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DB v PB *[20161 EWHC 3431 (Fam)*

Judgment of Francis J in relation to the wife's applications for ancillary relief and provision under schedule 1 Children Act 1989 and the husband's application for sale of the former matrimonial home pursuant to s.17 of the MWPA 1882.

The husband argued that the wife was entitled to nothing more than her half share of the former matrimonial home (in which the total available equity stood at £1,819,533). The wife argued that she was entitled to a full half-share of the sum of circa £11 million available for distribution.

The parties are Swedish by birth and nationality and have two young children together. The husband worked as a sportsman and was very successful in the United States, until he was involved in a serious accident in 2003, ending his career as a sportsman. The husband's principal source of income was now derived from his management of his substantial asset portfolio and his part-time work in an advisory capacity for two businesses associated with his sport. The wife did not presently work.

Prenuptial agreements

The parties signed a Swedish prenuptial agreement on 10 July 2000, a United States prenuptial agreement on 11 December 2000 and then a further (almost identical to the first) prenuptial agreement on 26 December 2000. All three agreements contained (i) a prorogation clause conferring exclusive jurisdiction on the City Court of Stockholm, Sweden and (ii) a property clause whereby each of the parties to the marriage retained their respective separate property on divorce.

The wife argued that the prenuptial agreements should not be upheld firstly on the basis of misrepresentation. She argued that the husband had obtained her signature by telling her that the agreements would never be implemented and in the event of divorce she would receive financial provision to enable her to maintain her matrimonial standard of living. It was clear that the wife had certainly received separate legal advice on the second of the agreements. The

husband denied that the wife had not been "in any way shocked or offended by the idea of a prenuptial agreement".

Mr Justice Frances found in favour of the husband, therefore rejecting the assertion that the husband was guilty of serious misrepresentation, although the Judge found found the husband's "current approach towards the wife and the knock-on effect that it would have on the children to be both mean-spirited and mean."

The prorogation clause

All three agreements contained clauses purporting to ensure that Swedish law should apply to the distribution of the parties' property on their divorce. The Judge considered the Maintenance Regulation (EC No. 4/2009) Article 4(1) and (2). The Judge noted that the regulation requires the satisfaction of two criteria: (a) the parties shall have agreed; and (b) that the agreement should be in writing. The Judge found that both criteria were satisfied. As such the effect of the valid prorogation clause is that Article 4 is engaged and therefore this court's jurisdiction to make orders for maintenance is excluded.

As such this court's jurisdiction was confined to dealing with "rights in property arising out of a matrimonial relationship". The Judge was bound to stay the wife's maintenance claims to enable them to be determined in Sweden.

At this hearing the husband also argued that the wife was therefore debarred from pursuing any claim for ancillary relief, including her "sharing claims". This contradicted his position at previous hearings, whereby he had accepted that the wife would not be precluded by the article 4 point alone from pursuing a sharing claim. However, the Judge held the wife's claims are "claims for a fair share of the assets of the marriage and these are clearly rights in property arising out of a matrimonial relationship". As such the prorogation clause is not caught by the Maintenance Regulation insofar as it deals with any sharing or real property claims, unless they are negated by the terms of the prenuptial agreement itself.

The effect of the prenuptial agreement

The wife also argued that the agreements were so unfair that the court should not give any effect to them. The Court considered Radmacher v Granatino [2011] AC 534. The Judge considered that giving effect to the agreement would leave the wife with one half of the value of the family home, less debts, leaving her with circa £560,000. This would amount to some 5 or 6% of the family assets. The Supreme Court in Radmacher plainly left the courts with a wide discretion as to the definition of what is fair in any given case. The Judge held the he was "satisfied that the prenuptial agreement would work unacceptable unfairness on the wife and that, worse still, it would adversely affect the best interests of the children of the family".

The wife therefore argued that the prenuptial agreement should be completely disregarded. The Judge disagreed. The Judge held that he was not driven, as a matter of law, to disregard the agreement altogether. If a valid agreement has been entered into and there are no vitiating factors present, then it would be wrong simply to disregard the agreement; rather it is the court's duty to step in to alleviate the unfairness. This would not be to simply restore the parties to the position they would have been in absent any agreement. In this case the parties had agreed to a regime of separate property. Where assets are available (as here) to meet the wife's needs, these should be met by invading the husband's separate property. This would have very serious ramifications for the wife, as the Judge would therefore approach the case on a needs basis.

As such the wife's claim would involve an element of maintenance. The Judge had already concluded that the prorogation clause prevented him from dealing with maintenance, at least until the Swedish court has had the opportunity to do so. The Judge held: "I have no alternative but to find that my power is circumscribed to addressing a right in property in the strict sense. In other words, I can order a sale of the family home, I can declare that the parties are entitled to half each of the net proceeds of sale, but I cannot order that the wife should have more than half of its value. If I were to do so, as I think would be fair here, then I would be taking into account 'the needs and the resources of each of the spouses'. It is clear that, once I do this, I step into the realms of maintenance, which I have found is currently impermissible in this case".

As such the family home was to be sold with the net proceeds of sale after payment of the costs

of sale and the mortgage to be divided equally between the parties. The wife's lump sum and maintenance claims were stayed until the City Court of Stockholm has resolved them or declined to resolve them.

The Schedule 1 claim

As such, the wife fell back on her schedule 1 claim. The husband was ordered to make the sum of £2m available for the purchase of a property pursuant to Schedule 1 to the Children Act 1989 on terms to be agreed or in default as ordered by the court, but on the basis that it is to provide a home for the children until at least 12 months after both of them have ceased full time education to end of first degree or training (to include a gap year). The husband was also ordered to pay the wife a carer's allowance for herself and periodical payments for the children in the global sum of £95,000 p.a. (to be index linked to the CPI since this is a needs based award).

Summary by Luke Eaton , barrister, 1 Garden Court Family Law Chambers

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This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

Case No: ZC15D00789
Neutral Citation Number: [2016] EWHC 3431 (Fam)

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22 December 2016

Before:

THE HONOURABLE MR JUSTICE FRANCIS
- -

Between:

DB Applicant
- and -
PB Respondent
- -
- -

Patrick Chamberlayne QC (instructed by Sears Tooth Solicitors) for the Applicant
Martin Pointer QC and Peter Mitchell (instructed by Irwin Mitchell LLP Solicitors) for the Respondent

Hearing dates: 14-18 November 2016
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Judgment
Mr Justice Francis:
1. This is the final hearing of three separate applications:

i) The petitioner's application dated 20 February 2015 for all forms of ancillary relief;

ii) The petitioner's application dated 25 August 2015 for provision pursuant to Schedule 1 of the

Children Act 1989;

iii) The respondent's application dated 31 August 2015 for an order for sale of the former matrimonial home pursuant to section 17 of the Married Women's Property Act 1882.

2. There are substantial jurisdictional and structural issues to be resolved. It is, however, common ground between the parties that I do not need to deal substantively with issues (ii) and (iii) above until I have resolved the application pursuant to issue (i). The difference between the parties could not be starker: the respondent's case is that the petitioner is entitled to nothing beyond her half share of the former matrimonial home. The petitioner's case is that she is entitled to a full half share of the sum of approximately £11 million available for distribution. The parties are agreed that the court has jurisdiction to deal with child maintenance.

