OUTER HOUSE, COURT OF SESSION

[2021] CSOH 66

F3/20

OPINION OF LORD ARTHURSON

In the cause

D

Pursuer

against

D

Defender

Pursuer: Party
Defender: J Brown, advocate; Thorntons Law LLP

23 June 2021

Introduction

[1] This is an action dealing with financial provision on divorce. The parties married at Edinburgh on 24 February 2011. The date of separation and relevant date for the purposes of section 10(3) of the Family Law (Scotland) Act 1985 is 16 October 2019. By way of an extensive joint minute and a supplementary joint minute, the valuations of matrimonial assets were in large part agreed. A summons was served on the defender on the instructions of the pursuer in January 2020. A proof diet was assigned to commence on Tuesday 6 October 2020 before an allocated judge. The disputed issues for proof related to special circumstances arguments in respect of the defender's pension and the matrimonial home,

there being in respect of the latter a source of funds argument. There was a substantial dispute between the parties in respect of the valuation of LTIP A shares and B shares in G Ltd held by the defender, who is an employee at Edinburgh Airport. The parties were also in dispute on the non-capital issue of periodical allowance. On the morning of the proof diet, following communings between the parties which had commenced the previous week, the action was compromised. Counsel appeared before the court by Webex and advised that agreement had been reached. Subsequent thereto in communications between agents between noon and 1.00pm, the defender's agents sent an email to the pursuer's agents setting out the terms of the agreement, with the pursuer's agents replying by email acknowledging that the said email letter had set out the agreed terms of settlement.

[2] On 8 October 2020 the pursuer spoke to a medical practitioner at Bruntsfield Medical Practice. The pursuer had a consultation with Dr Kenneth Duffy of the same practice on 9 October 2020. The pursuer had had a panic attack on the Friday morning prior to the proof while driving. She advised him that she felt unable to speak to her solicitors and was worried that she could not cope with what was happening. Having disengaged with her agents, the pursuer was the subject of a motion for a *curator ad litem*. Dr Duffy indicated by letter of 27 November 2020 that any assessment of capacity should be the subject of assessment by a psychiatrist. The pursuer was the subject of private referral in due course for trauma therapy and in early 2021 met Dr Haydee Cochrane, a Clinical Psychologist. The pursuer stated that she was experiencing certain symptoms. Dr Cochrane stated that these symptoms met the criteria for Post-Traumatic Stress Disorder. This was accordingly not a diagnosis, but an observation by Dr Cochrane that the symptoms described met the criteria. In any event, Dr Cochrane was of course not a psychiatrist or indeed a medical practitioner.

[3] A further proof diet having been allowed in early 2021, at a pre-proof hearing on 26 April 2021 it became clear that the pursuer was then contending that parties had not reached a valid and binding settlement. In these circumstances the Court made a series of case management orders and restricted the scope of the proof which had been assigned to the following two matters: (i) did the purported compromise in October 2020 constitute a valid and binding agreement between the parties; and (ii) if so, should that agreement nonetheless be set aside on the basis of unfairness or unreasonableness in terms of section 16 of the 1985 Act. The minute of proceedings for that hearing records that the pursuer was advised to take all possible steps to obtain professional and legal advice as soon as possible, standing the complexities arising in the forthcoming proof and having regard to certain documentation lodged by her in respect of her own health, that documentation including a short report by Dr Cochrane dated 15 April 2021. At a further by order hearing on 19 May 2021 it was confirmed that parties were ready to proceed to proof. The pursuer did not address the advice given previously by the Court in respect of the seeking of legal advice.

The preliminary proof

[4] The pursuer accordingly chose to represent herself at the proof diet. She gave evidence on her own behalf. She further led as witnesses a family friend living in Australia, Jon Holmes; her mother, ML; her daughter, O; an acquaintance and management consultant, Dr Jacqueline Conway; the retired chief financial officer of Edinburgh Airport, Alistair Couper; Dr Kenneth Duffy her general practitioner; and Jamie Younger, a chartered accountant with Saffery Champness who spoke to a report dated 4 September 2020 prepared by him in respect principally of valuations of the shares in G Ltd.

[5] For the defender, evidence was adduced from senior counsel instructed for the pursuer at the October 2020 proof diet, Ms Lynda Brabender QC; her instructing solicitor from Turcan Connell, Elaine Proudfoot; and Mr Robert Hayhow, advocate, counsel then acting for the defender. The defender also gave evidence on his own behalf. At the pre-proof hearing on 26 April 2021 a finding had been made that privilege had been waived in respect of the communings related to settlement negotiation culminating on 6 October 2020 and the Court had ordered that the pursuer's former legal representatives could competently give evidence on these matters whether or not the pursuer consented.

