St John's CHAMBERS

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A Digest of Financial Remedy cases for the last year

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NOTES

Procedure

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.

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.

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.

***Mickovski v Liddell* [2017] EWCA Civ 251** was an application for permission to appeal which introduces no new principle. Its main interest lies in the reminder by Macur LJ that (perhaps in particular *ex tempore*) judgments delivered at the end of a day, when the court had heard full argument and evidence, should not be read in isolation but that the principles restated recently by the President in in *Re F* [2016] EWCA Civ 546 at [22-24] and Ld Hoffmann's comments in *Piglowska v Piglowski* [1999] 1 WLR 1360 should be applied. The recorder had been entitled to reach the conclusions she did (rejecting H's application to vary downwards a periodical payments order and capitalising it at a slightly higher figure than W sought) and H's application for permission to appeal was dismissed with costs.

Drafting orders

***Ali v Ansar-Ali* [2016] EWCA Civ 781** An appeal on its facts, relevant

to the drafting of orders, in which the CA substituted transfers of various assets and accounts *in specie* (so W received the actual net sum realized) in place of the guaranteed sum drafted by counsel for one party, the other being unrepresented. Otherwise the appeal failed.

Variation of Executory order

In ***Bezeliansky v Bezelianskaya* [2016] EWCA Civ 76** the parties had reached a consent order in 2013 involving the transfer of properties to W one of which it transpired H had already sold 3 years earlier. The order remained executory when Moor J accordingly varied it in 2015, directing the shares in the holding company which owned a property in Paris should be transferred to the wife, and the property then sold, and arrears of child maintenance that had accrued were to be discharged from the proceeds of sale. H's application for permission to appeal was refused. A capital order that remained executory could be varied (*Thwaite v Thwaite*). Further, an order the terms of which remained executory, as here, constituted one of five situations which may trigger a review of a consent order (following *L v L* [2006] EWHC 956 (Fam)), if it would be inequitable not to do so in light of a significant change of circumstances. The circumstances justifying intervention are likely to be met where, as here, an order remains executory as a result of one party frustrating its implementation.

Delaying Decree Absolute

In ***Thakkar v Thakkar* [2016] EWHC 2488 (Fam)** Petitioner W opposed H's application to make a decree absolute prior to the conclusion of the financial remedy proceedings. There were significant allegations of non-disclosure and issues as to H's wealth and entitlement to assets all held in off shore structures where W's situation would be affected by the

difference between a status as wife or former wife. There were therefore "special circumstances" and H's application was refused with costs. (Readers are reminded of Cobb J's review of the law relating to the relevance of decree nisi in financial orders in *K v K (Financial Remedy Final Order prior to Decree Nisi)* [2016] EWFC 23). Moor J subsequently dealt with the fact finding (***Thakkar v Thakkar & Ors [2017] EWFC 13***) and although rejecting H (and family's) contention that he had to find the foundation a "sham" nevertheless found that H held the entire beneficial interest in the group of companies.

Delay

Waudby v Aldhouse (Financial Remedies: Delay in Application) **[2016] EWFC B63** was a decision on appeal from a deputy district judge. HHJ Mark Rogers makes some helpful distinctions between a challenge on appeal from findings of primary fact and the deductions, inferences and value judgments drawn by the judge of first instance in the exercise of discretion. The case itself involved long delay between divorce and financial proceedings, considered in the light of *Wyatt v Vince*. After a 12 year childless marriage the parties divorced in 1995. H remarried and had two children. Both parties were bankrupted (post divorce) by ruinous litigation arising out of a joint barn redevelopment during the marriage. As a result there were no assets to share and H's assets were all accumulated post divorce and after he requalified as a commercial pilot. W delayed issuing financial proceedings until 2014 believing H's false assurance that he would "see her right" financially. The wife had in the intervening years supported herself through employment and self employment, bought a house and car and lived with another man for 4 or 5 years but suffered psychological ill health after the bankruptcy proceedings and was in receipt of an ill health pension which left her

with a budget shortfall of £798 pm. The District Judge's award of £10,000 lump sum and joint lives periodical payments at £9,576 pa (£798 pm) was predicated on need alone. On appeal the absence of a causative link between the needs and the mental health problems, on the one hand, and the relationship, on the other, were held fatal to the claim and the husband's appeal was allowed.

Briers v Briers [2017] EWCA Civ 15 provided reinforcement of the principle that delay may be a (very) relevant factor, but nevertheless only one factor in the s.25 exercise in a case where needs were provided for and the issue was entitlement. W issued Form A 11 years after separation and 8 years after decree absolute. Following *Wyatt v Vince* the judge was not wrong to discount her share of the assets from 50% to between 27-30%. Ryder LJ rejected H's case that W's delay required her to discharge the burden of justifying any distributive remedy solely on the basis of need, nor did it deny her entitlement to share in post-separation accrual where H had traded with W's share in what was held to be an undivided matrimonial asset. The judge had to adopt a valuation and the business' current value, rather than that at separation, was fair subject to the above discount. A factual appeal as to the existence of a concluded agreement was rejected (not least because of H's failure to provide full and frank disclosure (*Radmacher v Granatino*))

Enforcement and committal

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* (below) 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.

***Morris v Morris* [2016] EWCA Civ 812** was an appeal from a variation of periodical payments by which H's liability was reduced from £2,000 to £1,750 pm, a suspended committal order made by way of judgment summons for arrears due under the earlier periodical payments order and a consequential costs order. The appeal against the committal order was conceded because of fundamental procedural errors but Moylan J (giving the leading judgment) deals with the errors in detail "because it is clearly of considerable importance that proper process is followed whenever an

application is made by judgment summons". The errors included the fact that in breach of the rules and his right to remain silent H was required to file and serve evidence and gave evidence at the hearing without being informed of his right to remain silent, and he was not informed of his right to legal aid. The judgment summons was heard in tandem with the variation application (at which he had to give evidence) – a further error. The costs order was equally set aside and the judgment summons dismissed.

The variation application against an order made in August 2014 was decided in May 2015. H relied on a (modest) increase in W's income (reflected in the variation ordered) and what the CA found to be insufficiently significant changes in his circumstances. More generally Moylan J rejected the suggestion that on such an application the judge is required to consider the matter *de novo*. The court must conduct a s.25 exercise which, consistent with the overriding objective, is proportionate to the requirements of the case. This might warrant a complete review but can also justify focusing only on relevant matters and conducting a light touch review. S.31(7)(a) requiring the court to consider the termination of maintenance did not, so soon after the original order and in the absence of sufficiently significant events, require the judge to reduce the term. Overall H failed to show the judge's exercise of discretion was outside the bracket of fair awards.

***Migliaccio v Migliaccio* [2016] EWHC 1055 (Fam)** concerned W's application for a judgment summons for arrears of child periodical payments and unpaid costs which had been agreed as part of a consent order compromising earlier enforcement proceedings in which he also agreed to pay a lump sum in respect of arrears of spousal maintenance. H, who was in Dubai, did not attend although W had tendered £500

conduct money. Mostyn J rejected McFarlane LJ's recent (*obiter dicta*) comments as to the standard to which proof of a respondent's means and his default must be proved in proceedings under s.5 Debtors Act 1869 as unnecessarily requiring an applicant to prove the means issue *de novo* despite a finding in previous (albeit civil and thus to a civil standard) proceedings. He stressed that the principles he outlined in *Bhura v Bhura* [2013] 2 FLR 44 derived from Richards LJ in *Karoonian v CMEC* [2012] EWCA Civ 1379 and suggested that judgment should be regarded as definitive. He further held that while a discrete order for costs following a contested periodical payments application would not be an order to be treated "as if made" under Part 2 MCA 1973 and therefore not enforceable under s.5 Debtors Act, the consent order included the costs as part of a lump sum to be paid by H and thus was to be treated as if so made. In any event the court found the arrears of child maintenance proved and could (and did) make the payment within 28 days of the unpaid costs, as well as the repayment of the unused conduct money, and the further arrears of maintenance built up since the judgment summons was issued (and the costs of this application), all terms of the suspended order of 14 days imprisonment which he imposed.