3. For ease of identification I shall refer to the petitioner and the respondent respectively as the wife and husband.

Relevant background
4. The husband is aged 50 and the wife is aged 49. They are both Swedish by birth and by nationality. They commenced co-habitation in 1994 and were married in 2000. There are two children of the family, A who is aged 12 and B who is 8. Regrettably, the parties were unable to resolve issues relating to the care of the children in the absence of proceedings, but the position is now that A lives with the wife and enjoys substantial contact with the husband; B lives with each of his parents under a regime of shared care. A attends a private school and B attends a state school. The husband says that he is not in any way committed to private schooling for his children. The wife wants A to remain at her private school and would like B to attend a fee-paying school once he has finished at his current state primary school.

5. It is not substantively in issue between the parties that the husband and wife have made an equal, albeit different, contribution to the accumulation of the relevant assets. From the time when the parties commenced cohabitation, the husband worked as a sportsman and in due course he went on to achieve very considerable success in the United States. Very sadly, in 2003 the husband was involved in an extremely serious accident in which he suffered life-threatening

injuries and which ended his career as a sportsman. He retired in 2005, although in reality never competed again from the date of his accident. He has made a remarkable recovery and appears to be in good health, although he has been warned to expect arthritic changes as he grows older.

6. The wife also worked until the birth of the children but thereafter devoted her time principally to looking after the children, the home and the family. She moved to the United States to support her husband's career.

7. After the husband's accident, the parties initially moved to Belgium and then, in 2009, they moved to England where they have resided ever since. They purchased the matrimonial home in 2011 and the wife and children continue to reside there. The wife is extremely attached to this property and would like to stay there; the husband asserts that it must be sold. This is an issue of central importance to the parties to which I shall return later in this Judgment.

8. The marriage broke down in 2014 and the parties both issued proceedings on 10 February 2015: the husband in Sweden and wife in England. The husband conceded that the wife's proceedings were issued first in time and matters proceeded in this country, with Decree Nisi having been pronounced on 18 October 2016.

9. The husband's principal source of income is from his active management of his substantial asset portfolio and he deposes to an income from this resource of approximately £300,000 gross pa. He also works part-time in an advisory capacity for two businesses associated with his sport. These generate a further £55,000 gross pa between them. The scale of the husband's income means that it made obvious good sense to agree that this court should have jurisdiction in respect of child maintenance. The wife does not presently work outside the home and her earning capacity is another issue in this case which I have to deal with.

The former matrimonial home

10. The former matrimonial home is a very substantial property in Berkshire. Pursuant to an order of this court dated 27 September 2016, Savills were appointed as the single joint expert

valuer. There is a comprehensive report from Ms Gemma Chandler dated 11 November 2016. The property is described in that report as a detached five bedroom house arranged mainly over two floors with converted loft space to provide one of the bedrooms. The property's condition is described as being of very high standard throughout, albeit that some minor cosmetic repairs are required to complete the extensive renovations which were carried out by the parties. There is no doubt that the property enjoys a highly desirable location both in terms of being in a local beauty spot and also close to key transport links and well-placed for the children's schools. Ms Chandler concluded in her report that the market value of the freehold interest in the property with vacant possession as at the date of the report was £3 million.

11. In his Form E dated 18 May 2015, the husband estimated the market value of the family home as between £3.1 million and £3.5 million. In her Form E dated 2 June 2015 the wife estimated the value of the family home to be £3.5 million. The parties gave those estimates in their respective Form Es, since when the effect of stamp duty changes and the June 2016 referendum have probably impacted on property prices. Nevertheless, at the hearing I was faced with an application by Mr Pointer QC on behalf of the husband for permission to admit the evidence of another valuer, the husband wishing to persuade me that the property was worth £3.5 million. Mr Pointer sought to rely upon a report by Ms Alison Parry of Pike Smith Kemp dated 16 November 2016. That sought to undermine the Savills valuations and to suggest, instead, a value of £3.5 million.

12. In the event I declined to permit Mr Pointer to call this evidence but allowed him to have Ms Parry sitting next to him in court for the purpose of providing assistance with framing questions to the Savills valuer. The principal reason for my declining to admit this evidence was not because it was late, nor was it because it was not a properly constituted application pursuant to Part 25, but because it was a valuation of a different kind from that which would usually be expected and required. The Savills valuation was what is generally referred to in the profession as "a Red Book valuation", by a chartered surveyor. The Pike Smith Kemp valuation was, as it described itself, an "open market appraisal". Ms Chandler of Savills confirmed during the course of her evidence that she had spoken to local valuers, including Ms Parry of Pike Smith Kemp, in order to gain a better understanding of the local market. Whilst I have no difficulty in accepting Ms Parry's evidence that her firm is one of the principal estate agents in

the area, the fact is that what the two valuers had prepared were different species. It is not in the least bit surprising to me to find that a Red Book valuation is lower than an estate agent's marketing appraisal.

13. Moreover, neither is it surprising to learn that there is room for more than one opinion in relation to an unusual property in a special area in an uncertain market. Mr Pointer argued before me that the uncertainty in relation to the value of the property underscored the need for me to make an order for sale of that property, whatever other decisions I may make in relation to the structural issues to which I have referred and in relation to the exercise of my discretion. However, as I pointed out during the course of submissions, the gross difference between the valuers represented some 4% to 5% of the overall asset value in the case. It is the job of judges in these cases up and down the land to reach informed conclusions about the value of a variety of assets during the course of a financial remedy application. I reject the submission that the inability of a judge to come to a more or less certain figure when valuing an asset results in the necessity to make an order for sale of that asset. There are many factors which impact upon the decision as to whether to sell a home, including the desire of one or other of the parties to stay in that home, the first consideration of the court being the welfare of the children.

14. I deal later in this Judgment with my decision in relation to the sale, or otherwise, of the property, but for the purposes of computing the assets I find that the evidence of Ms Chandler from Savills was compelling and well researched and I find that the gross value of the property is in the region of £3 million. I note that any local agent offering the property for sale would be likely to start with an indicative price of £3.5 million and would hope to achieve a sale price in excess of £3 million. In my judgment, there is nothing particularly unusual in the difference between these two figures.

15. The family home is subject to a mortgage of £1,090,467 and, after deducting costs of sale of approximately £90,000, the equity in the property is taken to be £1,819,533. Although the property was formerly in the sole name of the husband, on 21 October 2016 the husband had transferred it into the joint names of himself and the wife and so they are legally entitled to share in that equity.

The other assets and liabilities

16. The husband owns a property in Sweden with a value of approximately £40,000. There is a minor dispute between the parties about the incidence of any Capital Gains Tax ("CGT") on sale of this property but the argument over a sum of less than £7,000 is de minimis in the context of this case and I say nothing further about it.

17. The husband has a number of bank accounts and a substantial portfolio of equities which total just over £9 million. These assets are all liquid or capable of being liquidated at short notice. The husband contends that I should deduct the sum of £1,935,070 from the total value of these assets. This is the tax which he says would be payable if the funds are remitted to the UK. Mr Chamberlayne QC for the wife asserts that this is a fictitious deduction since if any lump sum order that I make is paid to the wife offshore and not remitted to the United Kingdom by her until after the Decree Absolute has been pronounced, this remittance would not attract tax. Mr Pointer says that I cannot be sure that this loophole (as he calls it) would be successful in legitimately avoiding tax. Moreover, he says that his client will, in any event, be required to remit at least some of it to the UK in order to provide for his own living expenses once the lump sum (if any) to the wife has been paid.