[6] The pursuer focused at the outset of her evidence on the absence of certain certificates following the grant of commission and diligence on 6 August 2020. She advised that following the purported settlement there had been no tidying up of loose ends and that certain undertakings offered by the defender at an earlier stage in process had been breached by him. She accused the defender of fraudulently applying for a mortgage holiday, of perjuring himself in respect of his undertakings and of what she described in very general terms as domestic abuse during the marriage. She had been placed under duress as a consequence of a very combative approach taken on behalf of the defender to court procedures and in the days prior to the proof had been bombarded with late documents. She believed that the agreement reached on 6 October 2020 was a draft only and that it was not valid and binding. As I understood her position the pursuer appeared to accept that she had given the instructions referred to in the communings between agents on the morning of 6 October 2020 but that after the purported settlement she had left her solicitor's office having signed nothing and had given no further instruction. In short, the purported agreement was not binding nor valid and in any event was not fair and reasonable. She accepted that there was a range of potential outcomes at the proof but

emphasised that she had made it clear by an email sent at 1.30am on the morning of the proof to her agents that it was her intention to go to proof. The pursuer acknowledged the risks for her in particular associated with the potential valuation range of the LTIP shares and further accepted that there were areas of dispute in respect of the matrimonial home and the defender's pension. She accepted that she needed a capital settlement because she wanted to keep the matrimonial home, and accepted that there was a risk that the Court would not make an award of a capital sum sufficient to pay off the outstanding mortgage. The pursuer described a panic attack which she had experienced while driving the children to school on the morning of the Friday before the proof, a matter she reported to a friend who had provided an affidavit about this matter. On the morning of the proof the pursuer described arriving and speaking to her senior counsel on speaker-phone in the presence of her solicitor. She had walked out of the boardroom of her solicitor's office twice, upset, shaking and in floods of tears. She recalled what she described as the defining moment of the day in terms of which her senior counsel had said over speaker-phone: "The defender says if the pursuer carries on like this she will lose the house." In an earlier note of argument the pursuer had referred to this comment as a "statement of threat". She said that her position was that she had "wanted the whole sorry business put in front of" the allocated judge. She further stated "I felt my voice also needed to be heard." She described the words spoken by Ms Brabender to be the tipping-point for her given the degree of mental duress that she had suffered. Exhausted, she had just said "okay" when confirming that she was content to accept the capital sum offered in an increased offer made to her on the morning of the proof. In accepting that she did give an instruction to settle the proof, she advised that she barely held it together and that she "literally broke". She said that she had no resilience left.

[7] Mr Holmes gave evidence by video link from Australia. He spoke to his long connection with the pursuer's family and of his discussions with her by video calls the weekend before the proof. It was apparent to him that the pursuer was under a very high level of stress and he suggested that she see a doctor at the earliest opportunity. On the day after the proof, 7 October 2020, he had called the pursuer and thought that she was leading up to something quite close to a breakdown. He spoke of a previous visit to Scotland and encountering the pursuer and the defender at the door of their home at which time profanities were expressed. I found Mr Holmes to be an impressive and measured witness whose evidence I accepted in full. ML described the pursuer's normal personality in a work environment as being "quite in command" and referred to the weekend prior to the proof in the context of volumes of paperwork coming in. She gave a description of the pursuer as appearing one moment lucid and panic-stricken the next. On the day of the proof the pursuer had appeared detached and when she returned she got into bed. The witness confirmed that she had funded the pursuer's legal costs and that she expected to have that money returned. ML was a genuine and well-intentioned witness whose evidence in general terms was credible and reliable. O gave evidence related to an unspecified date around the time of the proof in which she described her mother as extremely drained with a grey skin tone. She described behaviour of the defender to the extent of door slamming and drinking. She did not describe any particular incidents. She gave evidence in a distressed manner; indeed, I required to intervene towards the end of her evidence given the level of distress that the pursuer's questions appeared to be causing her. Dr Jacqueline Conway, by profession a management consultant, spoke to working with the defender at some point in the past. The witness stated that early in 2020 the pursuer had texted her and asked her to say untruthfully that she had worked for Dr Conway's management consultancy. The

witness felt that her business was being increasingly compromised by her contact with the pursuer. The day after this witness had given her evidence the pursuer sought to lodge an exchange of text messages between herself and the witness. Counsel for the defender indicated that this was not opposed but it was agreed that the matter would be dealt with in the course of submissions. It was not readdressed by either party. In any event, had the exchange of text messages been produced, the witness had completed her evidence and had at no stage been asked to comment upon them. The witness was in my view both credible and reliable, but added nothing to the pursuer's case. I have already referred to the evidence of Dr Duffy, the general practitioner. I was extremely grateful to Dr Duffy giving evidence, in full medical scrubs, from his clinic and accepted his evidence in its entirety. With regard to the letter from Dr Cochrane dated 15 April 2021, he said that he could not comment on this matter, being as he put it very fairly and frankly, out of his depth. He confirmed that any question of capacity was one for a psychiatrist.