Elliott v Butler **[2016] EWCA Civ 953:** the CA upheld a 6 month prison sentence on a husband who had persistently failed to vacate the FMH following the outcome of a financial remedies claim which required its sale. His mental health difficulties had been adequately taken into account and did not prevent him understanding the order

In ***Bezeliansky v Bezelianskaya*** (above) H was in arrears of £253,000 in respect of child maintenance and W brought a judgment summons in respect of the arrears expressly to bring pressure upon H to transfer the

Paris property from the proceeds of which the arrears could be met. Having found, to the criminal standard, both breach of the order and ability to pay, Hayden J considered what outcome was proportionate in the circumstances and concluded that a six week prison sentence must be imposed, but suspended on terms that H complied with all of the requirements of the financial provision order relating to the Paris property. H's appeal failed. In circumstances where H's wealth was measured in many millions of pounds, the judge was perfectly entitled to consider that he would have been able to pay, or raise by loan, the sum of £253,000 which, in the context of the finances in the case, would be a very modest requirement. Hayden J was entitled to impose a tight timetable for the implementation of Moor J's order with the potential for the terms of suspension to be varied if, despite reasonable endeavours, it was necessary to do so. The CA rejected H's argument that the judgment summons process was an inappropriate mechanism to use in order to achieve enforcement of the capital transfer provisions. While on one view, terms of a suspended committal order designed to enforce a debt of £253,000 by means of achieving a capital transfer worth many times that sum might seem wholly disproportionate, each case will turn on its own facts, and here the tying together of the transfer of the Paris property, as required by the 2nd March order, with enforcement of the judgment summons debt by means of a suspended committal order was entirely justified and, in the circumstances, proportionate.

Iqbal v Iqbal **[2017] EWCA Civ 15** was a case with a lengthy history, and where a fundamental issue was the extent to which H was able to access the wealth of his family in Pakistan. After H disengaged midway through proceedings in 2011 and returned to Pakistan there were a number of hearings and judgments summons held in his absence. W continued to play an active role, though at times representing herself. H

had been excused attendance at an interim hearing, but he had attended at the first appeal, and had filed a number of documents with the court in purported compliance with its directions. The Court of Appeal concluded that elementary procedural protections that H had a right to expect would be observed were not. The consequence was that the final hearing was procedurally unfair and the order made at the end of it must be set aside and the matter remitted for final hearing before a new judge. The subsequent enforcement hearings including H's committal to prison for 6 weeks were wholly irregular in that no procedural protections were provided at all. The 'most glaring omissions' that arose in the final hearing were as follows:

- No consideration given to facilitating H's participation despite his absence, e.g. by video link (para [15])
- No warnings to H of the consequences of his continued absence or that inferences of fact might be drawn in his absence [16]
- No real attempt at active case management [16]
- W's statement was filed only eight days before the hearing (rather than allowing H five weeks to reply, as directed), with no leave given to rely on it out of time [17]
- W's statement was not served on H in any event [17]
- W's statement was itself insufficient to establish her case [17]
- Possibility that documents provided by H were omitted from the court bundle, of which no copy existed at the time of appeal in any case [18]
- No reference to H's documents in the hearing itself; H's non-compliance being held against him despite there being no analysis by the judge [19]

- A lack of inquisitorial analysis by the judge; assumptions made about H in exchanges between the judge and W; no enquiries made of the existence or content of basic documents such as H's Form E [20]
- W was not sworn and her evidence was in the form of signed letters with no statement of truth [21]
- No testing of any of W's evidence [21]
- Inadequate and inaccurate calculations of H's assets purely from W's untested evidence [21]
- No formal judgment; no discernible findings of fact, including what evidence was accepted and what rejected [22]

Likewise in the judgments summonses and committal proceedings:

- Failure to acknowledge the importance of procedural safeguards in committal proceedings (see s 5(2), DA 1869, Part 33, FPR 2010 and *Prest v Prest* at [55] & [62]) [27,28]
- Failure to file evidence in support of W's enforcement application [30], reliance on signed, unsworn letters [31]
- W was not sworn to given evidence [30 & 33]
- No evidence to the criminal standard of H having the means to pay and refusing/neglecting to do so [30 & 33]
- Dealing with the merits of a judgment summons and making a committal order at a directions hearing without notice to H [33]
- No judgment given [33]

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Strike Outs

***T v R [Maintenance after remarriage – agreement)* [2016] EWFC 26**

Parker J refused to strike out H's application to vary (pursuant to ss.34 and 35 MCA 1973) an agreement in a 1999 consent order, expressed as a recital, that he would continue to pay maintenance to W after her remarriage at the rate (payable pursuant to a conventional order until remarriage) in force at that date and index linked. W remarried in 2001. After H stopped paying in 2015 W was about to issue proceedings in the Queens Bench to enforce the agreement as a civil debt (relying on *H v H* [2014] EWCA Civ 1523, and contending the consideration included her forgoing a claim for a *Duxbury* capitalized sum) when H issued proceedings under s.31, which Parker J thought probably misconceived since the order itself had come to an end with remarriage and there was no power to vary it. He also applied to vary what he contended (but W denied) was a "maintenance agreement" under s.35. W sought to strike out both applications under FPR r.4.4. Parker J refused, finding that (whatever the merits of H's application which it was not permissible to consider) the s.35 application was not an abuse of the court's process (H's alleged litigation conduct might be relevant in subsequently considering the merits) nor did it disclose no cause of action. She rejected the suggestions (i) that the agreement having initially been reached orally it was not a written agreement (it had been reduced to writing),(ii) that the agreement was not a maintenance agreement because such an agreement must be made outside the court process and without reference to divorce (the judge noted that s.34 merely required an agreement in writing and did not require or exclude reference to divorce). Her conclusion was that this was a maintenance agreement standing alongside the court order and which was suspended and did not take effect until W's remarriage. She did however hint that the fact

of the agreement reached with legal advice would be a relevant factor in the outcome of H's application to vary.

***Roocroft v Ball* [2016] EWCA Civ 1009** On the dissolution of their civil partnership, R, who had been notionally employed by A, a successful businesswoman, instituted FR proceedings which were compromised in 2010 when she had no legal advisors, and although she had challenged A's disclosure as understating her wealth. The parties later resumed a relationship, A died intestate in 2013 and R took out letters of administration, and in 2014 instituted proceedings to set aside the 2010 order for non-disclosure. R's application was dismissed by a judge purporting to conduct an "abbreviated hearing" but in practice exercising a summary judgment jurisdiction which does not exist under the FPR (*Wyatt v Vince*). King LJ said "An abbreviated hearing is however precisely that, and does not avoid the need for the court to be satisfied on an application to set aside a consent order, that there has (or has not) been non-disclosure and, if so, whether it was material in the sense that it had led to the making of a substantially different order from that which would have been made following full disclosure." It was necessary for the judge to find whether the non-disclosure was inadvertent or intentional as that would determine on whom the burden in proving materiality fell (*Gohil* and *Sharland*) and could have a significant effect on the outcome of the case. The judge wrongly regarded the fact that R had agreed to the making of the order, notwithstanding her reservations about the honesty of the deceased's disclosure, as fatal to her application to set aside. *Gohil* established R could not exonerate A from her duty to disclose. By failing to investigate the evidence as it was presented by the deceased at the time of the consent order the judge deprived R of an opportunity of satisfying the court that there had been material non-disclosure justifying the setting aside of the order. King LJ

rejected the contention, made by the personal representatives of the deceased, that R's delay defeated the application. The application was not an appeal subject to time limits and as such mere delay could not justify the striking out of an application pursuant to FPR r 4.4(1)(c) (failure to comply with a rule, practice direction or court order). Further, if the deceased deliberately misled R that conduct could not be saved by a delay on the part of R to have discovered the fraud. The appeal was therefore allowed and the application remitted to be heard at first instance by a high court judge.

