her chronology she accepted the defender's evidence pro veritate, putting a number of events in July 2018, whereas in the defender's affidavit he said they took place in September 2018. She had not been able to obtain any "collaborative" evidence.

[19] There was no evidence on the balance of probabilities that the defender, at the date of signing the agreement, was suffering such ill health that his judgment was clouded. There was no evidence that unreasonable advantage had been taken of him. There was no evidence of any undue or unreasonable pressure being put on the defender by the pursuer: the pursuer did not even know what a post nuptial agreement was. There was no evidence of the pursuer exploiting the defender or having taken unconscionable advantage of him or his condition. He became ill far later than 5 September 2018.

[20] Counsel was reluctant to address the question of whether the agreement was fair and reasonable at the time it was entered into. His position was that the onus was on the defender to prove that it was not. His position was that the pursuer got \$750,000 out of the agreement, the defender got \$50,000 out of the agreement and the defender had wanted to make the pursuer feel safe. Subsequent regrets were irrelevant. Counsel submitted that there was no evidence of coercion or that the pursuer forced the defender into the agreement: it was not the defender's position that the pursuer had forced him to sign it.

### **Defender's submissions**

[21] Counsel for the defender spoke to her written submissions and supplemented these orally. She invited me to find in fact that the relevant date for the purposes of section 10(3)

of the Family Law (Scotland) Act 1985 was 31 July 2018. She invited me to find that the post nuptial agreement was not fair and reasonable at the time it was entered into and, in the event of decree of divorce being granted, to make an order setting it aside.

[22] As regards the relevant date, counsel referred to the Family Law (Scotland) Act 1985 sections 10(3), (7) and 27(2). She referred to *Banks v Banks* 2005 FamLR 116 at para 33, *HS v FS* 2015 SC 513 approving *Banks* at para 16, and Clive, *The Law of Husband and Wife in Scotland* (4<sup>th</sup> ed) paras 21.075 – 21.081.

[23] Counsel did not dispute that 19 December 2018, the date the pursuer submitted was the relevant date, was the very last day the defender stayed in the parties' rented flat and was thus the day when they physically separated. Under reference to *Banks* counsel referred to the evidence of the parties' relationship before 31 July 2018. They were devoted to each other, did everything together, were seen to be affectionate to each other, had a kind and loving relationship, shared a home and finances and worked on a new business venture together. They shared a bed and had a sexual relationship. They socialised together, ate together (the defender cooking for them) and had a very close and interdependent relationship.

[24] After 31 July 2018 the situation changed dramatically. They never again shared the same bed or had a sexual relationship. There were constant arguments. Their socialising together comprised attendance at events arranged prior to 31 July 2018 in order to keep up appearances for visiting relatives, a couple of evenings with friends in August 2018 and a couple of attempts to have "dates" later on in the year when trying to sort out their marriage. The defender spent nights in hostels, on friends' sofas and in AirBnBs, often for several nights at a time, and he spent his days out of the flat for hours on end because he was not welcome at home. They no longer spent hours discussing projects. There was no

mutual support, love or affection between them. Apart from when there was a visitor the defender only cooked meals or the pursuer when he was allowed to do so, as part of his attempt to salvage the marriage. The pursuer only allowed the defender to return to live in the flat in late September 2018 after she had learned from the Citizens Advice Bureau that they would not necessarily be regarded as living together. This suggests that in her mind the marriage was over. Her animus after 31 July 2018 was that they were no longer a couple.

[25] As regards the setting aside of the post nuptial agreement, counsel referred to the Family Law (Scotland) Act 1985 section 16(1) and (2), *Gillon v Gillon No 1* 1994 SLT 978 at 982J – L and 983D – H and J – K, *Gillon v Gillon No 3* 1995 SLT 678 at 681C – E and *Bradley v Bradley* 2018 SC (SAC) 7 at para 27. Counsel emphasised, under reference to *Gillon*, that the focus was on what happened within the relationship. This was a key matter. The parties had had a very particular relationship. It was very intense and had been since day 1. It was important to look also at what happened to them following the breakdown of that relationship. If there was a concern that there was a history of domestic abuse or a controlling spouse, then there was a concern that that overriding element of control or abusive relationship might bear directly on the actions taken regarding the agreement.

[26] When applying the *Gillon No 3* test and looking at “all the relevant circumstances leading up to and prevailing at the time the agreement was entered into”, this would include all matters that impinged on questions of fairness and reasonableness. Where the setting aside of the agreement was akin to reduction of a contract, relevant considerations would include duress, coercion, facility and circumvention as well as the nature of legal advice and the effect the agreement had on a division of matrimonial property.

[27] Counsel submitted that the factors bearing directly on the issue of whether the agreement was fair and reasonable at the time it was entered were:

- (i) The defender's state of mind at the time the agreement was signed on 5 September 2018. On the evidence the defender was struggling with the sudden breakdown of his marriage. He was constantly being challenged by the pursuer. He was obsessing about negative thoughts. There were constant arguments. He tried to make sense of things by writing things down in a diary on 13 August 2018. He wrote things down to try and get clarity of thought but it is clear from what he wrote that he was going round in circles. Lynn Hunter described him in January 2019 as "very muddled" in his thinking. He was sufficiently concerned about the situation and his need to "fix" himself and his marriage that he started therapy on 14 August 2018. Dr Hargreaves diagnosed him as suffering from a severe depressive condition which affected his ability to make properly informed decisions as at September 2018. In cross examination she expressed concerns that this was a relationship with all the hallmarks of abuse. He was subject to the control of his wife and thus not acting truly as a free agent. The diagnosis of a severe depressive illness at the time he entered into the agreement meant that it was not a free agreement and he was not entering into it on a fully informed basis. Dr Hargreaves questioned whether he had the capacity to enter into the agreement. His friends saw signs of the depression continuing for many months after. Dr Hargreaves described this as "collaborative" evidence, being indicative of an ongoing situation and reinforcing her diagnosis. On 4 December 2018 he sought medical help for depression, describing his symptoms as having persisted since August 2018 and was prescribed anti-depressants.
- (ii) The pursuer's overall attitude towards the defender and taking advantage of his emotional state. On the evidence the pursuer was clearly the stronger party in the relationship, especially emotionally. She had in the past demanded steps be

taken to preserve the relationship and the defender had undergone extreme medical interventions because of his fear of losing her. The defender was the one who had to leave the flat and find alternative accommodation. He pleaded to be allowed home, and to cook for her, and he had to plead to come back later the same day, and sometimes several times a day. The pursuer knew he was desperate to save the marriage and was trying to prove his commitment, but was still being rejected.

Dr Hargreaves gave evidence about the effect of continuing rejection on someone in an intense relationship and about how it could potentially lead to a situation of manipulation by the person doing the rejecting. The pursuer did nothing to dissuade him from the highly prejudicial agreement.

(iii) The parties' respective perceptions of what was intended by the post nuptial agreement. The pursuer thought the agreement was effective as soon as it was signed, which raised the question of whether she thought the marriage was over in early September 2018. The defender thought that it was a contract that would be effective if they reconciled and that it would regulate what happened if they were ever to divorce. He acted on the assumption that they were trying to reconcile: she acted as if the marriage was over, having him move out again within days of signing the agreement. After late September 2018, having ascertained her legal position, she invited him back but acted in a manner making the home situation so intolerable that the defender moved out in December 2018.

(iv) The defender did not have proper legal advice about the agreement. The legal advice he was given was not substantive in nature. The email exchanges with Charles Brown took place over the space of a day and focussed on the terminology and the definitions within the agreement. The general comments about the legal

tests were not legal advice and would have meant very little to a lay person, particularly the defender, having regard to his state of mind and inability to act or consider matters rationally.

(v) The overall unfairness of the terms of the agreement. When the agreement was entered into the pursuer accepted that the matrimonial property was worth about \$800,000 USD. She allowed the defender to sign up to an agreement which she thought would have immediate effect on the basis that he would only ever receive \$50,000 USD whereas she would receive \$750,000 USD. She had increased the sum he was to receive from \$1,000 USD to \$50,000 USD. She regarded herself as being more reasonable than him. She was thinking more rationally than him. She accepted that both parties had worked hard to accumulate the wealth over the course of the marriage. The inherent unfairness in the division is obvious: the defender receives about 6% of the assets.