[8] The pursuer's final two witnesses spoke to matters concerning Edinburgh Airport. Alistair Couper was the retired chief financial officer of the airport. It was put to him that he would be aware that by May 2020 information was required for these proceedings from Edinburgh Airport. He indicated that he remembered the matter arising in August or September 2020. The information sought required a trawl through records. His view was that rather than producing this material on a voluntary basis it would properly require a court order. He spoke to a document concerning the LTIP B shares purporting to be dated 14 October 2019, two days prior to the date of separation, but gave unchallenged evidence that this would in fact have been signed by the defender on 14 November 2019. The audit trail of documents showed that the document was not created until 5 November 2019 and all others involved in the B shares scheme had signed it during the period 10 to 24 November

2019. He confirmed that with regard to the A shares, the value was only assessable at the point of sale. This was not a liquid realisable asset, and any value therein would be hypothetical only. The final witness for the pursuer was Jamie Younger, a chartered accountant who gave expert evidence about share valuation. He spoke to the valuation of shares in a company called Neatebox said to be in the region of £14,000, accepting that in the broad scheme of the case this was of tangential relevance and that there was room for a contrary view on its valuation. On the G Ltd A shares and B shares, he spoke to the terms of his report dated 4 September 2020. He had valued the A shares and B shares respectively in the region of £1.5 million. He emphasised that share valuation was an art not a science. His valuations were based on the value of the shares as at the date of separation. He accepted that the defender could not have sold his shares at that date, but in his view nevertheless it could not be said that they did not then have a value. One had to consider a hypothetical sale with an assumed willing buyer and seller and look to the underlying value of the business. The internal rate of return hurdle had been already met and there was good evidence that an exit event was likely to occur in the foreseeable future. He accepted that his underlying methodology assumed a probable sale within a certain timescale. He further accepted that the articles of association of the company provided a certain formula for valuation based on the internal rate of return. Without an exit event, however, the witness was of the view that it was inappropriate to use that mechanism. The witness accepted that he had no specific knowledge and experience in the valuation of airports. He accepted that the circumstances of the post March 2020 Covid-19 pandemic were unique. He was unable to answer a question put to him by the defender's counsel about the breakdown of traffic at Edinburgh Airport. In attempting a comparison with Newcastle Airport, he accepted that he had not looked at sales transactions involving Scottish airports, including for example

Prestwick Airport. He did not know the projected parameters for the recovery of Edinburgh Airport. He accepted that factors extraneous to Edinburgh Airport would be relevant and that a zero valuation of the shares was a possibility. When it was put to him that the B shares which he had valued in the region of £1.5 million as at the date of separation had not actually existed at that date, he conceded that this was a fair point and advised that he had simply been asked to value the shares.

[9] Turning now to the defender's proof, the defender in his parole evidence asserted that the landscape concerning the valuation of the LTIP shares was very different post pandemic, the airport being a distressed asset making large losses. In 2020 the airport was operating at 5% capacity and would require to reach 60% to break even. The industry view was that the airport would not reach its 2019 level until 2023-2025. In response to questions from the bench concerning a variety of allegations which had been put concerning him by the pursuer in her own evidence, the defender made it clear that his application for a mortgage holiday was not fraudulent. He had been making all the payments to the mortgage and had completed the online exercise as it appeared before him. He did not accept the allegations of domestic abuse at all and stated clearly that he had not perjured himself. With regard to the evidence of Mr Holmes, the defender accepted that he had sworn frequently but the background was very much that this was not a one-sided matter. Although there was no allegation against him of any violence at all, he stated that the idea that he would use violence would never be the case and was not remotely close to the truth. The pursuer initially indicated that she did not want to cross-examine the defender, but after an adjournment decided that she would proceed to do so, raising issues of his potential capacity for domestic violence, the mortgage application, perjury and a single undated past event alleging drunkenness on his part, the latter of which he accepted. I wish to record at

this point that I accepted the evidence of the defender in full as credible and reliable, including his evidence in rebuttal of the allegations made against him by the pursuer. He gave his evidence in a measured way at the end of a proof in which the pursuer had throughout sought to traduce and malign his character.