Non-disclosure

Permission was granted for the CA's judgment in ***Norman v Norman* [2017] EWCA Civ 49** to be cited, notwithstanding that it was given on an application for permission to appeal. The case addresses issues of *res judicata* and procedure on appeal, and is also relevant to anonymity (see further below). In 2009 W varied a 2005 consent maintenance order (unsatisfactorily for her). She successfully appealed but the CA on H's second appeal restored the DJ's 2009 order. In 2010 W unsuccessfully applied to overturn the 2005 order for non-disclosure and her appeal from the 2010 order was not pursued. In 2013 W successfully secured the overturning of the 2009 order for non-disclosure but the CA (again) restored it. W then applied again to set aside the 2005 order for non-disclosure and the judge held her case to be totally without merit and made a limited civil restraint order against her. She now appealed that refusal. She had been represented throughout and the material on which she now relied was available to her in 2009 and 2010 but she wanted to deploy it in a 'different way', and sought to rely on a change in the law

effected by *Sharland* (and the transfer of the burden of proof where fraudulent non-disclosure is proven) and what she contended was a relaxation of the law of *res judicata.* She contended that s. 31F(6) Matrimonial and Family Proceedings Act 1984 FPR r.4.1 (6) gave the Family Court unlimited powers to rescind an order. Her application for permission was refused. The power under r.4.1(6) was not 'unbounded'. The approach to such an application to set aside a consent order should reflect the CPR approach and the criteria in *Tibbles v SIG Plc (trading as Asphaltic Roofing Supplies)* [2012] EWCA Civ 518 against the backdrop of the desirability of finality in litigation, the undesirability of permitting litigants to have two bites at the cherry, and the need to avoid undermining the concept of appeal. The discretion might be appropriately exercised normally only (i) where there had been a material change of circumstances since the order was made; (ii) where the facts on which the original decision was made had been misstated; or (iii) where there had been a manifest mistake on the part of the judge in formulating the order. Moreover, the application must be made promptly. Here there was an unexplained delay of 5 years. There was no new material on which W sought to rely. *Sharland* did not amount to a material change of circumstances. The lack of a material change was fatal to a r.4.1(6) application or any attempt to get round the principle in *Henderson v Henderson* and *res judicata*, notwithstanding the more liberal approach apparent from *Arnold v National Westminster Bank Plc (No.1*) [1991] 2 A.C. 93 and *Virgin Atlantic Airways Ltd v Premium Aircraft Interiors UK Ltd* [2013] UKSC 46, which the judgment discusses in detail.

In ***Goddard-Watts v Goddard-Watts*** [2016] EWHC 3000 (Fam) the court considered the approach it should take when rehearing a financial

claim following the previous final order having been set aside for non-disclosure (*KG v LG (Appeal out of time; Material non-disclosure)* [2015] EWFC 64), having regard to the "enormous flexibility to enable the procedure to fit the case" (*Sharland v Sharland* [2015] UKSC 60) and that while in some cases this will require the court to "start from scratch", in others it will not (*Kingdon v Kingdon* [2010] EWCA Civ 1251). The parties agreed the sharing principle was determinative (albeit they disagreed on the share W should have of the trusts in issue) but the dispute was whether W's award should be based on the value of the assets at the time of the first hearing (H's position) or the current values (W's position: she contended that any other conclusion would allow H to preserve his accumulated wealth, founded "as it was" upon the fraudulent presentation of his resources in 2010). Moylan J held that the fact that this was a re-hearing was not itself a reason to re-calculate the award on the basis of the current value of the assets. He found that on the whole this was a case akin to *Kingdon v Kingdon* [2011] 1 FLR 1409; the defect caused by non-disclosure was a discrete one which did not undermine the calculation with respect to the other resources, the division of which remained fair. As the interest in the trust was a marital resource (per *Charman v Charman* [2006] 2 FLR 422), W was entitled (after giving appropriate weight to the interest of other beneficiaries) to half the value, totalling £6.22 million. This was to be increased by a 'discretionary' £200,000 to reflect the fact that, had it been made with the original order, the wife would have received it earlier and the lump sum would not have been ordered to be paid over an 8-year period .

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Costs following non-disclosure

AB v CD* [2016] EWHC 2482 (Fam)** following her decision (AB v CD*** [2016] EWHC 10 (Fam)) to set aside a consent order on the basis of W's material (but initially non-fraudulent) non-disclosure of heavy third party investment in her company Roberts J ruled on H's application for indemnity costs. H had pursued his enquiries tenaciously and leaked material to the press and as he pursued her so W's replies became more misleading and in breach of her duty to provide full disclosure, and lacking integrity. H's conduct to an extent explained W's reluctance to make full disclosure but could not excuse her early lack of transparency from which most of the current costs could be traced. H had been unreasonable in continuing to pursue particular issues of fraud and non-disclosure in relation to other companies. After analysing the admissible offers to settle made by each party, Roberts J concluded that both parties could and should have used each other's offer and counter offer as a platform for further negotiations but had lost a valuable opportunity to settle the proceedings, although W had made a serious offer to settle and she had successfully resisted several allegations of fraud. However, H had succeeded in the set aside application which was a critical factor regardless of his own misconduct. The question was the extent to which H's litigation misconduct should discount his recovery of costs. The order made had to be fair and proportionate. The factors contained in CPR 1998 r 44.2(4) and (5) informed the Court's analysis. W should pay 50% of H's costs on a indemnity basis, stayed until after the rehearing of the FR application.

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Legal costs funding orders

MG v FG (Schedule 1: application to strike out: estoppel: legal costs funding) **[2016] EWHC 1964 (Fam)** notwithstanding the mother had entered into a binding agreement in Australia in relation to spousal maintenance, child support and capital provision, and W's unsuccessful attempts in Australia and England to vary the agreement, set it aside and apply for Pt III relief, her Sched 1 application was not struck out under FPR 2010 4.4 as the previous hearings did not consider the merits of the Sched 1 claim which was therefore not estopped, and in any event estoppel should be employed sparingly in children cases without a consideration of the merits. However M's application for a legal costs funding order was refused after consideration of the principles derived from *Rubin v Rubin* [2014] 1 W.L.R. 3289.

In ***BC v DE*** **[2016] EWHC 1806 (Fam)** however the same judge (Cobb J) awarded a legal costs funding order, distinguishing *Rubin* on the basis that here proceedings were already under way (and in *Rubin* they had been concluded and the application was to enable recovery of costs in the concluded claims). Here F was extremely wealthy and M had no resources. There was a danger that M would be inclined to accept a settlement, due to vulnerability in respect of a litigation debt, which would not be in the child's interests. There was a solid reason for lawyers not to have a financial interest in the outcome of family law litigation. Cobb J reviewed the authorities and concluded that M having a proper case to advance, and with a view to promoting fairness between the parties, while exercising a judicious mix of "caution and realism" the court could exercise its discretion in M's favour in respect of past and projected costs (less 15% to allow for a reduction on assessment)

Arbitration

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.