[28] The overall facts and circumstances indicated that the defender was not in a position to comprehend fully the effect of what he was doing. He believed that the agreement would never have to be relied upon, because the parties were reconciling and that it was, as the website noted, "a perfectly useless document". Dr Hargreaves's diagnosis was clear. The pursuer was well aware of the defender's state of mind: his inability to provide straight answers, his contradictory statements and his lack of clarity caused her great anger and frustration. She did nothing to dissuade him from a highly prejudicial act.

[29] The agreement was neither fair nor reasonable at the time it was entered into and should be set aside.

[30] If I were to set aside the agreement as not fair and reasonable, and if I were to find the relevant date to be 31 July 2018 and to accept the pursuer's valuation of the Virgin

Hyperloop account, then the defender sought no further orders for financial provision. If I were not to set aside the agreement, the defender accepted that the sum due to the pursuer was the sum craved. If I were to make an order for a capital sum in favour of the pursuer, interest should run from the date of decree at the earliest: Family Law (Scotland) Act 1985 section 14(2)(j), *Geddes v Geddes* 1993 SLT 494 at 499F – I, 500K – 501B and *Watt v Watt* 2009 SLT 931 at 136. The pursuer's second crave sought interest from the date of citation, but there was no record for this.

[31] Counsel then turned to the admissibility of paragraphs 46 – 49, 61 and 72 of the pursuer's affidavit to which objection had been taken at the commencement of the proof, and which evidence had been allowed under reservation. These paragraphs were all objected to as having no basis on record and being irrelevant. Evidence had been led about the incident referred to in paragraph 72, but it raised an issue of credibility and reliability given that that it had not previously been raised in the pleadings.

[32] As regards the credibility and reliability of witnesses, counsel submitted that the pursuer's evidence seemed well rehearsed. She was reluctant to answer questions in cross-examination directly. In terms of her demeanour in the witness box she often avoided eye contact, looking down frequently. In her affidavit she made a number of claims of physical abuse by the defender for which there was no basis on record. That was particularly significant given that the grounds for divorce were the defender's behaviour until the minute of amendment moved after the proof had started. There was no record for her claims that she was assaulted, pushed, pulled, grabbed by the wrist and grabbed by the throat: those would have been key averments in a behaviour divorce. Making such allegations in an affidavit, without fair notice, called into question the veracity of her

account. Evidence was led about the matter referred to in paragraph 72 of her affidavit and the defender's account should be preferred.

[33] The defender gave straightforward and honest answers even when they did not necessarily support his case. His upset when giving evidence was genuine. Although he had made comments and admissions about lying, these had to be considered in the context of when and how they were made. They all happened at a time when he was struggling to find the "right" answers for his wife, saying things to appease her, admitting his guilt for things he had not done such as have an affair or cheat on her. Dr Hargreaves saw this as part and parcel of the abusive relationship. The defender was obsessing about his guilt and constantly blaming himself in a depressed state.

[34] The "false abuse" claims being made at the hospital exemplified what was happening within the relationship. The hospital record referred to an "altercation" and made no reference to having been assaulted by the pursuer. However the pursuer insisted that he wrote to the hospital asking the record to be amended and stating that he had lied. He had not lied when attending hospital. The incident is an example of the control the pursuer had over the defender. Dr Hargreaves saw it as indicative of some form of domestic abuse. The defender had no need to lie about incidents like the pursuer destroying his model trains and pouring water on him and his bedding: these behaviours ultimately led to him leaving to live in a hostel over Christmas.

[35] Although the defender's diaries referred to him being untrustworthy or lying, there was no actual evidence that he had lied or had an intention to deceive. He was a man who was very confused and in emotional turmoil. He himself did not believe or recognise that he had been subject to coercion. Dr Hargreaves, as a psychiatrist looking into the relationship, saw the manipulation and that advantage was being taken of his vulnerabilities.

[36] The professionals he consulted believed him.

[37] Dr Hargreaves as a professional and an expert is a credible witness. Counsel for the pursuer suggested that she was defensive in cross-examination. She was a little frustrated at the simplistic questions in cross-examination and patiently tried to explain on many occasions that her role was more than simply listening to the words of answers from patients. No contradictor was offered to Dr Hargreaves despite the pursuer having had the defender examined by Professor Jenny Shaw, an expert in domestic abuse, in December 2020 and having had a draft report by 8 February 2021, which was not disclosed. The absence of that report is telling. Had it suggested that the defender had capacity or was not depressed or that there was a valid criticism of Dr Hargreaves's approach or assessment then the report would have been produced.

[38] Of the remaining witnesses, Francesca Ratner did not add much. The defender's witnesses were consistent in their views of the defender in 2018. They all spoke of someone in varying degrees of distress and depression and consumed by the need to sort his marriage. None overstated the position and all gave fair accounts. They were credible and reliable witnesses. Their evidence was collaborative of Dr Hargreaves's opinion.

## **WITNESSES**

### **The pursuer**

[39] The pursuer was not an impressive witness. Paragraphs 64 to 66 of her affidavit are inconsistent with the defender's discharge letter from the hospital following his attendance there on 20 October 2018. Paragraph 72 of her affidavit contains an allegation that the defender assaulted her, but there is no basis on record for this despite the original basis for divorce having been unreasonable behaviour for which there are still averments in article 3.

This suggests that the pursuer made up this version of the incident, presenting herself as the victim. I prefer the defender's account, and accept that he was the victim.

[40] The pursuer's animosity to the defender was obvious. There were a number of occasions where the pursuer gratuitously criticised the defender during the course of an answer.

[41] When it was suggested to the pursuer that the defender was emotionally confused and distraught at the thought of the marriage ending she answered that he was "distraught at the thought of losing me and losing control of me", despite previously having accepted that the defender adored her. When asked about a particular entry in the defender's diary she said "His tenuous grasp of the truth is in the bit you didn't read out. He has a black and white version of the truth and he decides what it is." When asked about another diary entry, the suggestion being that the defender was trying to work out what had gone wrong, she said "He did a lot of self-pity and I'd comfort him when he did it. I wasn't doing that so he switched to angry mode and self pity. This is what I see [in this entry]." During her evidence and at other stages in the relationship the pursuer described the defender as a "narcissist" and a "compulsive liar". Her affidavit is full of assertions that the defender is lying.

[42] During a passage of evidence where the pursuer was being asked to look at electronic messages for the purposes of demonstrating that the defender was having to ask for permission to return home in late 2018 and including on 12 December 2018 she responded "that's the day, according to his affidavit, when he made a false accusation that didn't happen". When it was pointed out to her that there had been many occasions between 31 July 2018 and December 2018 when the defender had had to move out overnight she responded "Yes, whenever I felt my safety was threatened."

[43] At times during cross-examination the pursuer was very angry, and there was a high level of tension in the court room. She seems to have been particularly angered that the defender had rated her as a 6 out of 10 in terms of looks. She said that he had never told her she was beautiful. In cross-examination she was asked about an engraved gift the defender had given her one birthday. On prompting she remembered that this had happened, that it was a music player and that it had characters, dashes or hyphens, made to look like a rose, which was her middle name. She did not accept that the engraving had said "for the most beautiful [rose symbol]". At other stages she proclaimed her love for the defender but her voice was so hard that she conveyed the opposite impression. The electronic messages between the parties in late 2018 and early January 2019 show the defender trying to be conciliatory but the pursuer reacting angrily and abusively, frequently swearing at the defender.

[44] The pursuer failed to give straight answers to questions. During a lengthy passage of cross-examination designed to establish that the relevant date was 31 July 2018, it was suggested to the pursuer that after that date the parties were not living together, having sexual relations or socialising together and that the marriage was never the same again after that date, she replied "Marriage is never the same day to day". After further questions pointing out the differences in the relationship before and after 31 July 2018 it was suggested to her that the relationship just was not the same husband and wife relationship it had been before that date and she responded "I was still his wife ... Our relationship evolved over a decade. It wasn't the same as what?" She continued to fail to accept there were significant differences before and after 31 July 2018. She does not appear to have appreciated that these questions were being asked in order to establish the relevant date.