[10] The key evidence in the case in any event was the professional evidence led on behalf of the defender from Ms Brabender QC and Elaine Proudfoot, solicitor, the pursuer's legal advisors in the litigation up to the proof in October 2020, and the evidence of Mr Hayhow, counsel for the defender during the same period. These witnesses provided detailed affidavits and gave evidence which I can only describe as compelling, credible, comprehensive and cogent. Their evidence together as the professionals in the case dealing with matters in the run up to and on the day of the settlement of the proof on 6 October 2020 was in lockstep in terms of its consistency.

[11] Ms Brabender QC is a senior counsel held in the highest regard by the Court, eminent in her field and of considerable experience and expertise. She advised that in this case there had been a source of funds argument in respect of the matrimonial home which could not be discounted as an argument that would potentially find favour with the court. On the LTIP A shares, while the only route to the shares being monetised was the sale of the airport, a future contingent event, although this had had an impact on value it did not determine value. The allocated judge for the proof, Ms Brabender advised, had in the past applied hindsight to relevant date valuations and Ms Brabender was clear that she could not ignore the possibility that the judge would take the post March 2020 pandemic into account. Ms Brabender was adamant that the B shares could not be said to be matrimonial property, and any argument in respect of those shares would be one limited to an argument in respect of economic disadvantage. The late lodging of the Ernst & Young share valuation report for

the defender was not a barrier to the defender's evidence on these matters coming before the Court, the author of the report being named on the defender's witness list. It was not uncommon in divorce litigation for such reports to be produced late. The recovered material from St James' Place and Melville Properties was described by Ms Brabender as the last two pieces in the jigsaw, arriving late as they did. The pursuer's solicitors went through them, Ms Brabender gave a view and by the Monday she was not concerned about this material as an issue. An open commission had been considered but Ms Brabender did not see the cost benefit of that in this case. In terms of the negotiations, Ms Brabender was sympathetic with the position of the pursuer, commenting that this was often an anxious time for clients. Ms Brabender's practice was to take an impression of her client's position at that time by reference to how the client had appeared throughout the action. If she had had any concerns about the presentation of the pursuer, she would certainly have raised them. In terms of negotiations an offer had been made on 18 September on behalf of the defender. A counter-proposal was made on 2 October 2020 and a further proposal made on behalf of the defender on the Sunday before the proof. The pursuer did not give an instruction to counter-propose in respect of that offer. In the course of the morning of Tuesday 6 October 2020, unusually the defender made an increased offer of effectively an additional £50,000 in monetary terms, involving as it did the payment of a capital sum and the repayment of the mortgage in full by the defender. In respect of that increased offer, Ms Brabender advised that the pursuer had stated "yes, okay". Ms Brabender had no impression that the pursuer was not thinking clearly or rationally. There had been discussions before the pursuer gave instructions to resolve the case concerning school fees and a camera. Ms Brabender was clear that she certainly could not advise the pursuer that she would get more if she proceeded to proof, bearing in mind her priority in respect of the retention of the

matrimonial home. The pursuer cross-examined Ms Brabender, her former senior counsel, putting to her that in the run up to the proof she had received 2,499 pages of documents and asking how it was possible for her as the client to appreciate and review these documents in any depth. The witness stated clearly that she would not expect the client to carry out that exercise. The client was paying for professional services and it would be for the solicitor to go through the material and highlight matters for questions. I put to the witness the phrase referred to by the pursuer in her evidence as a tipping point, expressed by Ms Brabender over the speakerphone. Ms Brabender's position was that this was not her phraseology, although there had been a discussion about the consequences of proceeding, with the potential result that the pursuer would not retain the house. Mr Hayhow had advised Ms Brabender that the defender was concerned about the outcome of the proof from that perspective. There were on any view inherent risks in proceeding to proof.

[12] Elaine Proudfoot, the pursuer's former solicitor, had provided a detailed affidavit dated 10 May 2021 and was cross-examined at some length by the pursuer. She confirmed that she was aware that the pursuer had told her that she had had a panic attack historically and that she was on medication in respect of anxiety. The pursuer put to the witness that her son M, who had driven her to the solicitors' offices, had been told by Ms Proudfoot that it was not necessary to come upstairs. Ms Proudfoot was quite clear that this did not accord with her recollection of events. On the pursuer's arrival in the building, the expectation of Ms Proudfoot was that the proof would be running. In the lift on the way up to the boardroom the pursuer had spoken openly about her son M, and made a joke about how handsome he was. Ms Proudfoot summarised the pursuer's temperament as being in good spirits. With regard to the paperwork, Ms Proudfoot stated that it was her job to revise any paperwork and to advise the pursuer on it. Anxiety on the part of clients at the closing