Bankruptcy

A trustee in bankruptcy in ***Re Elichaoff v Woodall* [2016] EWHC 2987 (Ch)** failed to secure permission to appeal a Registrar's strike out of his application in the Bankruptcy Court against W for a lump sum or property adjustment order (ss.23,24 MCA 1973) for the benefit of H's creditors in circumstances where a financial remedy consent order was agreed between H and W shortly before H's bankruptcy (but after service of the bankruptcy petition). The District Judge made the order ignorant of the bankruptcy. H died 5 years later. The following year the trustee made his application. The trustee admitted his argument was 'innovative and novel' and it was rejected on the basis that matrimonial causes legislation being essentially a personal jurisdiction arising between parties to the marriage, H's death terminated his rights under the MCA 1973

which in any event were not property vesting in the trustee nor a "cause of action" for the purposes of s.1(1) of the Law Reform (Miscellaneous Provisions) Act 1934 . In other words the claims for financial provision were personal to the parties and did not extend beyond their joint lives. Moreover the trustee could not sustain a claim under the 1973 Act against W for the benefit of the bankrupt's creditors based on the deceased H's "obligations". W's application to set aside permission to the trustee to appeal a declaration that payments made by the Bankrupt to W totaling some £40,000 were transactions at an undervalue pursuant to s.339 of the 1986 Insolvency Act was refused.

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 (below) 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).

The Court of Appeal in ***Horton v Henry* [2016] EWCA Civ** has resolved the recent debate as to whether a bankrupt aged 55 or over, is or can be obliged to access his uncrystallised pension to satisfy his creditors by way of an IPO. Conflicting answers were given by deputy judges in *Raithatha*

v Williamson [2012] EWCH 909 and at first instance in *Horton* with the latter being followed in *Hinton v Wotherspoon* [2016] EWHC 623 (Ch). The Court (Gloster LJ giving the lead judgment) held that a trustee in bankruptcy could not compel a bankrupt to elect to draw down payments from his personal pensions where he was eligible to make such an election but had not yet done so. A bankrupt could not be required to obtain property that was excluded from the bankrupt estate and convert it into income receivable by the trustee, and his contractual right to crystallize his pension was not a payment in the nature of income within the meaning of the Insolvency Act 1986 s.310(7)._This decision should preserve the pension as an asset available to the other spouse in financial remedy proceedings but nonetheless care needs to be taken in assessing the availability of the pension in such circumstances.

***Grant & Anor v Baker* [2016] EWHC 1782 (Ch)** was an appeal by Trustees in Bankruptcy against an order that a property, jointly owned in equal shares by the bankrupt and his wife and which was the only asset of value in the bankruptcy, should not be sold until the parents' 30 year old vulnerable child, who resided at the property, no longer lived there. Unless the property was sold, the Trustees would have no funds with which to discharge their own costs or make a distribution to the only known creditor, HMRC. Where an application is made to realise a sale of the bankrupt's house s.335A(2) IA 1986 sets out the factors for the court to consider and s.335A(3) provides that one year after the property vests in the trustee 'the court shall assume, unless the circumstances of the case are exceptional, that the interests of the bankrupt's creditors outweigh all other considerations.' On appeal the decision that the circumstances were exceptional was upheld but, on the facts, the district judge was held wrongly to have exercised her discretion and failed to meet the underlying purpose of the bankruptcy legislation which was to

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enable a bankrupt's interest in a property to be realised and made available for distribution among his creditors. The child's interests, on the facts, did not require a postponement beyond 12 months.

***Bataillon & Anr v Shone & Anr* [2016] EWHC 1174 (QB)** was an application under s.423 of the IA 1986 by creditors of H to set aside transfers of property, cash and chattels by H to W after a separation contemporaneous with the creditors' claims and purportedly in pursuance of an informal separation agreement by which W agreed not to initiate divorce or financial remedy proceedings. The judge did not find W's evidence reliable and held that the Claimants' claims under s.423 were made out and that the various transfers from H to W had either been made with no consideration or at an undervalue, and were intended to defeat the claims of the Claimants. The subsequent order did reflect W's 50% interest in the properties and the lump sum she was ordered to pay to the Claimants was reduced by £100,000 to make provision for the school fees of the parties' daughter who was found to be "an innocent victim"

***W and Another v CG* [2016] EWHC 2965 (Fam)** was an **a**ppeal concerning the effect of Party A's bankruptcy and declaration of trust on Party B's equitable interest in Party A's property arising out of an historical consent order. In 2009, the district judge directed that H should pay a lump sum in three installments and, in default of any installments being paid, H granted to W irrevocable authority to sell three properties including one occupied by W and a property occupied by H and his new wife and for W to receive the outstanding balance of her lump sum and any interest accrued. H defaulted on the thirds installment due in 2010 and in 2011 bankruptcy proceedings were commenced against H in which W was a creditor. In 2012 bankruptcy orders were made against H

and his second wife, but in 2014 they entered a settlement agreement with their trustees and H then purported to make a declaration of trust granting a 100% interest to the second wife in the two properties. In November 2014 W obtained an order for sale and then sought to set aside the declaration of trust under s.37. The matter eventually came before Moylan J on appeal when he held (inter alia together with certain procedural issues) that the order for sale made to secure payment of the lump sum within the 2009 order gave W an equitable interest in the properties, and H's subsequent bankruptcy did not affect W's interest because the trustee in bankruptcy had acquired the properties subject to W's beneficial interest.

Part III Matrimonial Property & Proceedings Act 1984

***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 then 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.

***Z v Z and Others* [2016] EWHC 1720 (Fam**) was part 2 of the Part III application decided by Roberts J in the Spring following an order in a Russian court purporting to be a final world-wide order but which did not address W's housing needs or the sufficiency of the award for her long term needs. The outcome is largely dictated by the facts and despite the resources the matter was addressed as a needs case. It was held that W was not entitled to remain in the property (owned by a trust established by H's father) indefinitely, but would have to leave when the youngest child finished tertiary education in 2022. It would not be appropriate to transfer that property to W as it would exceed the provision she would have received from an English Court. W was accordingly awarded £2.5m as a housing budget. A *Duxbury* award, assessed after setting off the rental yield from the property, and taking into account as relevant W's delay in bringing the claim, was made to meet the shortfall on her income needs and separate support was awarded for the children.

***Estrada Juffali v Jaffali* [2016] EWHC 1684 (Fam**) raised issues which are probably not the run of the mill fare in the county court. In a Part III case in which H's resources were very substantial, W's aspirational budget was £544,430 per month, she sought capitalized maintenance of £127m and a housing budget of £62.8m. While the standard of living during the marriage was a factor, W was not entitled to replicate it. Roberts J awarded a total of £53m premised on housing of £18m, an annual budget of £2.5m and steps down of 33% when the daughter (for whom H, who had terminal cancer had made generous separate provision) had finished her first degree (when W would be 64) and a further 25% when W was 75.

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***De Renee v Galbraith-Marten* [2016] EWCA Civ 537** the CA refused W permission to appeal an order dismissing her application for permission to apply for financial relief pursuant to Part III. W was Australian but with a permanent right of residence in this country. H was a British citizen. The parties had married in Australia in 2006, lived for 2 years in England and separated in 2008 when W returned to Australia alleging H's intimidating and violent behaviour They had an 8 year old daughter. In 2009 they entered into binding financial agreements in Australia which W alleged had not been fair and had not made proper provision for either her or the daughter. She had already applied unsuccessfully to set aside the agreements in Australia on the grounds of non-disclosure and duress, but instead of appealing, she had commenced proceedings here under Part III. Parker J dismissed the application and Black LJ refused permission to appeal. W had had legal advice before entering into the Australian agreements. If her lawyer, who could be assumed to have looked after her interests, had not then that was an issue between W and her lawyer. The difference between the systems in Australia and England was insufficient to "undermine" the decision of Parker J who had concluded the systems were similar, that W had and had had access to the Australian court, which had not been persuaded of her challenge to the agreements, that W should not be entitled to a rehearing here and that any new material W produced could be placed before the Australian court. Black LJ opined that the capital provision and limited term maintenance under the agreements would not be an unexpected outcome under an English order.