[45] She was asked to look at the blog, and the advice there to men who had cheated on their wives to make amends by entering into a post nuptial contract with an infidelity clause. It was suggested to the pursuer that the defender had followed that advice. The defender did not engage with the question. She wanted to argue that this was not the correct website and that he had taken the post nuptial agreement from another website. After repeated questioning about the defender possibly having taken this advice she said “Yes it is possible he lied to me about where he got it from”. Again, the pursuer failed to engage with the question asked and chose instead to answer her own question, and used it as an opportunity for a further gratuitous attack on the defender.

[46] There was a confusing passage in cross-examination about the post nuptial agreement. It was being suggested to the pursuer that the intention was to bring about a reconciliation and that the defender had no intention of divorcing. The pursuer saw it as being a “show” and that “he’d lose what he loved most – his savings”. She refused to accept that it was against a background of saving the marriage. She was asked if it was a desperate act to sign over all his assets. She described it as “a calculated risk”. It was suggested to the pursuer that the defender was not acting rationally if, as the pursuer had said, money was his god. The pursuer said it was rational in terms of risk management.

[47] I could not make sense of this evidence. The pursuer’s answers appear to be contradictory: if the defender loved money more than the pursuer then it would make no sense for him enter into the agreement. The pursuer just disputed every question in this passage, as she often did in cross-examination. This lends support to the defender’s evidence that in an argument none of his answers was ever good enough, he would then come round to agreeing with her point of view and when he thought about what he had

agreed to later, he realised that it made no sense at all. He gives an example of this in his affidavit paragraph 3(q).

[48] The conflict between the pursuer's evidence and other evidence in the case which I do accept, and her obvious bias against the defender mean that she is an unreliable witness. At times she was also incredible. In the passage of cross-examination about what she said the defender told her and what documents he gave her following his hospital attendance on 20 October 2018, I formed the view that she was deliberately not being truthful.

[49] The very way in which the pursuer gave her evidence lent support to the defender's account of what was going on in their relationship. She was not open to the possibility that there might be a version of events different from her own, and that she might be wrong. Her decision to respond to questions with an answer about something else suggested that she was trying to control the agenda. She was visibly angry and created a tense atmosphere in the court.

### **Francesca Ratner**

[50] Ms Ratner is a Junior High School teacher of ESL and English. She is 34 years old. She has been friends with the pursuer since 2004 or 2005 and has known the defender since the parties started their relationship. She was the pursuer's maid of honour.

[51] Ms Ratner adopted her affidavit and supplemented it with oral evidence given remotely. She described the pursuer as a loyal, intelligent friend, a very good listener, firm and stubborn, but reserved and less likely than Ms Ratner to confide in friends. She thought that the parties had a very good relationship. She had not noticed any difficulties in the relationship. She had stayed with the parties for about 10 days in the middle of August 2018. She had been busy sightseeing all over Scotland and going to the Fringe,

mainly with the pursuer. She did notice that although the defender cooked dinner, he rarely ate with the pursuer and Ms Ratner and he did not accompany them when they went anywhere. Sometimes the defender was in another room while Ms Ratner and the pursuer were eating, and sometimes he went out. This behaviour was different from how the defender had been when Ms Ratner visited previously. Ms Ratner assumed he just wanted her to have time with the pursuer. It was not until September or October 2018 that the pursuer called Ms Ratner and told her the parties were having relationship problems. The pursuer told her that the defender wanted to see other people and that he did not find her attractive. Ms Ratner said the pursuer had told her that at about the end of November 2018, right before the defender left to live somewhere else, he became violent with the pursuer and physically hurt her. This was the date of separation the pursuer had given Ms Ratner.

[52] Ms Ratner's evidence was of limited assistance. She also relied heavily on what she had been told by the pursuer, including a violent assault.

### **Charles Brown**

[53] Mr Brown is a partner with Harper Macleod in Glasgow. He qualified as a solicitor in 1998 and has specialised in family law for most of his career. In 2018 he was Head of Family Law at Miller Samuel Hill Brown in Glasgow.

[54] Mr Brown adopted his affidavit and supplemented it with oral evidence given remotely. He was contacted by the defender in September 2018 for advice regarding a post nuptial agreement. They communicated by email and never met in person, but may have spoken by telephone once. There was no general discussion with the defender about why he and the pursuer wished a post nuptial agreement. The defender brought the agreement to Mr Brown. His role was simply to advise the defender on an "execution only" basis about

the draft the defender had prepared. The defender wanted legal assistance to make sure that the agreement he had prepared was competent and enforceable, for which a limited fee was charged.

[55] On 5 September 2018 Mr Brown emailed the defender acknowledging receipt of his identification documents and the draft post nuptial agreement. He provided the defender with terms and conditions and a client care letter quoting a fee of £200 plus VAT. He commented on various drafting issues, checking what the defender intended by the drafting. He did not give legal advice on the legal effect of the document. The defender responded by email the same day, copying in the pursuer, seeking Mr Brown's input into the drafting exercise and whether changes are required to make the intention clearer. Mr Brown responded to those queries. The defender sent a further reply that day, copying in the pursuer, letting Mr Brown know of a change the defender had made to the agreement and asking if the agreement was complete and best protected against challenge by the parties. The defender told Mr Brown that he wanted an agreement that could be enforced but did not say why he wanted it. There was no discussion about fair sharing and Mr Brown did not advise on fairness. Nor was there any assessment of what the matrimonial property was or its value. Although the terms "fair and reasonable" and "coercion" were referred to, Mr Brown did not set out any analysis of fairness and reasonableness in this case.

[56] Mr Brown had did not know and could not form an impression about whether the defender was showing signs of depression, was struggling to make decisions, understood everything, or was being pressurised or coerced into signing the agreement. He had not made any enquiries about this.

**The defender**

[57] I found the defender to be a credible and reliable witness. I have made findings in fact based on his affidavit and his oral evidence in court. He came across as a sensitive, honest, thoughtful and intelligent young man. He gave clear answers to all questions and clear explanations for his actions. At times he gave evidence against himself, saying that on occasions he had said hurtful things to the pursuer and that he had caused her to be upset, which he deeply regretted, and thinking he might have been a Sex Addict because he had been having obsessive thoughts about whether he was attractive or whether he wanted to cheat. Throughout his evidence it was clear that he had been a devoted husband who adored the pursuer, who listened to her and who adopted her opinions as his own. At no stage did he seek to attack the pursuer.

[58] At times the defender was emotional, crying when recounting the incident where he was attacked with the salad tongs. Sometimes he appeared very sad, broken and defeated. The court had to adjourn during re-examination to allow him to compose himself. Cross-examination largely comprised a direct attack on his character, but his evidence was not shaken.

[59] The letter from the hospital regarding his attendance on 20 October 2018 and the entry in the GP notes from 4 December 2018 both support the defender's evidence. The evidence of Lynn Hunter and Dr Hargreaves support his evidence, and provide credible explanations for why the defender has said contradictory things at times. The defender's willingness to undergo psychiatric examination by Professor Shaw at the request of the pursuer suggests that the defender had nothing to hide. An inference to be drawn from the pursuer's failure to lodge Professor Shaw's report, despite averring in article 5 of condescendence that an independent psychiatric report was to be instructed and lodged and

despite the discussion about her at the pre-proof hearing on 14 December 2020, is that that report would have supported the defender's position too.

[60] The defender was cross-examined about his initial estimate of the value of the pursuer's Virgin Hyperloop account at \$50,000 on 31 July 2018. It was being suggested to him that he had deliberately inflated the value to suggest that the pursuer had more assets. The defender explained that it was a new company and his valuation was a rough guess. The pursuer was an employee of the company and she had stock options as an employee. There was no official valuation of the company and thus no way to know what it was worth. When the pursuer had joined the company it had fewer than 30 employees. The company aimed to produce transportation across the whole world and it was potentially worth billions of USD. The defender's only experience with a similar company which grew that quickly was with Space Ex. When that company went public, its first 100 employees all became millionaires. This is why he estimated its value at \$50,000. When the defender obtained more information he valued the company at \$0 for the purposes of division. I do not think the defender can be criticised for his initial valuation. It was a reasonable approach to take. The pursuer's own valuation of \$927.67 USD is a rough estimate. In any event, the defender had already erred in the pursuer's favour by allocating her an extra \$50,000 USD in the division because he was unsure of the value of certain assets, resulting in a 46.9%/53.1% split. He acted honestly and fairly.

