St John's CHAMBERS

Financial remedies pot pourri (February 2016 to June 2016)

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The article continues Christopher's regular reviews of the more important recent financial remedy cases, this one covering the period from February 2016 to mid June 2016.

We are cursed with excessive reporting of cases, many of which are mere examples of established principles. An example is *Besharova v Berezovsky* [2016] EWCA Civ 161 which was an appeal from a decision interpreting the wording of a consent order in which it was common ground that the principles applicable to the construction of a consent order are the same as those applying to a commercial contract. This author can see in it no new principle, merely a reminder that consent orders must be carefully drafted. There are also cases which hit the headlines but which merit no legal reporting, and *Hart v Hart* [2016] EWCA Civ 497 (where H sought to challenge the judge's refusal to adjust his assessment of W's needs by reference to her cohabitation with another man) was one which was merely a refusal of leave to appeal decided on its own facts. Munby P rejected the contention that Mostyn J's judgment in *AB v CB* [2014] EWHC 2998 (Fam) lays down any principle of law.

In these circumstances the subjective selection of cases which follows does not purport to be comprehensive

A case with media profile was the negotiated settlement in *Vince v Wyatt* which gave rise to a judgment on disclosure in addition to approving the order [2016] EWHC 1368 (Fam). W retained £325,000 previously paid to her in respect of costs and secured a lump sum of £300,000 but Cobb J declined to allow disclosure of her (unfinalised) outstanding costs (which would show her net result) despite H's wish to publish this,

although he had originally argued there should be no publication of any details of the case at all. Giving leave to publish the award Cobb J reviewed the conflicting issues under arts 6, 8 and 10 and the case law in reaching his conclusion that the starting point of privacy was "readily displaced" here where "the lives and financial circumstances of the parties ha[d] already been trailed extensively in the public domain" and no commercially sensitive information had been disclosed but declined to opine on whether the Judicial Proceedings (Regulation of Reports) Act 1926 applies to financial remedy cases.

Aziz v Aziz [2016] EWHC 973 (Fam) was a case which Moor J declared he would case manage 'vigorously' and did, limiting costs of representation of minor children, refusing valuation evidence, rejecting the use of a SJE to formulate an asset schedule and giving tight directions in respect of responses to a questionnaire including information from trustees.

The CA took a purposive approach to procedure in *Mutch v Mutch* [2016] EWCA Civ 370 where W, prior to its expiry, sought an extension of a periodical payments order by way of "further directions" under a liberty to apply provision and in an accompanying witness statement her application was framed as an "invitation" to the court not to terminate the order. H contended no proper application had been made in time. The CA held the intention was clear and the failure to comply strictly with the procedural requirements was not fatal.

Where a financial provision order contained an automatic increase in periodical payments in 4 years' time on the younger child leaving private secondary school, equal to one half of the fees, the CA found this to be an error of law. Periodical payments were to be based on need and it would be speculation to predict all the parties' future circumstances and assume no change. The release of the burden of the fees would be but one factor. The correct approach was for an application to be made to vary at the time: *A v A* [2016] EWCA 72

In *TM v AH* [2016] EWHC 572 (Fam) Moor J disagreed with Mostyn J in *DR v GR* [2013] that once trustees have been served there is no need to join them. Moor J's experience

was to the contrary namely that the trustees are joined when there is an application to vary the trusts of which they are the trustees, that this was necessary for orders to be binding upon them (*A v A and St George's Trustees* [2007]) and that Art 6 requires it.

On H's application to show cause (pursuant to *S v S (Arbitral Award: Approval) (Practice Note)* [2014] 1 WLR 2299) Mostyn J ruled in *DB v DLJ* [2016] EWHC 324 (Fam) that courts can interfere with awards made under the arbitration procedure for family financial dispute resolution run by the IFLA in cases of fraud, mistake or supervening event, the ARB1 agreement providing that that the award having to be embodied in an order of the court, its finality would be subject to (inter alia) any changes which the court making the order may require and the parties recognised the court's discretion in making the order. Mostyn J usefully reviews the law relating to mistake and *Barder* event*s* and finds that he should not interfere in this instance. He opines that *Barder* applications can be made to the original court.