18. The issue of whether, and to what extent, to deduct notional tax is not a new one. Alhough there is no absolute rule, the practice in my experience tends to be that tax (more usually CGT) is deducted from the gross value of an asset during the computational stage, even though it may be some time before the tax is actually incurred and payable. That practice itself is on occasion open to question. Suppose, for example, the court is dealing with the valuation of a controlling shareholding in a private company. It may very well be that the proceeds of sale would be subject to tax upon a sale but the sale itself could be many years away. Meanwhile, the owner of that shareholding would hope to be enjoying growth on the gross value of the company not the value net of tax. I believe that the circumstances in which deductions should be made are many and varied and will be case specific, but for my own part I do not accept that it is always correct to deduct the full tax as if the sum were payable at the date of Judgment. Here, I am dealing with more variables than usual:

i) Will other funds beyond that needed to fund any lump sum be remitted?

ii) Will the payment of a lump sum to the wife offshore be successful in avoiding tax?

iii) Can I meet the problem in part or at all by ordering the wife to pay a contingent lump sum to the husband, the contingency being one half or some other proportion of the tax ultimately payable?

iv) Alternatively, can I accept an undertaking from the wife to make such payment?

v) In any event, would options (iii) or (iv) be consistent with the clean break principle which is desirable, where it can be achieved, in all cases?

Ultimately, this will all be a matter for the discretion of the trial judge depending on the circumstances of a given case. In this case I am conscious of the fact that this is a husband whose domicile remains Sweden and who will, by retaining his monies offshore, be able to avoid the incidence of tax until such time as he remits funds to this country. I also recognise that HMRC have recently (and very publicly) made successful challenges to methods that were formerly regarded as safe. In this case, I have concluded that it would be wrong to ignore altogether the possibility that the husband will pay tax and I accept Mr Pointer's contention that the greater the lump sum the more likely the husband is to incur some or all of the tax arising on his gross estate.

19. I find that the assets in this case are worth £10,859,533 before deduction of any tax arising, which I round to £10.86m. That figure is arrived at as follows:

The Family Home

£ 1,819,533 1

Swedish property

£ 40,000

Equity portfolio and bank

£ 9,000,000

Total

£10,859,533

The wife's resources
20. Apart from her 50% equity in the family home, the wife has no resources at all in her own name. She has about £6,500 worth of ordinary debt and owes £11,000 in respect of an old student loan. She also owes the husband £95,000 which arose in the following way: during the course of the proceedings the wife made an application for legal costs funding against the husband. The husband resisted that application but instead agreed to lend the wife £95,000 on which interest would accrue at 5% per annum. That agreement was recorded on the face of the order of Moylan J dated 29 January 2016. The wife was constrained to accept that offer and so the legal position today is that she stands indebted to the husband in this sum. Until the property was transferred into the joint names of the parties in October 2016, the wife would probably have been unable to obtain funding from lenders such as Novitas. In any event, the interest charged by such lenders is normally around 18% and so it was plainly cheaper for her to borrow the money from the husband, albeit that it would be regarded by many as plainly wrong for the husband to charge interest in order to fund the litigation in circumstances where the resources could broadly be classified as matrimonial property.

21. Mr Chamberlayne opened his written presentation at the commencement of this case as follows:

"This is essentially a simple case. It is a long marriage (21 years, two children), in which they started out with nothing and all the £11.4 million of assets are therefore matrimonial. As

breadwinner, however, H has during the marriage placed every penny of the assets in his sole name. The clear and obvious outcome, submits W, is an equal division, on a clean break basis..."

22. Mr Pointer did not substantially demur from the proposition that, apart from two significant issues to which I now turn, this may well have been a case where the assets would have been broadly shared between the parties. I recognise that there may still have been arguments about the extent to which some of the assets were non-matrimonial in character, but in my judgment it is highly unlikely that the parties would have spent hundreds of thousands of pounds on high quality legal advice and litigation about such arguments but would have reached a compromise tolerable to each of them.

The prenuptial agreements

23. The parties signed a Swedish prenuptial agreement on 10 July 2000, a United States prenuptial agreement on 11 December 2000 and then they executed a further, but almost identical to the first, Swedish prenuptial agreement on 26 December 2000. These three agreements contain two potentially crucial provisions: (a) a prorogation clause conferring exclusive jurisdiction on the City of Court Stockholm, Sweden; and (b) a separate property clause whereby each of the parties to the marriage retained his and her respective separate property on divorce, the effect of which would mean that the wife was not entitled to any capital payment from the husband. Before examining the meaning and potential effect of these agreements, it is necessary for me to examine the circumstances in which the parties entered into these agreements. Mr Chamberlayne submits forcefully that all three prenuptial agreements are not to be upheld and he relies on two grounds, namely:

(i) misrepresentation: the husband obtained the wife's signature by telling her that the agreements would never be implemented and that in the event of divorce the wife would receive financial provision to enable her to maintain the matrimonial standard of living; and

(ii) unfairness: the agreements are so unfair that the court should not give any effect to them.

The wife's case in respect of the three agreements

24. The wife says that they became engaged on Christmas day 1997 and that they returned to the United States in January 1998 as an engaged couple. She says that the husband did not mention at the time of their engagement that he would require her to sign a prenuptial agreement or a prorogation agreement and that, in any event, he had no money to protect. She says that she had not ever come across anyone who had a prenuptial agreement. She says that by the early summer of 2000, when they had been engaged for around 2½ years, she had developed her faith in God and that she wanted to be married, particularly in view of the fact that she hoped to have children. She says that there was no discussion of a prenuptial agreement, that such a phrase was "not in our vocabulary". The possibility of entering into an agreement had not occurred to her.

25. The wife says that on 7 July 2000 she met her husband at the airport in Columbus, Ohio. The husband had flown in from Chicago and she had flown in from Alabama. They had planned a romantic long weekend in Canada at Niagara-on-the-Lake. She planned it weeks before and they were staying at a luxury hotel. She described how on either the Saturday or the Sunday she and her husband were lying on the bed relaxing when the husband "got up and took a document out of his luggage and told me you will need to sign this prenuptial agreement before we go home on Monday". She says that he was very matter-of-fact when he showed her the prenuptial agreement. She says that she was shocked by the request "after so many years together and everything I had done for him". She says that she could not recall at this distance what the agreement meant, but it "clearly did appear to operate against my financial security. Nor did my husband seek to explain what he understood it to mean either". She says that her husband was "very insistent" and said that it had to be signed that weekend. She says that he told her that "it wasn't about me or us it was about his businesses", and that he told her repeatedly that it was "just a piece of paper" and that it would not make any difference to her. Crucially she says "he told me if ever we divorced I would carry on financially just as before. Nothing would change. The prenuptial agreement would not make a difference to me. I should trust him, he said, because he had always looked after me. He made me feel guilty for implying that he might not stand by his word."

26. There is, at least, no doubt that the wife did sign an agreement that particular weekend. During the course of the hearing it has come to be referred to as 'the Niagara agreement', and I

shall so refer to it during the course of this Judgment.