***Al-Baker v Al-Baker* [2016] EWHC 2510 (Fam)** the background to the case involved an initial dispute on jurisdiction between Portugal and England resolved when H disclosed he had divorced W by talaq in the UAE. Mostyn J invited W to apply under Part III, made a series of

interlocutory orders, including freezing orders, which H subsequently sought to challenge or with which he failed to comply, and gave inadequate disclosure. At trial Nicholas Cusworth QC (sitting as a deputy High Court judge) reminded himself of the inferences to be drawn from non-disclosure, assessed the assets as best he could, reminded himself that there should generally be no appreciable difference between the outcome in Part III claims and applications under MCA 1973, and concluded that after a 46 year marriage W had established a right to share equally in H's wealth and made orders accordingly.

***Johnson v Takieddine & Anor* [2016] EWHC 1895 (Fam)** was an application made by a former wife under Part III of the MFPA1984, and for the enforcement, by way of a charging order, of a capitalised maintenance order made by a French Court.The parties divorced in France, where the court made a capitalised maintenance award in favour of W but neither party had yet applied to initiate the judicial liquidation process to determine how to effect the equal division of marital property to which under French law the parties were entitled. These Part III proceedings focused on a property located in London, occupied by W, but owned legally by a company (WEL) over which H had control, and which H claimed was purchased as an investment and not as a family home. Moylan J, agreeing with W, held that the property clearly was '*a* marital home' and that a family could have more than one matrimonial home. H argued that the court had no jurisdiction to entertain the present dispute over whether H was the beneficial owner given the existence of French proceedings. Moylan J held that, as it was a claim for a share of the marital wealth and not one of maintenance, none of the relevant EU provisions was invoked. Moreover, because there were no pending proceedings in France, nor any French court currently seised of the matter, there was no possibility of irreconcilable judgments. This

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court was in any case better placed to decide the issue of beneficial ownership than a court in France, given the application of English trust principles and the uncertainty over whether a French court would have jurisdiction. He rejected H's plea of issue estoppel on the facts because neither issue estoppel nor the principle in *Henderson v Henderson* applied as there was no issue which had formed a necessary ingredient in the previous judgment and been decided, which was now relevant to the Part III proceedings and which W sought to reopen. The issue of beneficial ownership had simply not been determined in the earlier proceedings. In turn, the question of beneficial ownership was decided in W's favour. The judge noted the factual similarities with *Prest v Petrodel*, and Sumption JSC's tentative suggestion that 'in the case of the matrimonial home [legally owned by a company], the facts are quite likely to justify the inference that the property was held on trust for a spouse who owned and controlled the company'. As in *Prest,* WEL had failed to engage with proceedings or provide disclosure at the direction of H as its controller. The Part III application sought a transfer of the home into W's sole name. Moylan J felt he could not engage with considerations under s.25(2) of the 1973 Act but considering ss.16 & 18 of the 1984 Act together, he did not feel it would create an 'improper conflict' to split the equity between the parties in notional half shares. Moreover, it would be appropriate to permit W to enforce against H's share both the costs orders previously made in this jurisdiction against him and, potentially, against WEL, along with the capitalised maintenance awarded in France.

Jurisdiction: Conflicts of Law

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.

Jurisdiction (Brussels I); ToLATA

Magiera V Magiera [2016] EWCA Civ 1292 was an appeal from Bodey J's decision in *G v G* [2015] EWHC 2101 (Fam) in ToLATA proceedings concerning the parties' property in London. H had appealed the finding that the English court had jurisdiction under Article 22(1) of Brussels I, reached on the basis that the ToLATA proceedings had, as their object, rights *in rem* in immovable property situated in England. Bodey J had

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distinguished the case at hand from *Webb v Webb*, a CJEU decision which held that a father seeking to acquire rights *in rem* from his son was essentially proceeding against the son *in personam*, thereby not satisfying Art. 22(1). Here, W already had a proprietary right as a co-owner and sought merely to give effect to it; while the order for sale would be *in personam* against H, the right of ownership itself was *in rem*. Since the first instance decision, the CJEU had given judgment in *Komu v Komu*, which proved a major obstacle to H's appeal. It stressed, as in *Webb* and previous cases, that Art. 22, as an exception to the usual rule that persons should be sued in the courts where they are domiciled (Art. 2(1)), should not be given any broader interpretation than necessary and repeated that the rationale for Art. 22(1) was that it tended to be most convenient to hear a case regarding proprietary rights in the jurisdiction where the property was located. The Court determined a question similar to that which arose in the present case: that an action for the termination of co-ownership in undivided shares of immovable property by way of sale falls within Art. 22(1). The CJEU had made clear that its definition of Art. 22 should take precedence over domestic decisions, and thus the English authorities relied on by H were of little assistance in light of *Komu*. Black LJ considered nonetheless whether it made a difference that an order for sale was rooted in the English law of trusts, in that such an order involved the exercise of the functions of the trustees. She explored the procedure for orders for sale under CPR Part 40 and PD40D, and the enforcement procedure in s.39 Senior Courts Act 1981, and concluded that, given what the order for sale involves on the ground, the court where the property was situated would clearly be best placed to consider an order for sale. Relying particularly on *Komu*, and agreeing that *Webb* should be distinguished, W's proceedings in the present case fell within Art 22(1).

s.25 issues

All the circumstances

An interesting example of judicial analysis and bringing together the various s.25 factors 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".

Discounting the assets/departure from equality

***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. However, a similar discount was also applied by Bodey J in **Chai v Peng [2017] EWHC 792 (Fam)** who observed that it was a familiar approach to depart from equality of outcome where one party (usually the wife) is to receive cash, while the other party (usually the husband) is to retain the illiquid business assets with all the risks (and possible advantages) involved. To try to take account of this difference in the type of the assets with which the parties will be left he awarded W 40% in place of the 50% which she would otherwise have received

Needs

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.

For a very recent commentary on "needs" especially in a short marriage see ***FF v KF* [2017] EWHC 1093 (Fam)** (below)

Non-matrimonial property and mingling

***MCJ v MAJ* [2016] EWHC 1672 (Fam**) was a case of assets worth between £10.5 and £11.6m in which a number of factual issues arose but H contended it was a needs case while W pursued an outcome based on sharing. Roberts J categorized it as a needs case. H was 17 years the senior of W and the marriage lasted between 13 and 17 years. Properties within the portfolio which H brought to the marriage had been sold during the marriage and replaced and income from the portfolio sustained the domestic economy, but this was insufficient to "change the fundamental nature of [the] capital asset [which] was non-matrimonial from the outset". Non-matrimonial property invested and preserved throughout the marriage without any inroads being made into the underlying capital value, remains non-matrimonial property

notwithstanding the use of interest or income therefrom to support the parties. In relation to non-matrimonial property and mingling the judge adopted Mostyn J's structured approach in *JL v SL (No 2) (Appeal: Non-Matrimonial Property)* [2015] EWHC 360 (Fam), but observed that this was one of those cases where there was insufficient reliable evidence to establish a reliable and historical benchmark in terms of crystallised value at a particular point in time and noted Holman J's observation in *Robertson* that the approach in *Jones v Jones* was a tool not a rule. The judge rejected W's claims that H promised her a half share of his wealth: "whilst he was willing to share with W the benefits which flowed from his wealth as a consequence of marriage, there was never – on his part at least – an expectation, far less legal commitment or agreement, to endow her independently with a 50% share of that wealth". However, H had not adequately acknowledged the extent of W's contribution to his nursing home businesses but the judge nevertheless cut W's budget from £140K to £90K and awarded a *Duxbury* sum accordingly. The wife retained £2.3m which significantly exceeded 50% of the matrimonial acquest but met her needs and left H with around 75% of the assets.