In *Randall v Randall* [2016] EWCA Civ 494 H successfully appealed against a decision of a Deputy Master that he (as a creditor of a beneficiary, W) did not have an 'interest' (within the meaning of r 57.7, CPR 1998) sufficient to enable him to bring a probate claim challenging the validity of W's mother's will.

In *Robert (Trustee in Bankruptcy of Jonathan Elichaoff, Dec'd) v Woodall* [2016] EWHC 538 (Ch) the trustee's attempt to pursue the deceased bankrupt's claims under ss.23 and 24 of the MCA 1973 as a cause of action vesting in the estate was rejected. The claims for financial provision were personal to the parties and did not extend beyond their joint lives. In *Sands v Tarlochan Singh* [2016] EWHC 636 (Ch) the trustee in bankruptcy failed to set aside a trust deed and a consent order (as a transaction at an undervalue) under which the bankrupt agreed that W would hold the FMH on trust for their two children. Giving up a claim under the MCA 1973 whether the order was by consent or after a contested hearing, absent vitiating factors such as collusion between spouses, amounted to consideration under the Insolvency Act 1986 s.339 (which would usually be assessed as equivalent to the value of the money or property transferred under the order). *Hill v Haines* [2008] Ch 412 applied. *Bataillon & Anr v Shone & Anr* 2016 EWHC 1174 QB went the other way, with the creditors succeeding under s.423 of the 1986 Act in setting aside an "informal separation agreement" between H and

W which they contended had transferred assets to W at an undervalue (no consideration).

W (Appellant) v H (Respondent) and Secretary of State for Foreign and Commonwealth Affairs (Intervener) [2016] EWCA Civ 176 concerned the Saudi H's claim to diplomatic immunity from W's claim under Part III of the 1984 Act on the basis of an appointment as Permanent Representative of St Lucia to the International Maritime Organisation. Hayden J rejected this claim in principle (finding H had not effectively taken up his post) and on the basis that he was permanently resident in the UK in any event. His first ground was not upheld as immunity derives from the time of appointment and does not allow a "functional review", but if (as Hayden J was entitled to find he was) he was permanently resident in the UK, immunity extended only to official acts (to which W's claim did not relate).

Z v Z, Codan Trust Co Ltd, Kopt Development Ltd [2016] EWHC 911 (Fam) was another Part III case in which Roberts J carefully analysed the s.16(2) factors in permitting W to make a claim after a Russian court made a consent order in 2009 (US$10m) which although it purported to provide W with just over half the joint assets in full and final settlement did not expressly provide for W's housing and no specific inquiry was made into the sufficiency of the award to meet her future needs, nor were there the English obligations of full disclosure of assets. W's case was that the Russian order was intended to deal with Russian property only and had not dealt with spousal or child maintenance. H now declared assets of £40m and W £4.7m. W and the children had loosening connections with Russia, a strong connection with England and lived in a London house acquired by H's father's trust. The court had regard to the financial benefit W received from the Russian order but even if the terms of the agreement were fair in the light of the <u>then</u> prevailing circumstances, that fact, of itself, was not necessarily a bar to an effective Part III claim provided that the English court considered it "appropriate" in all the circumstances to make an order. S.16(2) does not, in terms, require the court to consider whether the foreign order had foreclosed any claim in England under the terms of the agreement. W's delay was mitigated by several factors including her health and seeking advice during the period. W was presumed to have relied on H's assurances that she could, during the children's minority, remain at the

Kensington house upon which he paid rent to the trust. No separate provision was made for W's housing thereafter. It was conceded by H that the arrangements in respect of the house might constitute a nuptial settlement (*cf NR v AB* below). Her claim would be decided at a further hearing but the judge warned her aspirations were "wildly ambitious" and the delay would be a factor under s.18.