stages of such proceedings was part and parcel of the rigours of litigation. The witness confirmed that the pursuer's main concern was securing the matrimonial home. On the possibility of discharging the proof, the witness was concerned that this would have been a considerable expense. The pursuer raised the issue of not having been given paperwork concerning the settlement. The witness advised that on the morning of the proof a revised and increased offer made on behalf of the defender had come in. This was in almost the same terms as the letter setting out the terms of the prior offer made on behalf of the defender on the Sunday before the proof. A copy of that document had been printed and was before the pursuer. The only change was in respect of a component of the capital sum concerning the repayment of the mortgage. The witness stated that the pursuer had the heads of agreement in front of her and that they had talked through that. After the pursuer had given instructions to settle, Ms Brabender had said that she would draft heads of agreement and there followed an exchange of emails. The pursuer had been told that the agreement would require to go into a minute of agreement as the Court could not make certain orders in respect, for example, of BUPA health care. The pursuer in cross-examination put to Ms Proudfoot that she had got up and left the boardroom upset. The witness remembered that the pursuer had left the boardroom at a point when they were waiting to hear back from Ms Brabender who had spoken to Mr Hayhow. The witness assumed that the pursuer had left to use the bathroom. Another solicitor went out to check that the pursuer was alright and observed the pursuer texting someone in the corridor. In the boardroom on her return the pursuer said that she had received a text from a friend. The pursuer was asked how she was and she said that she was fine. Ms Proudfoot agreed that she was surprised when she was later advised that the pursuer was asserting that there was no capacity, observing that in her view the pursuer was in control of the situation and

seemed to know her own mind. Her impression was that the pursuer was fit to provide clear instructions. The witness stated that she had no doubt that the pursuer understood the instructions that she was giving, albeit that she did not like the advice that she was receiving. The witness said that the pursuer was offered the opportunity at that stage to proceed to proof and let the judge take the decision. On any view there were real risks in running the proof.

[13] Mr Robert Hayhow had acted as counsel for the defender in the case. Accordingly his evidence was of more limited value. He recalled that certain documents on behalf of the defender were submitted late, observing that productions were lodged late by both parties. The Ernst & Young report came in when it did on the basis that the pursuer's expert had taken 3½ months to prepare his report. Mr Hayhow's professional view was that Ernst & Young had done an excellent job in getting the work done within the limited timeframe available. Mr Hayhow at a case management hearing had made it clear to the allocated judge that the defender intended to consider the pursuer's report and then decide whether it was necessary to get his own report. The pursuer put to Mr Hayhow that the settlement equated to the draft agreement. Mr Hayhow demurred from that view and made it clear that the settlement was what was set out in the full terms of the emails of agents after instructions to settle had been given.

Submissions of parties

[14] The pursuer referred to her submissions lodged in the course of the case at different stages numbered 133 and 170 of process. On the morning of the final day of the proof she submitted an electronic copy of a further set of submissions. These documents are all in process. In addition the pursuer made oral submissions. I will attempt to summarise as best

I can the main points that I understood the pursuer was seeking to make on the basis of all of this material. On the morning of the October 2020 proof diet her state of mind had been overwhelmed. She had received vast amounts of material in the run up to the proof. She had suffered a panic attack on the morning of the Friday before the proof. The tipping point comment attributed to Ms Brabender QC was also referred to. It was submitted that the trigger of emotional impact from this had resulted in a complete breakdown of the pursuer's resilience. The defender had used his retained knowledge of what had happened to her during her previous divorce to intentionally inflict emotional distress. Her cognitive ability was compromised. This was a statement of threat, being an expression of the defender's view relayed unfiltered to the pursuer. The pursuer had little recollection of events following her acquiescence to the settlement after this. Her consent to any draft minute of agreement was made under duress. She left the offices of her solicitors without any paperwork, drafts or instructions. The acquiescence of the pursuer while under financial, mental and emotional distress could not be binding in such circumstances. The pursuer was not sufficiently informed. Her legal advice had not covered key issues of financial conduct by the defender in certain recovered documents. She was suffering from sleep deprivation, chronic fatigue and extreme anxiety. Dr Cochrane had provided an expert opinion on her mental state. The G shares should be valued at 50% of the value at exit. A draft minute of agreement had not been presented to the pursuer for consideration following her departure from her solicitor's office. Lack of diligence and proximity to the proof had had adverse effects upon her case and been prejudicial to settlement terms. The pursuer sought payment of a one off capital payment. In her oral submissions the pursuer stated that it was never her intention to enter litigation. Given the asymmetry of power, finance and control between herself and the defender, this was not a motivation at all. The litigation was not based on

the seeking by her of a moral victory, but was about fairness. The action was essentially about the pursuer's integrity, the pursuer submitted. The purported compromise was not valid, not binding, and was unreasonable and unfair. The pursuer concluded by moving for the expenses of the whole action dating from the service of the summons in January 2020.