27. The second prenuptial agreement was signed in Ohio and has been referred to as 'the American agreement'. The wife says that in or around November 2000 the husband told her that she had to sign a further prenuptial agreement, and that it was necessary to have a U.S. agreement because they were then residing in the U.S. She says that, again, she had been told that it was "nothing to worry about". The wife says she met with a lawyer called Richard Slavin of Bailey and Slavin in Ohio, who advised her not to sign the agreement. She says that he told her that the agreement would probably be invalid in Ohio if the marriage was of some length and if they had children because it was so unfair. What is clear is that Mr Slavin did not want it recorded on the face of the prenuptial agreement that he represented the wife. The wife says that she had one short meeting with Mr Slavin and that he did not go through the documents with her. I am in no doubt, however, that she was advised not to sign it and that she knowingly rejected that advice.

28. The American prenuptial agreement was drafted by a lawyer retained by the husband called Mr Satine. In her oral evidence, the wife said that she would not have got into discussion with Mr Satine because she thought this had nothing to do with her. Mr Satine gave evidence by video link. He referred to his timesheets which were all kept for billing purposes. An entry dated 22 August 2000 shows that he spent 75 minutes in telephone calls respectively with the wife and the husband. The timesheet does not say how much time individually he spent with each of them. At page C158 of the bundle is an email from the husband to the wife dated 22 August 2000, timed at 7:37 PM, part of which reads:

"I've talked to Roy Satine giving a bit more information about our situation. He says that another document is needed and he needs information from you. For example, what you do, your job position, your basic wage, if you have any other accounts etc. etc. The best thing would be for you to call him so you don't give him something he doesn't need. I did the same thing today."

29. He then gave the telephone (or possibly fax) number and ended, "Once you've got the extra document ready, you'll have to get your own lawyer who will be able to tell you what's what

you're signing. Kisses!".

30. Mr Satine gave reasonably detailed oral evidence via video link, given the passage of time, of the subsequent telephone conversation that he had with the wife. He says that the wife agreed that she would give him some information during the course of the call and that it was made very clear that the husband would be his client and that she needed separate advice. He says that he would have elicited as much information as possible from the wife and commented that he found that he usually obtained more information from the "disstaff", as he put it, by which I took him to mean the financially weaker party.

31. On 15 September 2000, Mr Satine sent the wife a letter enclosing "two counterparts of Draft-2 of the pre-nuptial agreement prepared at your mutual request". The letter also properly advised the wife of "the necessity of your obtaining independent legal counsel to advise you of the impact this agreement will have on you".

32. The third agreement has been referred to during the course of the hearing as "the Gothenburg agreement", for that is where it was signed. The third agreement is the same as the Niagara agreement, save that it contains a paragraph making provision for additional agreements and a separate page for signatures.

33. During cross-examination the wife admitted that she did sign all three agreements and that she knew they were important. She agreed that she was working in a good career and she recognised that the husband was working in a very risky occupation. She agreed with the suggestion that was put to her by Mr Pointer that the husband had said that he would transfer the matrimonial home into the parties' joint names. She agreed with the suggestion that was put to her that she signed a document saying that the parties would have separate property in the event of divorce, but she repeated the suggestion that the husband had promised her that the agreement would never actually be implemented if they divorced. She denied that there was a culture of equality in Sweden at the time that these agreements were signed.

The husband's case in respect of the three agreements

34. The husband denied that the wife was in any way shocked or offended by the idea of a prenuptial agreement. He says that he made it clear from the outset that he would not marry without a prenuptial agreement and that marriage was simply not something that was particularly important to him. He recognised that it was important to the wife in the event that they were to have children. He continued:

"neither of us believed that we should have any claim against the other in the (what we hoped would be unlikely) event that our marriage failed. Our agreements were based upon the fact that what she earned and owned, both now and in the future would be hers and what I earned and owned both now and in the future would be mine. We are both Swedish citizens and so the concept of separate property rights is not alien to us. Many Swedish people enter into some form of marital contract. Nor is it usual in Sweden for ongoing financial support once a marriage has ended."

35. The husband says that they had numerous discussions during their lengthy engagement about how they would regulate their financial circumstances and that they kept their financial affairs "separate". The wife knew, understood and agreed that they were entering into an arrangement whereby their respective property would be their separate property and that neither of them would have a claim against the other in the event of divorce.

36. The husband says that, by the time they signed the American agreement, he had already signed the Swedish agreement and so they knew what they were doing. By the Swedish agreement he means the agreement which I have referred to as the Niagara agreement since, although purporting to be a Swedish agreement, it was, as I have set out above, signed at Niagara-on-the-Lake. The husband said that he could not recall signing the agreement during the course of that Niagara weekend, but he conceded that it is perfectly possible that he did. Certainly he said that he did not insist that the document had to be signed that weekend, that the process had been going on for quite some time since they became engaged and that he was not in any particular hurry. The husband says that the wife prepared a summary of her details and resources for his lawyer, Mr Satine, and that a draft agreement was prepared and discussed with the wife.

My findings in respect of the circumstances of the signing of the agreements
37. Although I found the husband to be rather cold and matter-of-fact in the way that he gave his evidence and I find his current approach towards the wife and the knock-on effect that it would have on the children to be both mean-spirited and mean, I found him to be honest and truthful and preferred his recollection of the circumstances surrounding the signing of the agreements. Where I have had doubts as to who to believe I have found those doubts resolved in favour of the husband's case by certain objectively verifiable factors. These include the fact that the documents show, as I set out above, that the husband and Mr Satine both clearly told the wife that she should take independent legal advice. Furthermore, it is clear from the evidence of Mr Satine, who had no reason to do anything other than come to the court and tell the truth, that he had a reasonably long conversation with the wife, during the course of which the wife raised no complaints about being invited to enter into a prenuptial agreement.

38. I find that the husband was far less bothered about the prospect of marrying than the wife was; he was perfectly content to carry on in a relationship of cohabitation rather than marrying. Having heard from him and observed his attitude towards money I accept as probably correct that he told the wife he would not marry her if she did not sign a prenuptial agreement. Indeed, I was struck during the course of the husband's evidence by the fact that he seemed rather oblivious to the fact that all of this would have grave consequences for the wife because she would be left with something a little over £500,000 and he would have some £9.5m. Mr Pointer recognised that this may require me to make provision for the children pursuant to the provisions of Schedule 1 of the Children Act. However, because I find the husband to be financially mean does not have to lead me to the conclusion that he was a dishonest witness. On the contrary, his attitude led me to accept as far more likely than not that it was he that was giving truthful evidence about the circumstances that surrounded the signing of the prenuptial agreements. I accept that he was happy to carry on being unmarried. I reject the wife's assertion that the husband was guilty of serious misrepresentation in relation to the prenuptial agreements. It is also important to bear in mind that, at least in relation to the American agreement, the wife had independent legal advice and elected to ignore that advice. I cannot accept that the wife on three separate occasions signed a prenuptial agreement imagining it to be irrelevant and assuming its provisions to be of no impact. I was referred during the course of

the evidence to a diary note the wife had made during the course of the Niagara weekend which reads as follows:

"Vacation
Cosied up in the morning.
Went to the Niagara Falls.
Back to the hotel and had a massage and pedicure!
Went for a walk and ate at a worthless Italian restaurant.
Was at the hotel and watched a video.
Signed the marriage papers."