NR v AB [2016] EWHC 277 (Fam) involved inherited wealth and was agreed to be a needs case. W would under Saudi law inherit significant wealth on the eventual death of her father. H's father had already died but he, his mother and sister had followed his father's testamentary intentions by arranging the family affairs on the basis of joint or collective ownership of various properties (through a company: BCO) and assets of which he therefore held only a one third beneficial interest, which the judge concluded he could not access at will as his sister was unwilling to allow the release of cash. He could not access his mother's and sister's shares. W's case on the basis of *Thomas v Thomas* did not avail her beyond H's offer, which was a capitalised maintenance award and that her housing needs should be met by a licence to remain in the matrimonial home but without ownership. H's family would thereby be tying up capital assets to meet W's needs. Having reviewed the law in relation to resulting and constructive trusts, Roberts J held the matrimonial home to be owned by BCO but concluded that the terms upon which it was occupied amounted to a nuptial settlement capable of variation under s 24(1)(c) of the Matrimonial Causes Act 1973. W's needs were met substantially by H's offer of a lump sum of £2m for income, some capital for immediate needs, financial support for the children and a right to remain in the properties rent free until her re-marriage or her father's death. She did not get the capital interest she sought in the properties but no order could be made against BCO, and she had a guaranteed share in her father's estate in due course.

Re V [2016] EWHC 668 (Fam) concerned a conflict of jurisdiction between England and Scotland where W issued an application under s.27 MCA 1973, H having issued divorce proceedings in Scotland but not making any financial claim in the writ of divorce. There was no reason why the divorce and the financial claims might not proceed in different jurisdictions, England and Scotland being treated as different member states under the Schedule 6 to the Civil Jurisdiction and Judgments Maintenance Regulations 2011. The

English court might not entertain an application under s.27 unless it had jurisdiction to do so by virtue of the Maintenance Regulation (Council Regulation (EC) No 4/2009) and Schedule 6 to the 2011 regulations. W satisfied the habitual residence condition but there remained the issue of whether the Scottish court was seized of the financial issue. Parker J held that the absence of any formal financial claim in the Scottish proceedings (which must be brought before the grant of a divorce, the opportunity to make such a claim being lost upon divorce being granted) was fatal to H's case to secure a stay of the English proceedings, which in the circumstances as to jurisdiction the court had no discretion to grant in any event. Interim maintenance and legal services orders were made.

Work v Gray (Phase II: Computation and Distribution) [2016] EWHC 562 (Fam) was the practical quantification of W's claim following Holman's decision [2015] EWHC 834 (Fam) that she was in principle entitled to 50%. Roberts J was critical of the expert accountancy witnesses (from the US (H) and UK and who brought different approaches to the task) for their adversarial rather than inquisitorial approach. She found, after resolving issues between them, that some discount should be applied to the value of H's risk laden or partially illiquid investment funds and assessed the balancing sum accordingly. The case is largely fact specific.

Moylan J in *BD v FD* [2016] EWHC 594 provided guidance on the assessment of need in an inherited wealth case following an 11 year marriage, 4 children (5-10), H 49, W 41. H's inherited wealth: £58m and a life interest in trust assets of £105m. This family wealth derived from funds dating back to the C17th. W had £2.9m including a £2.2m house bought on separation (for £2.5m). W sought capital of £11.8m to include houses in the country, in London and for her parents, a fighting fund for projected litigation in respect of the children and £950K for furniture, fittings and decoration. In addition she sought £17m as a *Duxbury* fund (at £500k pa without amortisation). H offered £8.2m (having offered £10m before costs were incurred). W had been warned in her MPS application [2014] EWHC 4443 (Fam) by this judge that even her maintenance pending suit budget (£392,000) "includes a significant element of forensic exaggeration" which substantially exceeded the marital standard of living. The judge awarded £200,000 but