[61] The pursuer freely and frequently accused the defender of lying, both in her affidavit and in her oral evidence. Reference was made to the defender's diary and to electronic messages. I am not persuaded that the defender has lied, other than in the letter of retraction to the hospital, and that was written under pressure from the pursuer because the pursuer thought she might get deported. She made it clear to the defender that she felt very

threatened and she was very angry. He wrote the retraction letter in order to resolve the argument and move on.

[62] A lie is an intention to deceive. Diary entries are meant to be private, and it is difficult to see who a person intends to deceive when writing in a diary. The defender described internalising the pursuer's perception of him, adopting her view of him as untrustworthy. In the electronic messages to the pursuer and in his diary the defender was reflecting the pursuer's words that he was a "compulsive liar" and "untrustworthy" rather than admitting to being so. In the parties' arguments the defender would often change his position and agree with the pursuer in order to try and end an argument. This is not necessarily lying, dishonest or deceitful. He may have been trying to see her point of view and appease her. At the time he was confused, not thinking properly and depressed. The pursuer herself knew what the truth was: she was not deceived by what he said.

### **Lynn Hunter**

[63] Lynn Hunter has a post-graduate qualification in both counselling and psychotherapy and has practised in these areas for 10 to 11 years. She also had qualifications in Relationship Therapy and in supervising other counsellors. She is 60 years old.

[64] She adopted her affidavit and expanded on it in oral evidence. She met the defender once a week for 50 minute sessions between 4 January 2019 and 24 April 2019 about the difficulties he was having in his marriage. The pursuer had accused him of infidelity because he found other women attractive. The defender felt compelled to tell the pursuer about women he found attractive. The pursuer had asked the defender to make a list of

everything he did not like about her and the defender complied, not realising that this was a bad idea.

[65] Lynn Hunter tried to work on the defender's self-esteem. The defender had told her that the pursuer was emotionally abusive and controlling and made unreasonable demands of him. He had wanted to prove his commitment to the pursuer. He complied with her demands in order to appease her.

[66] Lynn Hunter accepted that she was not qualified to diagnose depression, but she referred to her experience of over 10 years. The defender appeared depressed to her. His mood was flat and he was quite unkempt, with a sense of hopelessness about him. Most of the time he could articulate the issues coherently, but there were times when he was really quite flat and not really capable of speaking coherently. At times he struggled greatly to explain things, and could be quite "muddled". His behaviour was not rational, although he may have thought it was. She referred to his signing over all his money to her to prove how much he wanted to rekindle the relationship. He took things too literally. She felt he might be on the autism spectrum or have Asperger's. She accepted that she had no qualifications to diagnose and that she was not attempting to do so, but she used to work for Autism Initiatives and thought that some of the ways the defender had behaved in the past were things she had seen before.

[67] Lynn Hunter did not think the defender was making things up. There would be no point in the defender paying for sessions and travelling to them every week if he was making it up.

[68] I accept Lynn Hunter as a credible and reliable witness. Her evidence was consistent with that of other witnesses called on behalf of the defender.

**Pang Chun Au**

[69] Mr Au met the defender at a business event in 2017 and they became friends. He is 29 years old. He is an entrepreneur.

[70] On 12 or 13 September 2018 the defender telephoned Mr Au and asked if he could stay at Mr Au's home for a few days. The defender sounded really down. When the defender arrived Mr Au thought he was "super depressed". The defender told him about the argument with the pursuer over having talked to another woman. The defender felt guilty and that he had been unfaithful. The defender was very unhappy and was not in a good state of mind. Mr Au offered him food, but he could not eat. He just kept looking at the floor the whole time. Mr Au had to pass the defender each time Mr Au went between the kitchen and his bedroom. The defender did not speak. Mr Au tried to support him by cooking, buying things from the supermarket, and speaking to him to try and bring him back to a good state of mind. The defender refused Mr Au's offers. Mr Au described the defender as being like a person without a soul, totally lost. His state of mind was like that of someone who had just suffered the death of a loved one. Mr Au was very worried about the defender. It was very hard for Mr Au to see a friend like that. The defender stayed with Mr Au for about 5 days.

[71] Mr Au met the defender on a couple of other occasions between September 2018 and December 2018. On one occasion the defender was trying to come up with a plan to show the pursuer how much he loved her and that he would not speak to another woman again. He decided to shave his head to make himself unattractive to other women and Mr Au went with him while he got his head shaved.

[72] Mr Au thought the defender was "down" over the period from 31 July 2018 to December 2018 and "super depressed and super sad" in September 2018.

[73] Mr Au was a good witness. He came across as a genuine and caring friend. I accept his evidence as credible and reliable.

### **Zackary Louis Jones**

[74] Mr Jones is a very good friend of the defender. They have been best friends since 2<sup>nd</sup> year in high school and through college, and Mr Jones was best man at the parties' wedding. He is 35 years old and is a research scientist. He adopted his affidavit and gave supplementary oral evidence remotely.

[75] Mr Jones is an important witness because he has known the defender and his family for so long. His view of the dynamics of the parties' marriage is particularly worth considering, because it assists with ascertaining whether the pursuer or the defender is telling the truth.

[76] I was particularly struck by Mr Jones's description of the defender's relationship with his parents in paragraph 2 of his affidavit. Mr Jones described the defender as always having lots of friends, being generally successful in whatever he put his mind to, and having a good relationship with his parents. Mr Jones described the defender as having fewer friends and more problems with his parents the longer he was with the pursuer. Mr Jones had never witnessed the defender having any issues with his parents before he met the pursuer. Following the breakdown of the relationship, the defender is now back in contact with his whole family. Mr Jones had felt there was something wrong with the parties relationship early on, as had other friends. Mr Jones had wanted to bring this up with the defender before the wedding, but the defender's family were already against the marriage and Mr Jones was expected to be the best man, did not want it to affect their friendship and was afraid the defender would become even more isolated. All of this has the ring of truth.

[77] Mr Jones described the parties' relationship as if the defender was trapped in a little bubble with the pursuer. The defender thought she could do no wrong and never challenged her. Mr Jones described the pursuer as very controlling of the defender even to the point of manipulation. He gave examples of why this was so. Mr Jones described the defender as seeming to fall into a slump and forget about his career and dreams towards the end of the relationship with the pursuer. Now he is being awarded grants for research.

[78] On 22 September 2018 Mr Jones spoke to the defender by video call. The defender was not living in the flat. He looked unkempt, unshaven and with long hair and a beard. This was the worst Mr Jones had ever seen the defender. The defender sounded depressed and desperate to do anything to get the pursuer back. Mr Jones was worried about him.

[79] Mr Jones thought the post nuptial agreement made no sense because potentially signing over life savings would not save a marriage and would put the pursuer in a conflict of interest by having an incentive not to reconcile. It also gave the pursuer control of the defender by being able to hold the threat of losing his life savings over him. Mr Jones thought that the signing the agreement was indicative of how isolated the defender was and that he was not in the correct state of mind to make such a big decision.

[80] I accept Mr Jones's evidence. He was a very good witness. His affidavit is sensitively written. He has known the defender and his family for a very long time, and his evidence requires to be given weight. He clearly cares for and has worried about the defender. It fits with the other evidence led on behalf of the defender.

### **Armin Ellis**

[81] Mr Ellis is a business owner. He is 41 years old. He has known the defender since 2011 or 2012 when they both worked for NASA and were involved in Mission Architecture.

They now work together again. Mr Ellis knows the defender better than he knows the pursuer.

[82] Mr Ellis's affidavit is of limited assistance. He thought the parties had a kind and loving relationship. Mr Ellis and his girlfriend visited the parties in Edinburgh in late July and early August 2018 and thought the relationship was cordial. In video calls in October or November 2018 with the defender on Mr Ellis's return to America he saw how upset the defender was because the parties had separated. The defender was living in hostels. In the calls it was clear from the defender's voice and his appearance that he was in bad shape, completely distracted and in a lot of pain. At some point the defender told him he had entered into a post nuptial agreement, his purpose being to provide the pursuer with substantial sums of money if they resumed their relationship and later it did not work out.