I agree with the submission made on behalf of the husband that these did not appear to be the musings of a person who was "shocked by the request that [she] sign a prenuptial agreement after so many years together".

39. I find that the parties did consensually enter into one or more prenuptial agreements and that, at the time when they were entered into, the effect of the agreement or agreements was not vitiated by factors such as fraud misrepresentation or undue pressure.

The prorogation clause
40. As I have set out above, the Niagara agreement and the Gothenburg agreement were drafted in identical terms, save that the latter had a separate signature page. Both agreements were headed "Prenuptial Agreement and Prorogation Agreement". The introductory paragraph states as follows (as translated from Swedish):

"The undersigned… who intend to contract a marriage with one another, by this conclude the following prenuptial agreement. Furthermore we enter into a prorogation agreement in which we determine what law and court shall apply and as to the distribution of property with ourselves."

The prorogation agreement reads as follows (again translated from Swedish):

"Moreover we agree that in case of separation between the two of us Swedish law shall apply at the distribution of our property and that any dispute as to that property shall be settled in accordance with Swedish law before the City Court of Stockholm, Sweden.

Hereby we are aware about the regulations in /Swedish/ law 1990:272 regarding certain international issues regarding spouses properties, and confirm our agreement that Swedish law no other law is to be applied on the distribution of our properties and that it shall be settled before the City Court of Stockholm, Sweden."

41. As I have said above, the Gothenburg agreement was in almost identical terms. The American agreement contained the following clauses in this regard:

"WHEREAS, the parties are each citizens of the Kingdom of Sweden and are currently residing in the United States only because of the business necessity thereof by [the husband], and it is not the intention or the desire of either of the parties to avail themselves of the judicial system of the United States as relates to their personal relationship now or in the future, and

WHEREAS, it is the desire and intent of the parties to submit themselves to the jurisdiction of the judicial system of Sweden, and more particularly to the City Court of Stockholm, Sweden and

WHEREAS, the parties have caused a "Prenuptial Agreement and Prorogation Agreement" to be filed with the judicial authorities in Sweden pursuant to Swedish law, whereby they, inter alia consent to the City Court of Stockholm, Sweden and the application of Swedish law for the resolution of any dispute between them, and

WHEREAS, the parties intend that the said "Prenuptial Agreement and Prorogation Agreement" as filed in Sweden shall be incorporated in the within Agreement but shall not merge and shall survive, and

WHEREAS, the parties agree that in the event of any inconsistency, ambiguity, or conflict

between the Swedish Prenuptial Agreement and Prorogation Agreement, and the within agreement, the Swedish document shall take precedence and shall apply."

Is the prorogation clause valid under European law?
42. The validity of the prorogation clause requires consideration of the terms of the Maintenance Regulation (EC No. 4/2009) Article 4(1) and (2) which provides (so far as is relevant):

"1. The parties may agree that the following court or courts of a Member State shall have jurisdiction to settle any disputes in matters relating to a maintenance obligation which have arisen or may arise between them:-

(b) a court or the courts of a Member State of which one of the parties has the nationality.

2. A choice of court agreement shall be in writing."

43. This therefore requires the satisfaction of two criteria: (a) the parties shall have agreed; and (b) that the agreement should be in writing. I have already found that the parties each consented to the agreement; and the agreement is of course in writing. The wife accepted during the course of her oral evidence that she understood that each of the three agreements provided for the resolution by a Swedish court of any issue that might arise between them concerning the agreement or its implementation. Moreover, the evidence of Mr Satine leads me to conclude that the wife understood the agreement into which she was entering and knew that there was a Swedish forum clause. I have already found that there were no vitiating factors at the time when the agreement was entered into and therefore I find that this is a valid prorogation clause.

44. I reject Mr Chamberlayne's contention that the prorogation clause is invalid due to the fact that there is an inconsistency between the American and the Swedish agreement. The language of the American agreement in respect of Swedish jurisdiction is entirely clear and, in any event, the American agreement expressly says that in the event of any inconsistency between the

Swedish and the American agreement, the Swedish agreement shall take precedence and shall apply.

What is the effect of the prorogation clause?
45. The effect of the valid prorogation clause is that Article 4 is engaged and therefore this court's jurisdiction to make orders for maintenance is excluded. The Swedish agreements are headed "Prenuptial Agreement and Prorogation Agreement". The American agreement is headed "Prenuptial Agreement". Mr Chamberlayne asks me to find that there is some important distinction in terms of the way that they are headed. I disagree. The American agreement expressly incorporates the Swedish prorogation agreement. Furthermore, it says that the parties "... consent to the City Court of Stockholm, Sweden and the application of Swedish law for the resolution of any dispute between them".

46. Having found that the prorogation clause is valid, I am clear that this court's jurisdiction is confined to dealing with "rights in property arising out of a matrimonial relationship". I am bound to stay the wife's maintenance claims to enable them to be determined in Sweden.

47. Mr Pointer asserts that the effect of the EU Maintenance Regulation is that the wife is debarred from pursuing any claim for ancillary relief and that this includes what we commonly refer to nowadays as her "sharing claims" (he accepts that the court has jurisdiction to make orders pursuant to the Married Women's Property Act 1882). His argument is that there is no such creature as a sharing claim; ancillary relief claims are brought under the Matrimonial Causes Act 1973 sections 23 and 24 for claims for periodical payments, lump sum and for a property adjustment order. In this case, given that the only relevant piece of real property has already been transferred into joint names, the claim is effectively for periodical payments and for a lump sum. Insofar as the lump sum claim is said to be one based on sharing, he contends that that means little more than that the rationale for the award is said to be the generation of resources by the efforts of the parties during the span of the marriage, in which the claimant says she ought now to share. He says that any award I make in favour of the wife is a discretionary award and that this does not, therefore, equate to a "right in property".

48. This argument is a new one on behalf of the husband and stands in contradiction to the case which the husband has been running from inception. In a letter dated 5 March 2015 from the husband's solicitors to the wife's solicitors was the following paragraph:

"The consequence is that as a matter of EU law (which is not subject to any discretion) your client is not entitled to invoke the jurisdiction of the English court in relation to maintenance for herself, at least unless and until she has first invoked the jurisdiction of the City Court of Stockholm and that court has declined jurisdiction. Whether that court would in practice be likely to make any order for maintenance in her favour is not relevant.

We are not suggesting that your client is debarred from making any financial application within her divorce proceedings. EU law recognises that the English law of ancillary relief is a hybrid which in any given case may encompass elements of maintenance and also other elements. You are no doubt familiar with the decision of the ECJ in Van den Boogard v Laumen [1997] 2 FLR 399. Accordingly we acknowledge that your client is entitled to pursue financial claims in England in so far as these do not consist of or include any element of maintenance. However, our client will be relying on the terms of the American agreement as a whole if she chooses to do so."