W in fact spent approximately £865,000 (including £215,000 on vehicles), excluding legal costs. W's case was that H had been mean during the marriage and she sought a "very different lifestyle and one which, in her view, [was] justified because the husband [could] afford it". The judge however found "no justification for the application of the sharing principle to the non-marital property" and approached the case as one of need, it being agreed that the award should comprise funds for W's income needs and housing needs for life (some 50 years). The judge observed that W's section 25 statement was 62 pages long. "It is excessive both in its length and in the manner in which it addresses the marriage. It descends into wholly unnecessary detail…". Such a "rummage through the attic" was deprecated. Subject to first consideration being given to the welfare of minor children, the principal factors which impact on the court's assessment of needs are: (i) the length of the marriage; (ii) the length of the period, additional to (i), during which the applicant spouse will be making contributions to the welfare of the family (here (i) and (ii) being some 30 years) (iii) the standard of living during the marriage; (iv) the age of the applicant; and (v) the available resources as defined by section 25(2)(a). In broad terms, where the resources are available, the longer the length of the period(s) in (i) and (ii) the more likely the court will decide that the applicant's spouse's needs should be provided for at a level which is similar to the standard of living during the marriage and the more likely that those needs will be assessed on a lifetime's basis. However, the judge stressed this would be subject to the available resources in the case, but also subject to the important caveat that the level at which future needs are assessed will depend on the duration of the period for which they are being met. The longer that period, the more likely that the court will not assess those needs at the marital standard of living throughout that period, for as time passes the marital standard of living becomes increasingly irrelevant, and often the provision should enable a gentle transition from the marital standard of living to the standard that spouse could expect as a self-sufficient person. In the event W's housing need was assessed at one country property at the value of the matrimonial home (£3.6m), her income needs at £175K pa capitalised on an amortised basis at £5m, and additional capital of £0.5m but £300,000 was added back on the basis of W's exorbitant expenditure which it would be inequitable to ignore, giving a net £8.8m. Moylan J rejected the assessment of the award as a proportion of assets but stepping back regarded this as 'fair'.

The assessment of need as a flexible concept referable to the marital standard of living featured in *Rapp v Sarre* [2016] EWCA Civ 93. H's claim that the parties' needs were equal failed. The judge had awarded W 54.5% of the net assets (c.£13.5 million) which he justified on the basis of W's needs, and also in reference to H's conduct in wantonly dissipating assets due to his addictive behaviours. Black LJ declined to engage with the post-*MAP v MFP* [2015] EWHC 627 (Fam) debate on conduct. H had an earning capacity (despite the loss of his job as an oil trader for cocaine use) which W did not share. W had provided a detailed budget to be scrutinised but H had not. His reliance on contribution and pre-acquired assets failed on the basis of the length of the relationship (16 years), the mingling of the assets and W's need. His complaint that the judge had left him with high risk capital which he would have to draw on to live was rejected as he had income from shares and would generate income from business ventures but in any event he had investment knowledge which would enable him to manage assets in which it had been his choice to invest. Other complaints were largely met by reference to H's failure to engage in the process.

Another interesting example of judicial analysis is Holman J's judgment in *Robertson v Robertson* [2016] EWHC 613 (Fam) where after an 11 year relationship H contended the assets of £219.5m, which largely derived from a business in which he had (unrealisable) shares valued at £1.2m at the outset, represented a special contribution and his remaining shares (£140.8m) were not matrimonial property, while W contended on a *Jones v Jones* basis that only the value of the shares plus passive growth (a total of £4.8m) should be excluded from sharing. Holman J treated *Jones* as a tool not a rule. The court's overarching duty was to apply s.25(2) factors. He rejected the special contribution on the basis that although the value of the assets H had built triggered the concept, he had not demonstrated the exceptional and individual quality required (he had partners in his business and was simply good at what he did) and importantly his contribution was not unmatched as W had been an excellent homemaker and mother. 'All the circumstances' included the fact H had already owned the shares and had made important business decisions before meeting W, but equally much of the wealth had formed part of the family economy and supported the standard of living. A fair solution was to attribute one half of the shares and the £10m of investment properties (bought