Non-marital assets

***Scatliffe v Scatliffe* [2016] UKPC 36** an "ill-starred appeal" by H against financial orders made in the BVI where the law remains broadly similar to the MCA 1973 (save for the 1985 amendment in respect of putting the parties back in the position they would have been had the marriage subsisted). The Privy Council dismissed the appeal finding the orders to be entirely reasonable, giving to each of the parties a home in which to live for the rest of their lives and a rental income on which, even without other income, they could subsist. It appeared moreover to represent an outcome on a clean break basis which was fair to both

parties in the light of all the relevant circumstances and which represented a reasonable discharge of the obligation cast upon the court in the concluding words of section 26(1) of the BVI statute. The lower court had however failed to bring into account a property inherited by H, while H had failed to disclose some of his assets. The PC observed the local courts seemed not to understand the concept of matrimonial assets and provided useful guidance encapsulated in 10 propositions at para [25].

Resources and Contributions

***X v X* [2016] EWHC 1995 (Fam)** concerned the discounts to be applied to H's shareholding on the basis of the husband's unique importance to the company (on the facts H would be able to counter the negative effect of a sale and the discount was limited to 8%); the extent to which shares held in a LTIP scheme acquired post separation but arising from employment during the marriage should be treated as 'matrimonial' (50% so treated); the extent to which H's interests under discretionary trusts should be treated as a resource (the question was whether, if H requested the capital of the trust from the trustees, they would be likely to advance it to him. While accepting the trustee's discretion was entirely unfettered, given that the wording of the trust described the husband as the 'primary beneficiary' to whom any income from the trust would be given, and that H alone among the beneficiaries could be considered for the advancement of capital, it was likely that the trustee would accede to any request from H for up to 50% of the capital, leaving ample funds behind for other beneficiaries); and issues in relation to 'unmatched contributions'. On this H relied on pre-marital savings some of which were invested in the marital homes. The judge could see no reason to depart from the general rule that payments like these into the

matrimonial home become so much a part of the parties' shared family economy as to become or be swallowed up by 'matrimonial property' (see also per Bodey J in *Chai v Peng* [2017] EWHC 792 (Fam). H's savings had also contributed £0.5m to supporting the family in about 2000 during the early life of the company enabling its earnings to be ploughed back, which justified giving weight to this "in a broad way" in considering departure from equality. H's claim to have made a *Lambert* special contribution failed. He had seen and seized the opportunity to adapt and improve what was already happening, rather than exercised a spark of innovative genius, nor was the net wealth created in the league of *Sorrell*, *Charman* or *Cooper-Hohn*. The judge did accept H's post separation endeavour as relevant. However, he rejected H's case that his contributions throughout the marriage in respect of domestic and child care activity, when W's contributions were diminished due to alcoholism (which was not to be categorised as her 'fault'), were such as to amount to an unmatched contribution which should be taken into account as regards the outcome. While the contributions were unequal, they were not so unequal as to reduce W to a needs case. There would be a discount to sharing and, checked against her needs, a fair outcome was 37.5% of the assets. The share price had increased significantly between the hearing and judgment but Bodey J held that any court should be 'very slow indeed' to admit adjustments after the hearing and before judgment; the hearing was the logical point to take the 'snapshot' of the assets.

***Chai v Peng* [2017] EWHC 792 (Fam)** was the resolution of what Bodey J described as "titanic" litigation between the 70 year old wife and 78 year old husband (the chairman of Laura Ashley, *inter alia*). H's claim that he had made a special contribution was rejected. Although he had been a hugely successful and well regarded entrepreneur who had the

foresight to see how to make the most of Malaysia's progressing business economy over the last 40 years and accumulated a fortune of over £200m, the evidence showed that he was merely in the right place at the right time (an expression used by Holman J in *Gray v Work* of the husband in that case whose contribution was assessed as not reaching the rarified category of "special") and he astutely made the most of it through his business acumen and hard work. In cross-examination he accepted that he had never described himself as a 'genius', agreed that he had not come up with any particular invention, nor done anything particularly innovative in the commercial sphere, and accepted that the expansion of the markets in which the companies traded would have happened "... as a normal development of a multi-national company". Moreover (and importantly) the judge observed that "it must usually follow that the harder the entrepreneur breadwinner had to work at his business, the more the responsibility of childcare and domestic infrastructure would have fallen to the home-making wife. That is particularly so here, where one of the children has Tourette's syndrome and the other is on the autistic spectrum....Accordingly, when I set the husband's substantial contribution as breadwinner against the wife's substantial contribution in the home and in caring for the children (much if it on her own, on different continents from the husband), I conclude that there is no room here for a reduction from equality based on any differential between the parties' respective contributions to the marriage."

This focus on the lack of any disparity between the contributions such as would be inequitable to disregard was identified as core in the Court of Appeal's decision in ***Work v Gray*** **[2017] EWCA Civ 270** in which the Court re-affirmed the approach in *Miller / McFarlane* and *Charman No.4*. H sought a 61% share of the assets of $225m (61% was the

midpoint in the bracket of departure from equality suggested in *Charman No 4*: 55 - 66.66%). W argued on appeal (which had not been argued below) that the concept of special contribution, at least if focused in financial contributions alone, should be discarded as discriminatory against the homemaker. The parties, in their late 40s, had 2 children during a 21 year relationship. All the wealth had been accumulated during the relationship (during H's employment with a private equity fund, Lone Star until 2008, chiefly when he ran its office in Japan for 8 years). The CA rejected the suggestion that there was uncertainty in the application of the principle. They did not find reference to Australian jurisprudence helpful as the Australian statute was in different terms. The touchstone remained a fair outcome but there had not been such a change in perceptions of discrimination, equality or fairness since *Miller* and *Charman* as to warrant a different approach. The Court rejected the developments in the principle proposed by each party. W's contention that special contribution required a combination of financial and other contributions had no principled basis. H's proposed test could elevate a financial contribution above others nor could the contribution be separated from the contributor. The agreed with Holman J that the use of the word "genius" was unhelpful. If the contribution does not derive from the "exceptional and individual quality" of the contributor it would not be a special contribution. The suggestion that the concept was discriminatory (of itself) was rejected in light of the few examples of its application, and the fact that it is confined to very narrow bounds. The court is required by statute to consider contributions. The focus is not on whether the contributions are "matched" but whether there is sufficient disparity to make it inequitable to disregard. Save for this the Court upheld Holman J's analysis and rejected H's appeal against an equal division.

On 12th May 2017 there were press reports of a decision by Haddon-Cave J ***AAZ v BBZ* [2016] EWHC 3234 (Fam)** (a judgment in fact delivered 15.12.16) where by he awarded 41.5% of "a fortune totaling just over £1bn". H put his income needs at $25 million pa. H and the companies in which his wealth was held played no part in the hearing (the only time H had really engaged was for the FDR by video link from his yacht in the Caribbean) and was in breach of many orders regarding disclosure, valuation and settlement offers. W's counsel therefore identified the arguments which H might have adduced based apparently on his contentions in Form E, replies to questionnaire etc. Haddon-Cave J (a QBD judge) sets out at paras 21-35 a thumbnail sketch of the principles applicable to financial remedy claims, including the Court's entitlement to draw inferences from H's silence (see eg per Lord Sumption in *Prest v. Petrodel Resources Ltd*). Between paras 58-91 in a helpful *vade mecum* he sets out the basis for and process of analysing H's interests in the trusts and companies which held the wealth and concludes H had access to the trust assets and the companies held assets on a bare trust for him (*Prest*). Paras 92-105 set out the basis for and analysis of W's claim pursuant to s.37 MCA 1973 and s.423 Insolvency Act 1986 (disposition was at an undervalue and entered into for the purpose of putting assets beyond the reach of W and/or otherwise prejudicing W's interests) to set aside H's purported transfer of assets to a trust. Absent any evidence from H, the presumption that this was designed to defeat W's claims led to the orders being made. H claimed he was wealthy before the marriage. It is axiomatic that if a party is going to assert pre-marital assets, it is incumbent on them to prove the same by clear documentary evidence. H had not. His contention that the marriage had come to an end many years earlier failed. He had forged Russian court documents, and there had been a reconciliation after a

separation in the 1990s. The marriage lasted from 1993 until a failed reconciliation in 2014 The suggestion of a special contribution was rejected, the judge concluding that W who had been "a housewife" and "hands on mother" to the couple's now adult sons had made an equal contribution to the welfare of the family. Whilst H clearly worked very hard to create wealth out of a Russian oil and gas company (the shares in which he sold for $1.375bn in 2012, a value built during the years of marriage) and was resourceful, H's evidence fell far short of the exceptionality (or 'genius') test elucidated in the authorities. There was no post separation accrual. The judge could see no reason to depart from a 50/50 division but W was content with £453m or 41.5% which was the award made. Of this £224.4m was identified as the "maintenance" element to enable W to enforce in Switzerland under the Lugano Convention. Finally the judge sets out the requirements for service overseas and concludes H and his corporate manifestations had all been appropriately served.