[15] For completeness I will at this stage insert a record of my notes of the pursuer's reply to the defender's counsel's submissions, which I will record shortly. The pursuer stated that some of the things that had been said had been offensive to her. There had been an asymmetry of access to information. She had chosen not to take a criminal route in respect of these matters. She raised the question of CCTV footage from the solicitor's office. It had not been her intention to enter litigation and she had not wished to go to proof to seek a jackpot. At this stage the pursuer put certain documents in front of the screen which I do not recall having been referred to in evidence, stating that she had pursued truth and was simply seeking to reach a fair and reasonable settlement. She was not a gold digger and had come through an acrimonious prior divorce. She asked the Court a direct question about pressing charges against the defender, stating that that may be an option for her. She concluded by stating that the tipping point had come on the morning of the proof, but everything before that had brought her to the state that she was in that day.

[16] Counsel for the defender spoke to the note of argument which he had lodged following the pre-proof hearing on 26 April 2021. That document also lies in process. Counsel invited the court to sustain the defender's eighth plea-in-law and to grant declarator in terms of his second conclusion. The decree which he would be seeking in due course would be one of dismissal, the question of divorce still requiring to be settled. Counsel observed that there was sufficient evidence in the affidavits before the Court to

justify a conclusion that the marriage had irretrievably broken down. The allocated judge in the case at an earlier hearing had indicated that grounds had been made out on that basis.

[17] The question of whether there had been instructions to settle was a question of fact. It was clear that the pursuer had given such instructions. Senior counsel of the experience of Ms Brabender would not have proceeded, of course, without instructions. There was no suggestion in this case of a complete absence of capacity. Any evidence of that could only come from a psychiatrist. Dr Cochrane's report was available. Counsel did not doubt that the pursuer had indeed obtained a referral for treatment. The contents of the report not having been spoken to or agreed, in any event no diagnosis was made therein and Dr Cochrane was a clinical psychologist and not a psychiatrist. On the assumption therefore that the pursuer had capacity and had given instructions, the question then arose whether her apparent consent had been vitiated by some form of duress. Counsel invited the court to proceed on the basis that the pursuer had established that she was extremely stressed and anxious. That she had had a panic attack on 2 October 2020 was not in doubt. The evidence of Ms Brabender and Ms Proudfoot made it plain however that there was at the same time on the part of the pursuer a high level of functioning and engagement. Many litigants face such stress in the final part of a divorce action. The choice of pressing on for the jackpot carried with it the risk of a ruinous result. There had to be an element of buying off the risk of a disastrous outcome. As a matter of policy, parties must be in a position to compromise litigation. The pursuer in this case may view it through the lens of her own position, but her circumstances were by no means unique. With regard to the "threat" that she would lose the house, whatever Ms Brabender may or may not have said, the pursuer was clearly at risk of losing the house. It was the duty of her advisers to draw her attention to that risk. It was plain that such risk had been very carefully explained.

[18] Counsel submitted that the accounts given by the professional witnesses had been remarkably consistent. Regarding the three substantial exigencies on capital matters, the LTIP shares could not have been sold independently. The airport was a private equity business which was in 2019 being fattened for market, and but for the pandemic would have gone to the market probably by 2022. Mr Younger had not undertaken a valuation by the prescribed mechanism. The shares could not be sold until an exit event and there was no suggestion that the airport would be sold prior to the onset of the March 2020 pandemic. The prospect of a sale at that time evaporated. The B shares were simply not matrimonial property, not being in existence at the relevant date. In all the circumstances it was reasonable and rational for parties to have compromised as they did. In the whole circumstances counsel submitted that this was as far away as it was possible to get from any scenario that section 16 of the 1985 Act was designed to address. On the late documents, any response from a third party was a matter for that party. An optional procedure notice did not confer obligations and was cheaper than an open commission. One of the documents that the pursuer had objected to concerned the third inventory for the defender which contained many hundreds of pages. It was of note that these documents actually comprised the pursuer's own bank statements which had been recovered by the defender by commission and diligence and produced as soon as they were available. Ms Brabender had not considered herself prejudiced by late notice.

[19] Counsel concluded his submissions by seeking the appointment of a by order hearing in due course at which the operative interlocutor concerning disposal of the divorce and any other matters could be dealt with. In the event that the defender was successful in the present preliminary proof, the expenses of the action up to the settlement of 6 October 2020 had of course been compromised on a no expenses due to or by basis, but counsel

indicated that he would be seeking the expenses of the subsequent proceedings in respect of the validity of the settlement including of course the instant preliminary proof.