with shares he had sold) to H as non-matrimonial property and divide the rest equally, making a total award of £69.5m which happened to be just under a third, which was not the basis of the award but seemed fair. This was not an 'arbitrary' decision but arose from the exercise of judicial discretion which "is the product of a weighing of all relevant factors and wise, considered and informed decision making by an experienced adjudicator after hearing argument".

Mann v Mann [2016] EWHC 314 (Fam) was another instalment in 17 years of litigation. Roberts J calculated outstanding arrears and capital due to W and considered whether interest was payable. S.24 Limitation Act 1980 (not excluded by s.32 MCA 1973) and *Lowsley and Another v Forbes (t/a L E Design Services)* [1999] 1 AC 329 precluded a claim to interest other than for a period of six years from when it became due and payable. On the facts she held it would be unfair to order interest on unpaid child support. In respect of W's application to commit H pursuant to s.5 Debtors Act 1869 and the law in relation to the burden and standard of proof the judge adopted the recent guidance given by the Court of Appeal in *Prest v Prest* where McFarlane LJ cast doubt on Mostyn J's comments in *Bhura v Bhura* [2013] 2 FLR 44. McFarlane LJ was concerned that Mostyn J (and Thorpe LJ in *Mohan v Mohan* [2014] 1 FLR 717) were suggesting that "in the course of the criminal process that is the hearing of a judgment summons, it is simply sufficient to rely upon findings as to wealth made on the civil standard of proof in the original proceedings and that those findings, coupled with proof of non-payment, is sufficient to establish a 'burden' on the respondent which can only be discharged if he or she enters the witness box and proffers a credible explanation." He went on:

"….at the end of the day this is a process which may result in the respondent serving a term of imprisonment and the court must be clear as to the following requirements, namely that:

i. The fact that the respondent has or has had, since the date of the order or judgment, the means to pay the sum due must be proved to the criminal standard of proof;
ii. The fact that the respondent has refused or neglected, or refuses or neglects, to pay the sum due must also be proved to the criminal standard;
iii. The burden of proof is at all times on the applicant; and
iv. The respondent cannot be compelled to give evidence."

W had been unable to satisfy the burden on her to prove that H had or had had since May 2005 the means to pay the sums found owing, but had neglected or refused to do so or that the alleged hidden assets existed.

However, in *Migliaccio v Migliaccio* [2016] EWHC 1055 (Fam) Mostyn J took issue with McFarlane LJ's "obiter" comments in *Prest* and referred back to what he contended is the binding dicta of the CA in *Karoonian v CMEC* [2012] EWCA Civ 1379 in which Richards LJ said at [57]:

> "It follows that in practice the Commission must adduce sufficient evidence to establish at least a case to answer. In the generality of cases the exercise may not need to be a particularly elaborate one, since there will be a history of default from which inferences can properly be drawn. But the exercise is an essential one: the defendant is not required to give evidence or to incriminate himself, and in the absence of a case to answer he is entitled to have the application against him dismissed without more. If the Commission establishes a case to answer, there will be an *evidential* burden on the defendant to answer it, but that is unobjectionable in Art.6 terms. I would add that there is no requirement under article 6 for the Commission to serve evidence in advance of the hearing, but if it chooses to wait for evidence to be given by the presenting officer at the hearing, the court must be astute to ensure that the defendant is not taken by surprise and that the matter can proceed at that hearing without unfairness to him."

Mostyn J makes the point that this issue extends beyond s.5 and encompasses child support enforcement and suggests that McFarlane LJ's "restrictive" formulation will cause practical problems. This seems an issue which will need to be resolved.

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