**Dr Emma Hargreaves, Consultant Psychiatrist, BSc, MBBS, MRCPsych**

[83] Dr Hargreaves is suitably qualified to provide expert evidence in this case. She had been instructed to provide an independent psychiatric opinion on the defender's mental state at the time of signing the post nuptial agreement on 5 September 2018, focussing on the six months prior to that date. She adopted her report.

[84] She had consulted with the defender via video conference on 6 August 2020. Video conferencing did not adversely affect her ability to assess a patient, and there could be advantages to it. The factual information in the report about personal history, the relationship with the pursuer and the events from 2018 onwards all came from the defender. Dr Hargreaves felt that the defender was very open with her and that his answers were not rehearsed. He was not guarded, he allowed Dr Hargreaves to push matters and he

responded. Having regard to her training as a psychotherapist, she felt the discussions were genuine and not exaggerated.

[85] With reference to the incident about a year after the parties' marriage, Dr Hargreaves said that the way the defender described the relationship was that if the parties had had an argument, he would be held responsible or blamed. Relationships are two-way things, and there was a question about the extent to which the pursuer accepted responsibility. The defender did not seem to realise that it was not always his responsibility to make things better or to make peace. This seemed to Dr Hargreaves to have been a very longstanding aspect of the relationship. So when the defender was faced with demands, he tried to comply. He felt very insecure due to his inexperience in relations. Although a very intelligent man, he does not have a high level of emotional sophistication. He has a limited understanding of psychological relationships, ideas of power, how things co-work, with people being jointly responsible for the success of a relationship. His insecurity made him take on full responsibility. He took on too much responsibility and was constantly trying to prove he was worthy of the pursuer's affection.

[86] During the argument in the first year of the marriage, after months of sleeping on the floor and the parties avoiding each other, the defender had confronted the pursuer and told her how much he cared about her. She offered to forgive him if he completed a list of things that would demonstrate that he loved her and was not hiding anything from her. The list included engaging with therapy for obsessive compulsive disorder and being circumcised. He did both these things.

[87] Most people taking an objective view of this would consider that these were not reasonable demands to make of a partner but were quite extreme. The fact that he felt he needed to undertake them suggested that he felt he had no option but to do so. There was

an implicit threat that if he did not comply, she would end the relationship. The defender wanted to keep the relationship and became increasingly willing to do whatever it took, irrespective of the negative impact on his own well-being as a result. This suggested that the power within the relationship was very much one-sided: the defender's position was to carry out or agree to what was asked of him.

[88] The early incident showed the defender's aim to be open and honest within the relationship. This may have been a slightly immature view of relationships, like adolescent relationships where everything is open and honest, the love is all or nothing, and there is intensity. The defender's belief in honesty led him to tell the pursuer he had found another woman attractive, even though he had no intention of pursuing her, but it created a huge row. As a result of the row, he probably understood that finding anyone other than his wife attractive was not acceptable. It was not a healthy relationship. People in such relationships become isolated from family and friends. These problems within the parties' relationship were still there in July 2018.

[89] After the row in July 2018 the parties never slept together again. This was the beginning of being able to see more clearly the amount of control that was evident in the relationship. If something was not done to the pursuer's satisfaction, there was a very stark rejection of the defender. Refusing to allow him to sleep in the same bed was a very strong communication within the relationship. For it to continue for so long, the average person would see that as quite an extreme outcome of an argument.

[90] Asking a person to move out for a night or two is about control, taking away even the person's safety about where they are living. It was not just rejection from the marital bed or a period of non-communication, but eviction from your house. The normal or average person would question why the defender went along with this. He had a right to

stay there: it was his home. By this stage, this over-controlling relationship had become such that he did not put up any fight. He was still hoping he would be able to do something that would make the pursuer forgive him and they could return to their relationship.

[91] Over the six month period as the defender tried to sort out the relationship, he was failing and feeling helpless. This affected his mood and had biological effects in terms of eating and sleeping. The effects were becoming increasingly severe, with depressive and negative thoughts coming more to the fore, his level of functioning diminishing and him experiencing thoughts of suicide. He was suffering from a depression which was generally increasing over a number of months.

[92] Couples counselling would have been helpful. The pursuer's refusal to participate suggested that she was not interested in making the relationship better. This would feel like another rejection to the defender. He was in a helpless position.

[93] The defender's subservient position in the relationship and the risk of being manipulated had been present throughout the relationship. He always took the view that he had to do something or that his view was less important. Dr Hargreaves could not form a view that in July or August 2018 the defender was in fact being manipulated, but she said that the post nuptial agreement felt like a very stark final demand: sign it to prove you love me and the relation will continue. In psychiatric terms this was known as "coercion, with a threat associated". The defender described it as a final desperate attempt to keep the relation. A normal person's objective view of this would be that it sounded potentially very manipulative.

[94] The defender was very vulnerable in August 2018. He was not able to stay at home, he was wandering about outside, trying to make his marriage better, not functioning very

well, not in contact with his friends and family, not in work and not looking after himself in terms of nutrition.

[95] If a patient had come to Dr Hargreaves with this post nuptial agreement she would have looked at doing a capacity for decision making assessment at that time. The agreement was not only of no advantage to the defender, it was severely disadvantageous to him. She expected that if the defender had taken it to a solicitor, the solicitor would have questioned his capacity and asked for a psychiatric assessment.

[96] Dr Hargreaves was asked about her view of the incident where the pursuer asked the defender to write out a list of his reasons for not finding the pursuer beautiful and his compliance with that request. She said that it was unusual to expect someone to provide a list about why someone was not beautiful. This is something which could have been discussed at couples counselling. The issue was not really about why the pursuer was not beautiful: it was about why she requested the list and what were the implications of not complying with the request.

[97] Depression did not arise immediately. It could be identified when the more serious symptoms such as loss of sleep and appetite and negative or obsessive thinking appeared. The defender had been becoming depressed over the course of 2018, but it became very obvious and severe in the two months prior to 5 September 2018. The intensity of his suicidal thoughts and hopelessness were within the final month and continued beyond 5 September 2018.

[98] Negative thoughts and circularity of thought recorded in a diary during August 2018 are consistent with the diagnosis. As people become depressed their thought patterns become increasingly depressive or negative. A person who is not depressed can put such thoughts aside. For someone suffering from depression it is as if the world shrinks to only

one or a few thoughts or incidents. The brain becomes absorbed by this, causing obsessive thinking. The individual knows they cannot shift from it and becomes incredibly pre-occupied, focussed and distressed.

[99] At the time of signing the agreement the defender's mental state had deteriorated significantly and his decisions were affected by his depressive illness. He met the criteria for Severe Depressive Disorder ICD-10 Diagnostic Classification F32.2.

[100] He would have needed an assessment of capacity to see if his decision making was reasonable or not. If a person suffers from profound depression, they cannot even take information in. He might have thought about the decision, but could he think reasonably about the consequences? Could he rationalise why he made the decision? Could he communicate reasonably about his reasoning for making the decision? With severe depression, all four areas of capacity can become abnormal.

[101] Although Dr Hargreaves had not had "collaborative" information about the defender's presentation from friends, family and colleagues at the time of reaching her diagnosis of the defender, the evidence from his close friends that in August and September 2018 the defender was "super depressed", not eating, staring at the floor, and decided to shave his head, was very upset, sad and had an air of fear and desperation about him all strengthened her diagnosis. That evidence provided very strong collaborative evidence that he was suffering from a severe depression.

[102] Dr Hargreaves was confident that her retrospective diagnosis was accurate. Psychiatrists always look to the past, for example early development and school. It is not uncommon in criminal cases to make a retrospective diagnosis that an accused person was insane at the time of the offence.

[103] Dr Hargreaves did not think the defender had made up his account. She was surprised that the defender had agreed to be examined by another psychiatrist, Professor Jenny Shaw. He had no obligation to do so, but he said he had nothing to hide and so had agreed. Dr Hargreaves said that Professor Shaw was a very eminent and very well respected forensic academic with a strong interest in domestic abuse and the impact that had on a person, and she would have been interested to read Professor Shaw's views of the parties' relationship.