Discussion and decision

[20] In this case the pursuer has contended that the compromise reached by the parties as expressed in emails between their agents on 6 October 2020 was neither binding nor valid and that, if it was, it should nevertheless be set aside on the basis that it was unfair and unreasonable. In my opinion these contentions are entirely misconceived and ill-founded.

[21] The pursuer gave evidence of suffering a panic attack on 2 October 2020 and of her anxiety in the run up to the diet of proof and on the morning thereof. I accept all of that evidence. In addition I noted that at one stage in cross-examination the pursuer stated that she had felt in the October 2020 negotiations that her voice needed to be heard and I found that position to be a wholly understandable one. In other areas of the pursuer's evidence, however, I consider that she lacked credibility. The passage of evidence referred to above concerning the evidence of Dr Jacqueline Conway, in which the witness stated that the pursuer had in terms asked her to lie on her behalf, while not pertinent to the issues before the Court in this case, was one minor example of the lack of credibility which I am describing here. . A more important example of that concerned the pursuer's evidence about leaving the boardroom on the morning of 6 October 2020, as she put matters in cross-examination, twice, in floods of tears. The evidence of Ms Elaine Proudfoot on this matter stood in direct contrast to the pursuer's account. Ms Proudfoot did recall the pursuer leaving the boardroom. Another solicitor went out to check that all was well and found the pursuer texting someone in the corridor. On her return to the pursuer indicated that she was fine and that she had received a text from a friend. The initial encounter with the

pursuer and her son when her son dropped her off at the office that morning was also placed in issue by the pursuer's cross-examination of Ms Proudfoot. The pursuer's position was that her son had been told that it was not necessary that he come upstairs to accompany her. Ms Proudfoot simply stated that this did not accord with her recollection of events. From her demeanour I detected that Ms Proudfoot was very surprised that such a contention of fact had been put to her. The account given by the pursuer of her resilience being broken and her condition in the room during settlement was also contradicted directly by the evidence of Ms Proudfoot. Ms Proudfoot had "no doubt" that the pursuer understood the instructions she was giving. Ms Proudfoot's clear impression was that the pursuer was fit to provide instructions, was in control of the situation and seemed to know her own mind on these matters.

[22] One could simply characterise these discrepancies in the pursuer's evidence when set against the other evidence before the Court as matters of exaggeration or erroneous recollection under stress. I cannot do so, however, having observed the pursuer in her presentation of her case, in her evidence and in her submissions to the Court. The pursuer in my view at least in part sought to utilise the preliminary proof as a vehicle for an exercise in the baseless denigration by her of the integrity of the defender. The pursuer alleged a variety of serious accusations against the defender, largely couched in the purported context of the pursuer's contentions concerning duress, and even at the end of her submissions in reply to the defender's counsel's submissions, parts of which she stated she had found offensive, indicated that the pressing of criminal charges may be an option for her at the conclusion of the case. At this stage I should place on record that none of the defender's counsel's submissions were in any way improper and that the pursuer's criticisms of them as offensive were wholly without foundation.

[23] I now turn to the issues before the court, namely (i) whether the purported compromise in October 2020 constituted a valid and binding agreement between the parties; and (ii) if so, whether that agreement should nonetheless be set aside on the basis of unfairness or unreasonableness in terms of section 16 of the 1985 Act.

[24] Ms Brabender QC and Ms Proudfoot were clear that instructions had been given by the pursuer to settle the action on 6 October 2020. The pursuer herself accepted that she expressed the requisite words to that effect in her solicitor's office. I have no difficulty in finding in fact that the pursuer gave Ms Brabender and Ms Proudfoot the necessary instructions to accept the defender's increased offer on the morning of 6 October 2020. I have already addressed the evidence of Dr Duffy and the limited assistance which could be provided by the report of Dr Cochrane. The evidence of a psychiatrist would be required to determine capacity. Dr Cochrane is not a psychiatrist. I observe further in passing that the terms of Dr Cochrane's report provide no means of placing the symptoms referred to therein in the context of the decision-making process in the settlement in October 2020. The challenge to the validity of the settlement in terms of lack of capacity must accordingly fail.