In a subsequent judgment ***AAZ v BBZ & Ors*** [2016] EWHC 3349 (Fam) the judge rejected H's solicitor's claim that he was protected by legal professional privilege from answering questions about the whereabouts of certain assets. The claim to privilege was defeated by the 'fraud' exception. H's conduct had been seriously iniquitous. He had displayed a cavalier attitude to the proceedings and a naked determination to hinder or prevent the enforcement of W's claim. Moreover, there is no privilege in the case of a transaction (as here) caught by s.423 of the Insolvency Act 1986 or s.37 MCA 1973.

Short marriage; stock piling; standard of living

The question of how to provide for a claimant spouse after a short marriage (19 months: 4 year relationship), where H's high earning career

(£1m pa as a footballer) would be limited in time, but W would have long term obligations as carer of their child (of 22 months) was addressed in ***AB v FC* [2016] EWHC 3285 (Fam)**. The parties lifestyle (spending at a "prodigious rate") meant there was no significant marital acquest, realisable assets being c. £500,000. It was thus agreed to be a needs case but the judge assessed these conservatively, with a lump sum of £365K, assessing her housing need at £700K against W's housing budget of £1.7m (with a £1.1m mortgage). The parties had never owned a property but rented (£52K pa). H contended W should rent but the judge held this would be a waste. It was moreover held not unreasonable for W to be able to "stockpile" some of her periodical payments to divert to discharging her mortgage liability (cf *Field v Field* [2015] EWHC 1670 (Fam)). The presence of the child was an overarching consideration in assessing needs and the award. W would have no right to share in H's future bonuses. The award: child maintenance £36,000 pa, nursery/school fees £14,000, a mortgage allowance £80,000, joint lives spousal maintenance £84,000 to be reviewed in 7 years (against W's aspiration for £318K global maintenance and H's offer of £144K to include rent), and in light of W's need half her residual costs liability (there had been previous LSPOs).

Roberts J's comments on the relevance of the standard of living during the marriage (that the longer the period during which needs are to be met by the paying spouse, the more likely it is that the court will decline to assess those needs on the basis of a standard of living which replicates that enjoyed during the marriage) is consistent with a number of recent decisions including an unreported decision (*MacFarlane*: Daily Telegraph 13.2.17) in which Moylan J is said to have commented that "the previous living standards of a couple were only a guide", and with his comments

in *BD v FD* [2016] EWHC (Fam) 594 and Mostyn J's in *SS v NS (Spousal Maintenance)* [2015] 2 FLR 1124

The marriage in **FF v KF [2017] EWHC 1093 (Fam)** lasted less than 2 years although the relationship lasted, off and on, for 9. The most recent cohabitation was 2½ year. Mostyn J indicated he did not find the label "short marriage" helpful. H was 65, W 38 and suffered significant mental health problems and vulnerability arising from the marriage. Any earning capacity was very uncertain. H was worth £37m which was liquid and of which a little over £2m arose during the marriage, although given that the case was decided on needs, not sharing, Mostyn J criticised the time spent exploring this latter issue. The standard of living had been very high. W wanted £6m, H offered £1.75m. The common ground was that an award should be made up of a sum to settle W's debts of £300K, plus a home and an income, capitalised. W wanted a flat in London, H proposed a house in Cheshire at a third the cost. W wanted a life time *Duxbury* award, H proposed a discounted sum. The judge awarded £4.25m which appeared to have been based on a London flat and 10 years of income at a level less than her budget (which was less than the marital standard of living). H argued the award was greater than her "needs". Mostyn J in a succinct judgment of 21 paragraphs, observed that the where the "needs" principle is concerned there is an almost unbounded discretion. The main rule is that, save in a situation of real hardship, the "needs" must be causally related to the marriage. He referred to several big money cases where the "needs" awards were manifestly not what was "needed" for accommodation and sustenance. The main drivers in the discretionary exercise are the scale of the payer's wealth, the length of the marriage, the applicant's age and health, and the standard of living, although the latter factor cannot be allowed to dominate the exercise. In a short marriage case the discretion

when assessing needs is particularly broad and fact-sensitive. Frequently (but not always) it would be assessed by reference to a term of years (as here) but might be a lifetime award (eg *Miller v Miller* at first instance). Here the judge's award, while generous, was well within the bracket and H's appeal was dismissed.

Nuptial settlements

***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.

In ***DB v PB* [2016] EWHC 3431 (Fam)** the parties were Swedish. It was a 21 year relationship with 2 children (12 and 8), in which they started out with nothing. It was agreed to be a case of equal contributions (albeit all the money was made by H). The assets (subject to any tax) were £10.86m, all save the FMH in H's name. 3 pre-nuptial agreements were signed in US and Sweden with prorogation clauses which the judge found validly, for the purposes of Article 4 of the EU Maintenance Regulation, limited W's maintenance claims to be resolved in Sweden and limiting the English court to "rights in property arising out of a matrimonial relationship". He held the parties consensually entered into one or more prenuptial agreements and that, at the time when they were entered into, the effect of the agreements was not vitiated by factors such as fraud misrepresentation or undue pressure. He rejected H's case that a 'sharing' claim was in practice a maintenance claim and thus barred by the prorogation clause, but if the ante-nuptial agreements were otherwise valid the property claims could only be pursued to the extent it would be unfair to hold the parties to them. Here W would be limited to 5-6% of the assets. This would work unacceptable unfairness on W and, worse still, would adversely affect the best interests of the children (which was a priority under *Radmacher*). However, to respect the autonomy of the parties it would be wrong simply to disregard the agreement; rather it was the court's duty to step in to alleviate (only) the unfairness. However, to assess W's claim on need would be to render the claim a maintenance claim under Art 4, in respect of which the court's jurisdiction was barred. Thus the judge could only order a sale of

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FMH and its equal division, and could order neither a lump sum nor a property adjustment. However, he could and would make an order under Sched 1 of a housing fund of £2m and a global carer's and children's periodical payments order of £95,000 pa.