### *Cross-examination*

[104] Cross-examination of Dr Hargreaves was repetitive, had the effect of irritating her and was ultimately counter-productive by bringing out a much more damaging picture than had emerged in examination in chief.

[105] The bulk of the report is based on what the defender told Dr Hargreaves and what she believed, regarded as coherent and relevant to the questions she was asked, as well as her own thinking on it. She had not met the pursuer. Meeting the pursuer might have given Dr Hargreaves a better objective assessment of the relationship. But this report was about the defender's development of a mental disorder. It was not a report about the objective facts in the relationship, but about how the defender experienced it. The defender was able to tell Dr Hargreaves about that: it was his experience of the relationship which was important when assessing mental illness or impact, not fact. His experience of other relationships as he grew up was also important.

[106] The defender's verbal account and his non-verbal communications at interview such as how he answered the questions, his tone of voice, whether he was irritable, open or unguarded were important, and these were not adversely affected by video conferencing.

Psychiatrists undertaking assessments are doing more than just taking a factual account and listening to the words spoken.

[107] Counsel for the pursuer told Dr Hargreaves that the defender had made 17 allegations of “domestic abuse” against the pursuer (presumably the bullet points in his affidavit at paragraph 23) whereas Dr Hargreaves had referred to no more than one. She was asked if he had disclosed the other 16. Dr Hargreaves referred to the unpleasant behaviour referred to in her report at page 5. She referred to the onus always being on the defender and there being a threat that if he did not do what the pursuer asked then the relationship would be over.

[108] Dr Hargreaves expanded on her answer and explained that psychiatrists are careful about bringing the description “domestic abuse” into court, because such issues are extremely difficult and complex. If she was being asked if she thought the hallmarks of domestic abuse were present, then her answer was “Yes”. If she was being asked why it was not in her report, then her answer was that there was no need: when there was a clear mental illness present, that trumped the need to look at domestic abuse in addition.

[109] Counsel for the defender asked Dr Hargreaves to look at selected extracts from the defender’s medical records (number 6/7/4 of process) designed to show that the defender had consulted his GP in on 7 July 2018 about a verruca and on 5 September 2018 to request tests for a variety of sexually transmitted infections, but had not mentioned depression.

Dr Hargreaves explained that men in particular were bad at seeking help for mental ill-health and there was nothing untoward in the defender not seeking help from his GP until 4 December 2018. She explained that the PHQ form at 6/7/12 was a basic health screening questionnaire which she did not rate, because people either under ticked or over ticked the boxes. They were designed to see whether a proper assessment was required. She had

carried out a proper mental state examination to reach the ICD-10 diagnosis. She denied that her retrospective diagnosis involved a degree of speculation.

[110] Dr Hargreaves was asked whether the incident with the wet sleeping bag at page 5 of her report was in July 2018 or after the post nuptial agreement, as referred to in the defender's affidavit paragraph 23 to which she was referred. Dr Hargreaves thought there could have been more than one such incident. She accepted that it was possible that there were events taking place before the agreement, but it looked as if things got much worse after that.

[111] Dr Hargreaves was asked about friends not noticing things wrong with the marriage in the summer of 2018, and she was asked if the defender would have been able to conceal his depression from visitors in August 2018. Dr Hargreaves said that she had not heard the evidence and did not know if the person was a mutual friend or not. She said that men involved in domestically abusive relationships typically did not come forward. Part of this was due to shame. Some people could put on an amazing façade. She did not know how long the interactions with friends were for, or how well they all knew each other. People can appear fine in a relationship when they are not. There were likely to be some observations by a friend, but it depended on how observant or bothered the friend was, and whose friend they were. Not all of the symptoms of depression would be easily observable to an outsider. Even professionals could be surprised when an individual seriously self-harmed.

[112] Dr Hargreaves was asked if she was aware the defender had described himself as "untrustworthy". She was not, but she would have wanted to know why he had described himself as such and would not have taken the statement as meaning that he was. She was not aware that the defender had agreed he was a "compulsive liar", but did not know what

point counsel was making. It would not have affected whether she accepted what the defender had said at consultation. She had explained why she had assessed him as she did. Most psychiatrists would not be fooled by a person who tried to fit themselves within an ICD-10 classification.

[113] Counsel for the defender took Dr Hargreaves to the defender's letter at 5/4/5 in which he sought to have his hospital records amended and claimed to have lied. She was asked if this apparent admission of lying had a bearing on her conclusions. Dr Hargreaves described the document as a letter to staff at the hospital as opposed to an admission. She said that when people were in abusive relationships it was not uncommon for them to go to Accident and Emergency and make a statement because they had been injured. They would then return home to the abusive relationship and be afraid. They would then retract the claim. This would come as no great surprise to a lot of GPs. Sometimes people behaved like this. They claimed it was their fault, but they were lying about this. It is "classic behaviour in abusive relationships".

[114] I observed that during this passage of evidence Dr Hargreaves looked upset. What I took from her demeanour was that she was sure that the defender was a victim of domestic abuse and she was being presented with evidence of the extent of it.

### *Re-examination*

[115] Dr Hargreaves's primary concern about Mr Brown's involvement was that the defender was unwell. He was making a hugely important decision and Dr Hargreaves would have expected his solicitor immediately to have tried to get a capacity assessment. She presumed that the contact with the solicitor was by email: face to face would have been more appropriate.

[116] If the timing of couple counselling had not been in August 2018 and if the solicitor was not the defender's own lawyer, that would not affect Dr Hargreaves's overall assessment of the defender.

[117] Dr Hargreaves was asked to expand on domestic abuse and who the abuser was. She said that she had explored the issue with the defender. He was the person being controlled, threatened at times, made to do things constantly, what the pursuer required of him, and with a constant threat that she would end the relationship. Things had to be very much on her terms. There was no sense of joint taking of responsibility to make the relationship work or not. In Dr Hargreaves's view, the defender was being abused and it was "a significantly abusive relationship".

[118] The retraction letter (number 5/4/5 of process) showed that the pursuer was very powerful in getting the defender to do what she wanted him to do. If he told staff at the hospital he had been abused, there would be a permanent record of it. It was not uncommon for the first allegation of domestic abuse to be made in Accident and Emergency.

[119] I accept Dr Hargreaves's evidence in its entirety. She is a professional witness and eminently qualified to give the evidence she gave. As would be expected of a professional witness, she gave her evidence in a restrained manner and did not exaggerate. In examination in chief she spoke to her methodology and her diagnosis and commented on the level of apparent control within the relationship. In cross-examination Dr Hargreaves was polite in response to the repetitive questioning of her methodology and conclusions. The nature of the questioning brought out a much more damaging picture than had emerged in examination in chief and ultimately led to her opining that this was a domestically abusive relationship with the pursuer as the perpetrator. She showed genuine concern for the defender on being asked to look at the retraction letter (number 5/4/5 of

process). In re-examination she went further, describing the relationship as “significantly abusive”. It is significant that the defender submitted to examination by the psychiatrist instructed by the pursuer, Professor Jenny Shaw, who has a strong interest in domestic abuse and the effect it has on a person. No report was ever lodged by Professor Shaw. Had her report reached a different conclusion from that of Dr Hargreaves, I would have expected it to have been lodged and Professor Shaw to have been called as a witness.

### **LEGAL FRAMEWORK**

[120] The legal provisions applicable to determining the “relevant” date are set out in the Family Law (Scotland) Act 1985 sections 10(3), (7) and 27(2). Section 10 considers the fair sharing of the value of the matrimonial property. “Matrimonial property” is all the property belonging to the parties or either of them at the relevant date which was acquired by either of them during the marriage but before the relevant date (section 10(4)). The “relevant date” is the date on which the parties ceased to cohabit (section 10(3)). No account is taken of any cessation of cohabitation where the parties resumed cohabitation, except where they ceased to cohabit for a continuous period of 90 days or more before resuming cohabitation for a period or periods of less than 90 days in all (section 10(7)). Section 27(2) provides that “the parties to a marriage shall be held to cohabit with one another only when they are in fact living together as man and wife.”