[25] I turn now therefore to the issue as to whether the pursuer's consent to the settlement was vitiated by duress in some manifestation or other. Having regard to the evidence of Ms Proudfoot, who was very much in the room with the pursuer on the morning of 6 October 2020, and that of Ms Brabender QC, who was present virtually from time to time, there is no available evidential basis for the pursuer's contention that vitiation arose due to her mental or emotional state. Ms Proudfoot was aware of the pursuer's history of anxiety and observed her to be, in terms, fully functioning and engaged in matters throughout the morning. She arrived in relatively good spirits (Ms Proudfoot's affidavit 10 May 2021 paragraph 47) and she left the office in good spirits (paragraph 71). Following the

settlement Ms Proudfoot stated that the pursuer appeared relaxed and on good form and was, the witness put it, very much holding the floor recounting a number of family stories (paragraph 68). On that account, together with the parole evidence from Ms Proudfoot which I have narrated above, I simply cannot accept the pursuer's contentions in this chapter of the case as a matter of fact.

[26] That said, it is without doubt a very stressful time for parties as they negotiate and navigate significant decisions in their lives at the final stage of a financial provision on divorce action as the door of the Court hoves into view. With the benefit however of an eminent senior counsel and experienced and skilled solicitor, the pursuer was in October 2020 very well placed to address the choices which required to be made by her during the negotiations. As I read and heard the evidence of the professional witnesses, I was struck by the high level of competence of the advice on each side in terms of the identification of risks and consideration of a range of possible outcomes, all in the context of well-considered client priorities, in this case the maintaining of the matrimonial home by the pursuer. That is not to say that these decisions do not involve the making of hard choices, but the stress involved in that cannot be said to amount to duress such as has been contended for on the part of the pursuer. She is one of but many litigants in this exact situation and her circumstances are surely far from unique. Parties must be in a position to compromise litigation. While the volume of paperwork coming in at the last minute was unfortunate in this case, the defender had no control over the actions of third party havers in a specification initiated by the pursuer, and the circumstances of the late share valuation report had been canvassed in advance before the allocated judge in terms of the order in which reports would be instructed.

[27] Turning to section 16 of the 1985 Act, it was accepted by the professionals dealing with the case that certain matters would be battleground issues, and in particular the valuation of the LTIP shares. Mr Younger was an impressive witness and gave informed evidence insofar as he could. He accepted, however, that he had no specialisation in airport valuations. With regard to the A shares, he departed from the sole valuation that the contractual documents provided for, and offered what could be described as a proxy valuation. I was not persuaded that the available evidence on this chapter of the case fully dealt with, the impact of the Covid-19 pandemic and the wholly new landscape that the airline industry requires to confront post pandemic together with the inherent unknowns associated with all of that. Any approach to valuation in such radically changed circumstances could well come to resemble a game of something akin to "Pin the Tail on the Donkey"; indeed of course, standing the sheer scale of the material uncertainties involved, it could perhaps be said that in any mode of valuation which requires to depart from the contractually stipulated one such an approach may on one view be inevitable. In any event, the A shares cannot presently be sold. Any right therein is a right to a future contingent payment, and perhaps at one time that right might have had a significant value. The devastation of the airport business from March 2020, before Edinburgh Airport could be sold, generates such a level of uncertainty that on one view it would not be difficult to imagine the Court electing to apportion if not a nil valuation perhaps a relatively nominal valuation to this asset at proof. With regard to the B Shares, it is plain that these were simply not matrimonial property and insofar as their valuation was in any way relevant, which is debatable, that relevance would be very much limited to a potential economic disadvantage argument and to that alone.

[28] In these circumstances I have concluded that the exceptional jurisdiction encompassed in section 16 of the 1985 Act has not been engaged in this case. In the latter stages of negotiation, indeed, parties were £100,000 apart, and ended up, inevitably one might say, meeting more or less in the middle in their final compromise on 6 October 2020. On the evidence available I consider the compromise reached to be an entirely reasonable and rational one. Having heard the evidence of the professionals I am not at all surprised that this was the outcome. I would go so far as to say that a section 16 argument in a case like this and on the evidence which I have narrated, is an unstateable one, given the quality of the advice and of the professional advisers involved and having regard to the range of outcomes and indeed the final outcome in the settlement reached. I consider that no substantial injustice can even be asserted. This provision should not be regarded as the final port of call of parties who simply have second thoughts and wish to re-litigate the past.

Disposal

[29] I accordingly sustain the eighth plea-in-law for the defender, repel the tenth plea-in-law for the pursuer and pronounce decree of a declarator in terms of the second conclusion for the defender. The application for dismissal set out in the second conclusion does not cover, of course, the principal matter of divorce. To that end I appoint parties to be heard by order and ordain them to make short submissions in writing of their proposals in respect of the final operative decision of the Court. These submissions should be lodged one week prior to the by order hearing. I should say at this stage for the assistance of parties that evidence has been presented in lodged affidavits which has satisfied me that the marriage has irretrievably broken down and parties should certainly not be using up further Court

time and incurring expenses on any fruitless exploration of these matters at the by order hearing, which I trust will be of very short duration.