49. This clear statement of principle to the effect that the wife had a valid financial claim provided it does not consist of or include any element of maintenance also found its way into the order of Sir Peter Singer sitting as a deputy judge of the High Court on 15 October 2015. Paragraph 3 of that order provided:

"It is the husband's contention that the terms of the agreement which the parties entered into on 11 December 2000 amount to a binding choice of court agreement in favour of the City Court of Stockholm for the purposes of Article 4 of the EU Maintenance Regulation (or alternatively for the purposes of Article 17 of the Brussels Convention on Civil Jurisdiction and Judgments); and that accordingly the wife is precluded from applying for maintenance for herself in this court."

50. On the 29 January 2016, Moylan J heard the wife's application for interim periodical

payments. On that occasion the husband was represented not by Mr Pointer and Mr Mitchell, who have represented him at this hearing, but by Mr Scott QC. The transcript of that hearing reads as follows when considering the Van den Boogard decision:

"MR JUSTICE MOYLAN: I appreciate that in the Court of Justice's decision it refers to the fact that if the provision awarded is designed to (inaudible) to provide for himself or herself, or, and this is the important element, if the needs and resources of each of the spouses are taken into consideration in the determination of the amount, the decision will be concerned with maintenance. Well, as a matter of law, s.25 requires the court to take into account needs and resources. But that cannot be the answer, because if that was the answer then every decision made by this court would be a maintenance award and not an award which comprise rights and property arising out of a matrimonial relationship.

Following the House of Lords indication of the manner in which matrimonial or financial claims are determined, in particular the sharing claim, there would seem to be open to a party to assert that a sharing claim is purely and simply a right in property arising out of a matrimonial relationship.

MR. SCOTT: Yes.

MR. JUSTICE MOYLAN: Because it is not talking about legal rights, it is talking about the manner in which the court is or the basis on which the court is exercising its powers.

Lord Phillips, in Radmacher v Granatino refers to the approach the court should take to when considering whether or not to enforce or what weight to give to an anti-nuptial, prenuptial agreement, and refers to the three strands needs, compensation, and sharing. So the wife in this case clearly has a freestanding claim to the property rights arising out of a matrimonial relationship, unaffected by maintenance.

MR. SCOTT: My Lord, we have always accepted that, and that is quite clear from our letter of 5th March that we accept that. We say she should not get an award, but we do accept is entitled to a (inaudible).

MR. JUSTICE MOYLAN: So, if the prenuptial agreement, if the court decides that the prenuptial agreement should have no impact, either because of the circumstances in which it was agreed, or because of its effect, what would the court then do?

MR. SCOTT: Well, my Lord, that takes us into complex arguments about the interrelationship of our argument about the merits of the wife's sharing claim and of course (inaudible) in relation to the claim so far as it is in the nature of maintenance.

MR JUSTICE MOYLAN: I appreciate there are lots of arguments and the case could probably quite happily, at some stage in its history or life, go to the Supreme Court, but I am not sure that would be to the benefit of the parties to see their carefully accumulated wealth being dissipated in litigation. But it is a serious point; if the court is determining the wife's property rights claims, then they are freestanding claims?

MR. SCOTT: Yes.

MR JUSTICE MOYLAN: If the court were to decide, and I do not want to unfairly put you on the spot, but I am just raising points, if the court was to take the approach as identified by Lord Phillips in Radmacher, the court could, could simply make a sharing claim, the (inaudible) sorry.

MR. SCOTT: My Lord, we have always accepted that it could, in the sense that nothing in the agreements precludes the wife's right to apply for that.

MR JUSTICE MOYLAN: Yes.

MR. SCOTT: But what we say is that because of the terms on the agreement, which I described in my note as being Radmacher compliant, that is the American agreement, then the court, in its discretion, following Radmacher, should not make any order in the nature of sharing in favour of the wife. And further, that it cannot make any order in the nature of maintenance because of the Article 4 point.

MR JUSTICE MOYLAN: So your defence to the wife's claim relies on both points?

MR. SCOTT: Yes."

51. Accordingly, it can be seen that on three separate occasions, one of them in a letter, two of them in court, the team acting for the husband have conceded that the wife would not be precluded by the Article 4 point alone from pursuing a sharing claim. In my judgment these concessions were properly made. In this hearing (and as advertised by him at the PTR which preceded it), however, Mr Pointer abandons those concessions and seeks to persuade this court that pursuing a sharing claim is not in any sense a right in property but is in reality a claim for maintenance. In paragraph 14 of his opening note, Mr Pointer stated, "the ancillary relief claims that W makes are for financial provision and property adjustment orders". He says that the concept of sharing is no more than a label used by the Supreme Court in Miller to identify and explain one of the reasons or bases for the making of a financial award at the conclusion of a marriage, and its quantum. It is not an independent head of claim at all. He relies (inter alia) upon a passage in the judgment of Lord Collins in Agbaje v Agbaje [2010] 1FLR 1813 who said, referring to the decision of the ECJ in Van den Boogaard v Laumen [1997] ECR I-1147,

"Van den Boogaard shows that a transfer of property may be in the nature of maintenance if it is intended to ensure the support of a spouse; but a transfer of property which serves only the purpose of a division of property is not in the nature of maintenance, and concerns rights in property arising out of a matrimonial relationship."

52. Since at least the decision of the House of Lords in White v White in 2000, it has been made clear that a spouse asserting a claim for ancillary relief in a marriage where the parties have made a broadly equal contribution is not the assertion of a supplicant but is a claim to a share in the fruits of the marriage. This principle was made explicit by the House of Lords in Miller v Miller; McFarlane v McFarlane in 2006, in the speech of Lord Nicholls of Birkenhead who said (paragraph 9):

"The starting point is surely not controversial. In the search for a fair outcome it is pertinent to

have in mind that fairness generates obligations as well as rights. The financial provision made on divorce by one party for the other, still typically the wife, is not in the nature of largesse. Is not a case of 'taking away' from one party and 'giving' to the other property which 'belongs' to the former. The claimant is not a supplicant. Each party to a marriage is entitled to a fair share of the available property. The search is always for what are the requirements of fairness in the particular case."

Later, in paragraph 16 he said:

"this 'equal sharing' principle derives from the basic concept of equality permeating a marriage as understood today... When their partnership ends each is entitled to an equal share of the assets of the partnership, unless there is a good reason to the contrary. Fairness requires no less."

In my judgment, what the wife makes here, subject to the pre-nuptial agreement to which I shortly turn, are claims for a fair share of the assets of the marriage and these are clearly rights in property arising out of a matrimonial relationship in the sense referred to in Van den Boogaard. Accordingly, in my judgment, the prorogation clause, albeit properly entered into, and not negated by one of the traditional vitiating factors, is not caught by the Maintenance Regulation insofar as it deals with any sharing or real property claims, unless those claims are negated by the terms of the pre-nuptial agreement itself, an issue to which I turn next.

The effect of the pre-nuptial agreement on the wife's financial claims
53. I have found above that none of the vitiating factors are present such as could render the agreement void ab initio. At paragraph 75 of the Supreme Court decision in Radmacher v Granatino [2011] AC 534, the court advanced the following proposition:

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

The court then went on to say at paragraph 76:

"that leaves outstanding the difficult question of the circumstances in which it will not be fair to hold the parties to their agreement. This will necessarily depend upon the facts of the particular case, and it would not be desirable to lay down rules that would fetter the flexibility the court requires to reach a fair result."