[121] Factors which may be relevant to determining whether a couple are in fact living together include: the amount and nature of time spent together, living under the same roof, sleeping together, having sexual intercourse together, eating together, having a social life and other leisure activities together, supporting each other, talking to each other, being

affectionate to each other, sharing resources, and sharing household and child-rearing tasks:

Clive, *The Law of Husband and Wife in Scotland* (4<sup>th</sup> ed) paras 21.075 – 21.081.

[122] The legal test to be applied when ascertaining the relevant date is set out in *Banks v*

*Banks* 2005 FamLR 116 by Lord Carloway:

“The task of the Court is to determine when the parties ceased to cohabit, having regard to the statutory provision that cohabitation occurs only when parties are “in fact living together as husband and wife”. That is, as the provision itself states, a matter of fact. The ultimate determination of the issue must depend upon the particular circumstances of a given case. As a generality, the Court must look at the issue objectively; no doubt taking into account the illustrative factors mentioned by Professor Clive. There may, of course, be many others which emerge as relevant. The intention of the parties cannot be determinative of the issue. In that sense, there is no absolute requirement for one of the parties to have decided that the marriage or relationship has run its course or that such a decision should have been communicated by one party to the other. However, the intention of the parties and any communication of them to each other may be relevant factors in the equation. (Paragraph 33)”

[123] That passage was approved in *HS – v – FS* 2015 SC 513, paragraph 16, by the Inner House.

[124] The relevant provisions applicable to agreements on financial provision in the 1985 Act are as follows:

“16(1) Where the parties to a marriage ... have entered into an agreement as to financial provision to be made on divorce ... , the court may make an order setting aside or varying – ...

(b) the agreement or any term of it where the agreement was not fair and reasonable at the time it was entered into.

(2) The court may make an order – ...

(b) under subsection (1)(b) above ... on granting decree of divorce ... or within such time as the court may specify on granting decree of divorce. ...

(4) Any term of an agreement purporting to exclude the right to apply for an order under subsection (1)(b) ... above shall be void.”

[125] In *Gillon v Gillon No 3* 1995 SLT 678 Lord Weir, having regard to *Edgar v Edgar* [1980]

1 WLR 1410, *McAfee v McAfee* 1990 SCLR 805, and *Gillon v Gillon No 1* 1994 SLT 978, set out

the general principles to be applied in cases seeking to set aside agreements as follows

(page 681C – E):

“(1) It is necessary to examine the agreement from the point of view of both fairness and reasonableness. (2) Such examination must relate to all the relevant circumstances leading up to and prevailing at the time of the execution of the agreement, including amongst other things the nature and quality of any legal advice given to either party. (3) Evidence that some unfair advantage was taken by one party of the other by reason of circumstances prevailing at the time of negotiations may have a cogent bearing on the determination of the issue. (4) The court should not be unduly ready to overturn agreements validly entered into. (5) The fact that it transpires that an agreement has led to an unequal and possibly a very unequal division of assets does not by itself necessarily give rise to any inference of unfairness and unreasonableness.”

[126] The Sheriff Appeal Court endorsed this approach in *Bradley v Bradley* 2018 SC (SAC) 7 (at para 27).

[127] I have carefully considered the cases cited to me in relation to setting aside, all of which were considered by Lord Weir in *Gillon v Gillon No 3* and incorporated into his principles, and need not be considered here at length.

[128] An order as to the date from which any interest on any amount awarded shall run is an incidental order: Family Law (Scotland) Act 1985 section 14(2)(j). It requires to be justified by the principles set out in section 9 of the Act, and reasonable having regard to the parties’ resources (sections 8(1), (2) and 14(1)). An incidental order for interest is an integral part of the order for financial provision and not something added on afterwards once all the exercises to arrive at that provision are complete, and the order must also be made having regard to the purpose for which interest is awarded by the court: *Geddes v Geddes* 1993 SLT 494 at 499I-J. Where a party seeks interest from a date earlier than decree, pleadings are required as a matter of fair notice: *Watt v Watt* 2009 SLT 931 (para 136).

## **REASONS AND DECISION**

[129] I have explained why I preferred certain witnesses to others and that I have made findings in fact based on their evidence.

### **Admissibility of evidence**

[130] Counsel for the defender had objected to certain paragraphs of the pursuer's affidavit on the basis that they were not relevant and there was no basis for them on record.

[131] The averments in paragraphs 46 to 49 and 61 are scurrilous attacks on various members of the defender's family. They should not have been drafted and, if the pursuer drafted the affidavit herself, they should not have been sworn. There is no basis for them on record. They have no relevance, other than to show the pursuer's animosity to the defender and his family, and thus call into question her credibility and reliability, about which there is other evidence in any event. I am not prepared to admit them as evidence.

[132] I will allow paragraph 72 to be admitted, because evidence was led about it and it is relevant to the issues at proof. I preferred the defender's evidence about this incident. I do not accept the pursuer's version. Had it happened as she claims in her affidavit, it should have appeared on record as unreasonable behaviour of the defender. Its absence from the pleadings is a further indication that the pursuer is not credible or reliable.

### **Grounds of divorce**

[133] When this action was raised the pursuer sought divorce on the grounds of the defender's unreasonable behaviour. Had she proceeded to proof on that ground, she would have failed because I did not find her credible. Nor could she have satisfied the requirement

of the Civil Evidence (Scotland) Act 1988 section 8(3) to provide evidence other than that of a party to the marriage. That is an important requirement.

[134] Counsel sought to amend the ground of divorce to two years' separation.

Francesca Ratner's affidavit was offered as the evidence of someone other than a party to the marriage, but it is clear from her affidavit that she only knows the parties have been separated for over two years because the pursuer told her this. That does not satisfy section 8(3) of the 1988 Act. On the second day of the proof, counsel lodged an affidavit from Azul Carmen Hernandez Miras, but that too is hearsay of the pursuer as regards a two year separation period. It might have been capable of satisfying the requirements of section 8(3) in a one year separation with consent, but the defender was not asked in cross-examination if he did consent to divorce. On the final day of proof the pursuer lodged a copy affidavit of her mother, Raydine Espinosa Prado, who was present in the flat on 2 February 2019 when the defender appeared and removed all his belongings.

[135] Compliance with section 8(3) of the Civil Evidence (Scotland) Act 1988 is essential. Failure to do so may mean that divorce is refused, with significant consequences in expenses. This divorce came close to being refused.

### **Relevant date**

[136] The pursuer avers that the parties separated on 19 December 2018. Her affidavit also refers to the parties having separated in December 2018. The joint minute of admissions had separate paragraphs listing the matrimonial property at 31 July 2018 and at 19 December 2018, although the assets on both dates were identical and no values were given. Evidence was led about the different values of the assets on each date, and the defender was cross-examined as to why he had not already given the pursuer the \$17,800 USD he had calculated

would have been due to her at 19 December 2018. Counsel for the pursuer, however, made no submissions about the relevant date.

[137] It is a question of fact whether the parties to a marriage are living together as man and wife, and when that cohabitation ends. The parties' intention as to when they ceased to cohabit as husband and wife is not determinative of the issue, and there is no requirement for one of the parties to have decided that the marriage is over. Thus the defender's intention to do all that he could to save the marriage after 31 July 2018 does not mean that the parties were still living together as man and wife after that date.

[138] It is helpful to consider the nature of the parties' cohabitation before and after 31 July 2018. Before 31 July 2018 the parties had had a very close and interdependent relationship. They spent much of their time together. They were working on a business project together. They enjoyed each other's company, and spent much of their time in coffee shops brainstorming for the business. They socialised together. They lived under the same roof. They slept in the same bed and had sexual relations with each other. They ate together. They supported each other, talked to each other and were affectionate to each other. On 30 July 2018 they travelled to Dunkeld together with their dog, and spent a long, enjoyable day together. An argument over food occurred when they returned home. That argument escalated into an argument about fidelity, which continued for many months. The relationship was never the same again. They never slept in the same bed again or had sexual relations. The defender was frequently told he had to leave the flat, and he had to stay in hostels or with friends for many days at a time. Even when he was allowed to sleep in the flat, he was frequently told to leave during the day. There were times when the defender had to beg the pursuer to be allowed to come home. Sometimes he would be allowed home for a few hours and would have to leave and then ask permission to return

the same day. They constantly argued. The pursuer was no longer affectionate towards him. They did not spend quality time together. The pursuer asked the defender to leave the flat again a day or two after the post nuptial agreement had been signed. By 26 September 2018 the pursuer had sought advice about divorce, and allowed the defender to return to the flat when she learned that it would not necessarily prevent her getting a divorce. On several other occasions that autumn she told him she wanted a divorce. Two attempted dates as a couple did not save the marriage. The pursuer became violent towards the defender, causing him to attend hospital. She destroyed his possessions. She abused him. Having regard to the pursuer's behaviour, it is reasonable to infer that she thought the marriage was over by the time the post nuptial agreement was signed.