54. In seeking to give some guidance as to what might constitute a fair or unfair agreement, the court reminded us that the first consideration of the court must be to the welfare while a minor of any child of the family who is under 18. The court went on to say that "a nuptial agreement cannot be allowed to prejudice the reasonable requirements of any children of the family". Later, the court said:

"the parties are unlikely to have intended that their ante-nuptial agreement should result, in the event of the marriage breaking up, in one partner being left in a predicament of real need, while the other enjoys a sufficiency or more, and such a result is likely to render it unfair to hold the parties to their agreement. Equally if the devotion of one partner to looking after the family and the home has left the other free to accumulate wealth, it is likely to be unfair to hold the parties to an agreement that entitles the latter to retain all that he or she has earned."

55. In this case, giving effect to the agreement would leave the wife with one half of the value of the family home, less debts of some £350,000, leaving about £560,000. The husband indicated to me that, in the event of this outcome, he would not press for repayment of the loan of £95,000, so the wife's resources would grow to £656,000 (although his concession was very carefully limited to the acceptance by the court, in full, of his open offer). That amounts to some 5% or 6% of the family assets. The Supreme Court in Radmacher plainly left the courts with a wide residual discretion as to the definition of what is fair in any given case. I am satisfied that the prenuptial agreement would work unacceptable unfairness on the wife and that, worse still, it would adversely affect the best interests of the children of the family. To consider this in the context of the passages quoted above in Radmacher, I do not believe that it can be considered fair after a marriage of this length and with these contributions and with these children, for the wife to be left with almost nothing and for the husband to be left with almost everything. Certainly it would put the wife and children in a predicament of real need.

56. Mr Chamberlayne submits that if I conclude (as I do) that the agreement is unfair then I should completely disregard it. He prayed in aid the decision of Mostyn J in Kremen v Agrest (11) [2012] EWHC 45 (Fam) who said:

"... It is doubtful that the parties ever actually intended that the agreement should govern the financial consequences of the marriage coming to an end...

... Accordingly, I accord the agreement no weight whatsoever and discard it from my assessment of the fair award."

57. The point here, however, is that the wife has failed to make out her claim as to misrepresentation, to persuade the court that the husband told her that the nuptial agreement would not govern the financial consequences of the marriage coming to an end. As I have set out above, I have found that the wife did understand that she was signing a prenuptial agreement that would govern the financial consequences of the marriage if it ended. The position is, accordingly, quite different from the one which Mostyn J was considering. Moreover, in Kremen, Mostyn J found that there had been materially deficient disclosure and that the husband had put the wife under considerable pressure.

58. In argument, however, Mr Chamberlayne persisted in his submission that a very unfair prenuptial agreement should be "ripped up" even if not contaminated from the outset by one of the vitiating factors and even if apparently fair when entered into. I disagree. The effect of this would be that an agreement properly entered into but which turns out, with hindsight, to be unfair, would be completely disregarded when it reached a particular tipping point. It would have the effect that a relatively unfair agreement would be binding whereas a very unfair agreement would be treated as if it never existed. It would place legal advisers in a most precarious position of having to advise their client of the moment at which the tipping point would be reached. In Radmacher itself the Supreme Court found the agreement to be unfair and intervened to provide additional housing and income for the husband, albeit on a limited basis, both in terms of amount and timing. If Mr Chamberlayne's submission is correct then why did the Supreme Court not simply disregard the prenuptial agreement altogether? The

answer, it seems to me, is to be found in the fact that the court paid substantial regard to the concept of autonomy in saying, at paragraph 78, "the reason why the court should give weight to a nuptial agreement is that there should be respect for individual autonomy. The court should accord respect to the decision of a married couple as to the manner in which their financial affairs should be regulated."

59. I recognise that in Radmacher, the husband's sharing claim was of a very different nature since the overwhelming part of the fortune concerned derived from the wife's family and did not constitute what we might these days regard as matrimonial property. In the instant case, I have already noted that the overwhelming majority of the assets were generated during the marriage and so the wife's sharing claim is clearly made out. This makes it easier for me to find, as I do, that the agreement is unfair. But that does not, as a matter of law, drive me to disregard it altogether.

60. What is the correct approach of the court when a prenuptial agreement has been found to be unfair? Plainly, if there is a vitiating factor present such as fraud, duress or undue influence, a court is likely to determine that the agreement is void ab initio. I would expect that in most cases material misrepresentation would have the same effect. In Sharland [2015] UKSC 60, the Supreme Court ruled that the maxim "fraud unravels all" applied to matrimonial consent orders. It is clear to me that, by analogy, the same rule should apply to a prenuptial agreement, which is a different type of matrimonial agreement. However, where, as here, a valid agreement has been entered into and there are no vitiating factors present, then in my judgment it would be wrong simply to disregard the agreement; rather it is the court's duty to step in to alleviate the unfairness. That will not usually be simply to restore the parties to the position that they would have been in absent the agreement. In the instant case the parties agreed to a regime of separate property, so the starting point here is that, apart from the matrimonial home, the husband owns everything. Where assets are available (as here) to meet the wife's needs, these should be met by invading the husband's separate property. The extent to which need is "generously" or otherwise interpreted will of course vary from case to case.

61. This is the approach which was taken by Moor J in Z v Z [2011] EWHC 2878 (Fam) where the court upheld a French separation de biens insofar as it excluded sharing but the court went on

to meet the wife's reasonable needs. A similar approach was adopted by Holman J in Luckwell v Limata in 2014.

62. The effect of the above is, however, very serious indeed for the wife, when I return to the consequences of the prorogation agreement, for it means that I am now to approach the case on a needs basis. This claim would now involve an element of maintenance and I have concluded that the prorogation clause prevents me from dealing with maintenance, at least until the Swedish court has had the opportunity to do so.

63. Had I concluded that I had the power to address the wife's maintenance needs then I would have carefully studied her budget and, perhaps after trimming certain items, I would have carried out a conventional Duxbury calculation and made a lump sum order against the husband. It would seem to me to be inappropriate, at least at this stage, to set out in any more detail what level of Duxbury award I would have made. I regret that I am unable at this stage to make one, but this is the clear effect of Article 4 as applied to the findings of fact which I have set out. It may be that, in due course, the matter will return to this court, as envisaged by the pre-nuptial agreement itself. The American agreement provided that no dispute could be submitted for resolution in any court until the City Court of Stockholm "has first declined jurisdiction and the appellate process for such declination has expired". It is not for me to comment on whether or not the City Court of Stockholm will decline to deal with the matter.

64. The question of the housing needs of the wife and children is more complex. However, I am completely satisfied that they cannot fairly be met from the net value of the wife's half share in the family home, and most certainly cannot be met without severely prejudicing the needs of the children. Mr Pointer asserts that my hands are tied and my jurisdiction removed by a proper reading of Article 4. He refers again to the decision in Van den Bogaard v Laumen (by which this court is bound) which said at paragraph 22,

"It should be possible to deduce that aim from the reasoning of the decision in question. If this shows that a provision awarded is designed to enable one spouse to provide for himself or herself or if the needs and resources of each of the spouses are taken into consideration in the determination of its amount, the decision will be concerned with maintenance."

65. I have no alternative but to find that my power is circumscribed to addressing a right in property in the strict sense. In other words, I can order a sale of the family home, I can declare that the parties are entitled to half each of the net proceeds of sale, but I cannot order that the wife should have more than half of its value. If I were to do so, as I think would be fair here, then I would be taking into account "the needs and the resources of each of the spouses". It is clear that, once I do this, I step into the realms of maintenance, which I have found is currently impermissible in this case.

66. I note that Mostyn J had to grapple with a similar point in CG v IF (MFPA Part III: Lugano Convention) [2010] 2FLR 1790. Although that case was concerned with the Lugano Convention, a similar point arose in relation to similar provisions. Referring to paragraph 22 of Agbaje to which I have referred above, he said,

"It seems to me that if an ancillary relief award contains an ingredient (to any material degree) the satisfaction of needs, then it will not be 'solely' concerned with the division of property between spouses. This will be the case whether the needs are for accommodation or income; and whether they are satisfied by way of Duxbury lump sum or periodical payments; or by the supply of one or more homes..."

67. I have referred above to the Judgment of Lord Collins in Agbaje v Agbaje [2010] 1FLR 1813 where he said, referring to the decision of the ECJ in Van den Boogaard v Laumen [1997] ECR I-1147, "Van den Boogaard shows that a transfer of property may be in the nature of maintenance". A transfer of property may be in the nature of maintenance, for example, if I were to transfer Wildwood to the wife in this case with the intention that she sells it and uses the surplus capital for her maintenance. As Lord Collins observed in paragraph 57 of Agbaje, "this is an area which involves difficult questions which do not arise for decision on this appeal". However, they do arise now and must be addressed. Although it is possibly (if not probably) an unintended or accidental consequence of the Maintenance Regulation, I am quite satisfied that on its proper construction I am prevented in this case from ordering the husband to make a lump sum payment to the wife for the purpose of purchasing a property for herself and the children.

The Schedule 1 claim

68. I have determined that the wife, having lost her sharing claim by reason of the Pre-nuptial agreement cannot presently make a needs based claim by reason of the Maintenance Regulation as applied following the Prorogation Agreement. Accordingly, at least until such time as the Swedish court has addressed the issue, she has to fall back on to her Schedule 1 claim. It will be necessary now to order that a property be settled on the children in what might be regarded as conventional Schedule 1 terms. I am quite satisfied that such money as she has left from her share of the equity in the family home should not now be used to meet the housing needs of the children. The wife is entitled to invest such money as is left after she has paid her costs and to save that money for when the time comes that the settlement of property order has ended. The wife may wish, for example, to invest her money in a modest property which will provide for her when the children have left home. She is entitled to enjoy the capital growth on that property as well as any income that it may derive. The husband, meanwhile, will not be permanently deprived of the money that is to be used in the purchase of a property for the wife and the children to live in whilst the children are dependants.

69. In the usual way, I looked at property particulars in this case, each party contending for properties at whichever end of the scale best suits his or her respective case. The husband has suggested that the wife and children should live in a modern estate type property in an urban location some distance from the relevant schools. The price range of his suggested properties is £600,000 to £1,195,000. The wife has produced particulars of properties of a broadly similar size to the family home, each of them in a fine location, the price range being £2.2 to £2.75m. Having regard to the wide discretion afforded to me by the provisions of Schedule 1, I have determined that the housing needs of the children, and of their mother as carer, can fairly be met by the sum of £2m, to include the costs of purchase. Such a sum is to be settled or otherwise made available to provide a property until 12 months after A and B have both ceased full time education to end of first degree and/or training (to include a gap year) or further order of this court. I would hope that the parties and their advisors will be able to agree the basis and terms upon which the purchase can be effected but, if not, the matter can be remitted to me for determination. The husband will also need to provide a fund which will pay for the usual "landlord's costs" such as repairs, property insurance etc. This will doubtless be a substantial six figure sum, required, as it is, to cover a period of perhaps 18 or so years. Obviously if, in due

course, the court makes a lump sum order in favour of the wife then the Schedule 1 property may need to be reviewed.

70. The wife says that she needs to purchase a new car. She may do so with part of the £2m housing fund, and of course such sum as is used for the purchase of a reasonable car for herself and the children will not be returned to the husband when the house is eventually sold.

71. I have determined that I cannot order the husband to make a lump sum payment for maintenance or periodical payments to the wife unless and until the wife's claims for maintenance have been determined by the City Court in Stockholm. I have referred above to the fact that Moylan J ordered the husband to make payments of maintenance pending suit to the wife in the sum of £95,000 and in my judgment that is a fair sum for the husband to pay to the wife for herself as carer's allowance and for the children to meet their needs. The husband asserts that this is demonstrably too high. I disagree. There is no doubt that the husband can readily meet this from the sums that he seems to be able to make each year from his own portfolio, plus of course his earnings. If the wife is able to supplement this with a modest income then she should be allowed to do so without the sum being varied. Of course, should her earnings be substantial then I cannot bind another court on another day. The husband asserts that the wife has an earning capacity, although he has presented little evidence as to what, how and where the wife could earn. I would hope that she will take such steps to earn as are consistent with her duties to the children and her need to deal with the barrage of litigation that may yet still face her.

72. I expect the husband to continue to pay A's school fees and this should form part of my order. I have not been asked to rule on whether B should attend private school. It must be hoped that the parties will be able to agree on all schooling issues, but they will have to issue an application if they cannot do so. It would, I suggest, be a dreadful shame for the children if they were to be the subject of litigation on an issue which the parents should be able to agree if they put the interests of their children first.

73. I intend in the circumstances to accede to the husband's request for an order for sale of the family home pursuant to the MWPA 1882.

Conclusion
74. My order summarised is as follows:

i) The family home will be sold.

ii) The net proceeds of sale after payment of the costs of sale and the mortgage will be divided equally between the parties.

iii) The wife's lump sum and maintenance claims will be stayed until the City Court of Stockholm has resolved them or declined to resolve them.

iv) The husband will make the sum of £2m available for the purchase of a property pursuant to Schedule 1 of the Children Act 1989 on terms to be agreed or in default as ordered by the court, but on the basis that it is to provide a home for the children until at least 12 months after both of them have ceased full time education to end of first degree or training (to include a gap year).

v) The husband will pay the wife a carer's allowance for herself and periodical payments for the children in the global sum of £95,000 pa. I would expect the parties to be able to agree the precise terms of this provision, but in default of agreement it will be drafted by the court. I would expect there to be index linking to CPI since this is a needs based award.

75. I end with these observations: the husband is 50 and may not see the return of his £2m housing fund (less of course the costs of purchase etc and the cost of the new car) for some 18 years or so. The wife will now doubtless pursue her claims in Sweden. She may then, according to outcome, decide to renew her claims here. Whilst not in any way seeking to foretell what may be the outcome of any applications that may be made, they will doubtless be expensive and they will be hard for the parties and, more importantly, for the children to bear. They have already been engaged in litigation for almost two years. The husband has sought to rely on the terms of the pre-nuptial agreement and he has been largely successful. I have found it to be unfair and have been forced by the technicalities of the European Maintenance Agreement to use the unusual route (within divorce proceedings) of Schedule 1. I urge him to see whether he would not, even at this late stage, wish to settle this case on terms that would now draw a line

under this marriage and this family's battle, rather than prolong the family's agony for what, at the end of the day, is money that he can spare.

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1 That is £3m less mortgage of £1,090,467 and sale costs of £90,000