[139] Looking at the matter objectively, the parties ceased to live together as man and wife on 31 July 2018.

### **The post nuptial agreement**

#### *The terms of the agreement*

[140] This is an extreme case. This is not a case where it subsequently transpired that the agreement has led to a very unequal division of assets: it is clear on the face of the agreement that it would, if the parties' assets remained the same as they were at the date of division. The defender obtained \$50,000: the pursuer obtained \$750,000. He obtained 6% of the matrimonial property. Both parties had contributed equally to that wealth. Both had worked equally hard. It was money saved for their joint future and their retirement. In terms of the agreement the defender was left with virtually nothing. He lost his share of all that the parties had worked for together. The agreement was of no benefit to the defender: he handed over virtually his whole share of matrimonial property for nothing. The parties

did not reconcile. If the parties had reconciled for some time, then there might have been an argument that what he got from the agreement was a further few years of marriage. That might have been something to set off against the award of \$750,000 USD to the pursuer. But there was no reconciliation.

*Relevant circumstances leading up to and prevailing at the time of execution of the agreement*

[141] The parties had had a very intense relationship since they met at the age of about 20. The defender's identity and self-worth were wrapped up in the marriage. He was devoted to the pursuer and would have done anything for her. The pursuer knew this. She had required him to undergo circumcision following an argument in the first year of their marriage. The defender was in a subservient position in the relationship and at risk of manipulation.

[142] In the six weeks prior to the signing of the agreement the parties were constantly arguing. The argument that had begun on 30 July 2018 about serving dinner developed into an argument about whether the defender had cheated on the pursuer by finding another woman attractive. The defender sought to resolve the argument, but it continued. The defender's answers were never good enough for the pursuer during arguments, and he became confused.

[143] The pursuer told the defender to leave the flat on several occasions, and he stayed in hostels. When he was allowed to return home he was not allowed to sleep in the parties' bed, and he still had to leave the flat for hours at a time. He did not have a secure home base. He was not in contact with his friends and family, not in work and not eating or sleeping properly. He was very vulnerable. He was not functioning very well. He was

feeling helpless. He was tearful. He was not able to concentrate. He was depressed and his condition was worsening. He sought counselling, and began engaging with a psychologist for therapy on 14 August 2018.

[144] The defender was distraught at the prospect of the marriage falling apart, especially if it was over the pursuer's fear of being cheated on. He try to resolve the argument by adopting various solutions designed to prove to the pursuer that she could trust him. He deleted his social media accounts. He let her read his diary. He found the online blog suggesting that men who had cheated could offer a post nuptial agreement with an infidelity clause to make their partner feel safe in the relationship again. The blog stated that such an agreement would be "a perfectly useless document" unless the man cheated again. The defender saw this as his only option to save the marriage, other attempts having failed. The defender thought that the agreement would only apply if they reconciled and he was subsequently unfaithful. He knew that the marriage would not fail due to his infidelity. He told the pursuer that he was serious about the agreement and that she would get everything if he cheated on her. He did not consider the possibility that the pursuer might sign the agreement and then decide to leave the marriage.

[145] On the morning of 5 September 2018 the defender submitted to tests for a variety of sexually transmitted infections in the hope that this would help save his marriage. In the early afternoon Mr Brown sent his first email to the defender about the drafting and enforceability of the agreement. The defender responded, and there were further email exchanges which ended sometime after 3pm. This is the full extent of any discussions with Mr Brown about the post nuptial agreement. Later that afternoon the parties went to Edinburgh solicitors, signed the agreement and had it witnessed.

[146] At the time of signing the agreement the defender's mental state had deteriorated significantly and his decisions were affected by his depressive illness. He met the criteria for Severe Depressive Disorder ICD-10 Diagnostic Classification F32.2.

[147] The pursuer was in the dominant position in the marriage. It was an abusive relationship. In the period from 30 July 2018 to the signing of the agreement she exerted significant control over him. The pursuer withdrew her affection. She did not allow him to have the security of knowing where he would sleep each night. She did not take steps to resolve the argument. She was not willing to compromise. She knew the defender would do anything to save the marriage. She knew that the defender was suffering and was not thinking properly: she could see he was upset, and his inability to give straight answers, contradictory statements and lack of clarity had annoyed her during their arguments. She knew that the agreement was grossly unfair to the defender and yet she allowed him to enter into it. She took advantage of him. This is particularly so, when regard is had to the parties' different expectations of the agreement. The defender thought that the parties would reconcile and that it would be a "perfectly useless document" provided he did not cheat on the pursuer. The pursuer appears to have thought that the agreement came into effect immediately, there was no requirement for a reconciliation and no requirement that any subsequent separation was based on the defender's infidelity. She asked him to leave the flat a day or two after the agreement had been signed, and continued to abuse him emotionally and latterly physically too. There never was any reconciliation. Knowing that the defender was vulnerable, she allowed him to enter into an agreement in terms of which she thought she was entitled to 94% of the parties' assets the day after the agreement was signed. It was wholly irrational for the defender to sign up to such an agreement whereby there was no incentive to the pursuer to reconcile and the defender stood to lose everything.

*Legal advice*

[148] The defender did not obtain legal advice about whether the agreement was fair and reasonable, or about what he might have been expected to be awarded as financial provision by a court. Mr Brown only gave him advice about drafting issues, and did not explore the parties' relationship. Ms McHardy was only instructed to witness the signatures. She commented that the defender was signing his life away: the fact that he signed the agreement despite that comment indicates his poor mental health at the time.

[149] The agreement was neither fair nor reasonable at the time it was entered into, and I will make an order setting it aside. The figures are stark, and I would have been prepared to have set it aside on this ground alone in the particular circumstances of this case. The pursuer had been the dominant party in the relationship for at least ten years. It was a controlling and abusive relationship, with the pursuer continuing to exert significant control over the defender in the weeks prior to the signing of the agreement. The pursuer's behaviour towards the defender after the argument on 30 July 2018 caused him to be unable to think rationally, suffer from depression and begin attending counselling. The pursuer knew this. She took advantage of the defender's weaker position and allowed him to enter into an agreement which was of no real benefit to him and of great benefit to her. She accompanied him to solicitors to execute the deed. The defender signed the agreement late in the afternoon on 5 September 2018 when he was suffering from a severe depression, had been for tests for sexually transmitted infections in the morning and spent the early afternoon revising terms in the draft agreement. The agreement was rushed through that day, with no legal advice of any substance from Mr Brown or Ms McHardy. It is in the interests of justice for the agreement to be set aside.

**Interest**

[150] The pursuer seeks interest from the date of citation on the capital sum due in terms of the post nuptial agreement. Clause 3.1 of the agreement provides that “in the event of separation, divorce or the annulment of the Marriage” the defender shall transfer the assets to the pursuer. The words “separation, divorce or the annulment” suggest the end of the cohabitation, whether by judicial separation, divorce or annulment. If “separation” meant the relevant date, then there would be a confusion as to whether transfer was required then or on divorce. Interest in terms of the agreement is, therefore, only due on divorce. There is no basis for seeking interest from the date of citation, and none has been pled: *Watt v Watt* 2009 SLT 931 at paragraph 136.

**Disposal**

[151] I will grant decree of divorce. I have found that the relevant date is 31 July 2018. I will make an order setting aside the post nuptial agreement. Parties were agreed that if these were my findings, neither party would be granted a capital sum. A date will be fixed for the hearing on expenses.