Maintenance

***Mills v Mills* [2017] EWCA Civ 192 – variation of maintenance** Under a 2002 order, the wife (W) received periodical payments for herself of £1,100 per calendar month and the majority of the liquid capital from the marital assets, leaving the husband (H) with a small capital sum, his pensions and the business from which he earned his income. In the years following, W made a series of bad financial decisions, buying a string of properties with increasingly large mortgages, the eventual consequence of which left her in rented accommodation, having spent all of her capital from the divorce settlement. W made an application for increased spousal maintenance and/or a capitalisation of the same so as to achieve a clean break. H made an application for a decrease in payments and either a term order or capitalisation of a short-term order to lead to a clean break. H argued that W had already had the lion's share of the capital and that his maintenance obligations had already extended beyond the length of the marriage, and would, with the absence of a term order, extend beyond the time that the parties' son finished his tertiary education. HHJ Everall QC found that H was reliable, truthful and frank. He had remarried, and supported his new wife, his wife's daughter, his child with her, his son with W and W. The judge analysed H's financial position, including his income and that of his capital interest in housing and in his business and found that he had could afford to pay the increased payments W was requesting. He found that W's monthly income needs were £2,982 and her net monthly income was £1,541 per

month. This left her with a shortfall of £1,441 per month which was only partly met by H's £1,100 monthly maintenance payments. The judge dismissed both parties' applications, leaving H to continue his payments of £1,100 per month under the 2002 order. W appealed, arguing that the judge, having found that W could not increase her earnings, had found no basis on which to reduce her basic needs budget, or why she should live below the basic needs budget that he himself had approved. H argued that the basis for the judge's order could be construed as W's financial mismanagement, and/or that he did not have sufficient regard for W's earning capacity and/or that although he had not explained why he had reduced W's budget, he was still entitled to do so. The Court of Appeal held that the judge's findings were clear: whilst W had made a series of unwise investments she had not been financially profligate or wanton and there had not been financial mismanagement on her part. He had made specific findings that W had no greater earning capacity in her existing or any other employment but had made an error in principle in deciding that because W could not meet her needs, she would have to adjust her expenditure to reduce those needs, without explaining how. Without such reasoning, on the facts he had found the conclusion was not open to him. H could afford to pay the increased maintenance payments and was therefore ordered to pay increased periodical payments of £1,441 per calendar month to meet the shortfall.

***B v G* [2017] EWHC 223 (Fam)**

This was a case on its facts. The parties were married and lived together for around 12 years and had one son, now 12 years old. H, having inherited significant sums from his father, was a wealthy man and had never worked. At 65, he was deemed to be incapable of earning any

worthwhile income. W qualified as a mathematician and, although she claimed she would like to, had not worked for some time. As such her earning capacity was purely speculative. In 2013, Blair J, ordered that a £6M house, beneficially owned by H, should be sold and a lump sum of £1.6M paid to W. In the meantime, W was permitted to continue to live at the house and was to receive periodical payments for herself of £55,000 per annum and £10,000 per annum for the child. It was clear from the order and judgment that Blair J contemplated the house would be sold within a short space of time. However, that had not happened. H, wanting W to vacate the property, secured a loan against the house and paid W £1.6m, so she moved to rented accommodation. However, H could not afford to pay both the interest on the loan (£64,000 per annum) and W's periodical payments. At an earlier hearing when W had tried to recover the arrears which were beginning to accrue, the court held that the arrears should not be paid to W, whilst she still had the £1.6m from which to support herself. By the date of this hearing, the arrears were up to £37,919. Between the August 2016 hearing and the January 2017 hearing, W purchased a £1.4M flat. Taking into account stamp duty, legal fees, £80,000 spent on a failed business venture and various other expenses, most of the £1.6M had been spent. Holman J found that W had £78,000 of liquid capital available, and that she should not have to exhaust this to support herself. Accordingly, he would not "remit for all time" any of the arrears owing. Instead, he suspended the need for the H to pay the arrears until the date on which the property was sold. In the meantime, the maintenance was reduced by just less than £2,000 a month, until the completion of the sale.

H's appeal was dismissed by Baker J in ***Roxar v Jaledoust*** [2017] EWHC 977 (Fam) on an application to discharge or vary a periodical payments

order which originally provided for payment on a joint lives basis. HHJ Hess had allowed H's appeal but, on a rehearing, had rejected evidence of a loan to H from a family company on the basis that the one paragraph letter in support did not prove the debt to the requisite standard of proof, and similarly H, a dentist, had shown a lack of enthusiasm for producing written information about his 2016 accounts or his future income, so the judge assumed a continuation of previous levels of income. He also found H to have an available and unexploited earning capacity because he was unwilling to earn so as to pay maintenance for W and support the home in which she lived with their son. He attributed an appropriate income and then, to incentivise H, tapered the provision towards retirement when there would be a clean break on a 50% PSO of the NHS pension. On appeal H produced substantial but ultimately unhelpful documentation (which did not comply with Moor J's directions, and Baker J warned could attract adverse costs consequences) and had not demonstrated that Judge Hess's decision was wrong. Nor had he demonstrated that circumstances had changed so as to justify a further reduction in W's periodical payments.

Pensions

***Goyal v Goyal* [2016] EWCA Civ 792** is another example of the unwisdom of not having specialist advice in pension cases (cf *WS v WS* [2015] EWHC 3941). The trial judge worked on what in the subsequent appeal (but see *Goyal No* 3 below) was thought to be the erroneous basis that he could not make a PSO in respect of a foreign pension. The CA accepted such an order could be made (paras 29-31) subject to the essential procedural prerequisites being satisfied (para 33), although the decision is actually about the limits of the court's power under s.37

Senior Courts Act 1981 and whether the Family Court has any power to make an order transferring or assigning one spouse's interest in a pension annuity policy to the other spouse outside the statutory scheme established by the 1973 Act. The comments about the jurisdiction to make a PSO in respect of a foreign pension are therefore strictly *obiter*. Assuming he could not make a PSO against the Indian annuity policy, the judge (apparently) had sought to use s.37 to make a substantive order that H transfer or assign the policy to W. The CA held he could not do this and that the use of s 37 is confined, in all circumstances, to orders which are ancillary to, or supportive of, a separate substantive legal or equitable right. The application for a PSO (which had not been decided on its merits) was remitted to the first instance court.

The litigation arising from the *Goyal* case of which Mostyn J observed "It has been going on for far too long and so far as I can tell there is virtually no money left" continued following the CA's decision.Having heard H's counsel change his position and now argue that a PSO could not be made (contrary to the invited submissions of the FLBA and Resolution – at least in respect of an exported UK pension scheme, i.e. a QROPS ("qualifying recognised overseas pension scheme") Mostyn held (***Goyal v Goyal* [2016] EWHC 2758 (Fam)**), relying on the presumption against extra-territorial effect of a statute, that the procedure relating to pension sharing could not extend beyond the domestic context and a PSO (s.24B) was not available in respect of any foreign pension. In any event W had failed to submit proper evidence that any such order would be enforced in India. Mostyn J did observe that there were a number of possible alternative routes to achieving direct sharing of overseas pensions:

1. A consent order with undertakings to obtain an order splitting the pension in the jurisdiction in question;

2. A *Brooks v Brooks* variation of a nuptial settlement (section 24(1)(c) of the 1973 Act, which remained effective in cases that did not fall under section 25D);
3. A property adjustment order, provided that there is clear evidence that the order would be enforced by the foreign court

Ultimately, the first instance judge had wanted to award the wife the entire benefit of the husband's annuity. Mostyn J noted that the entire litigation could have been avoided by way of a two-part periodical payments order: the husband would pay, in addition to the existing monthly periodical payments, the full amount that he could draw from his annuity contract on a quarterly basis. Such orders are commonly made, for example in cases where a party has both a salary and a bonus. And it was here that, if necessary, an injunction under s.37 Senior Courts Act 1971 could properly come into play, supporting the existing legal right within the periodical payments order and mandating the husband to receive and pay the full annuity amount.

Goyal v Goyal (No. 3) **[2017] EWFC 1** was the next installment (which he hoped would bring to an end "this long running and futile litigation") when Mostyn J was to consider the beneficial ownership of the rights under the Indian annuity contract, W's deemed application for a variation of the periodical payments order so that she receives all the benefits arising under the annuity contract, and H's application to reduce the existing periodical payments. The judge opined that Judge Brasse's findings as to ownership had not been under appeal and thus could not be set aside (as the CA order purported to do). Mostyn J would have reached the same conclusion in any event (viz that H owned it and had not transferred it to another) and held that, anyway, H was prevented by issue estoppel from reopening the issue. Judge Brasse had found that

because H had lost such vast sums by reckless gambling W should recover the few scraps that were left, including the proceeds of some shares that in the event had been distrained by a creditor, so there were powerful reasons for making a supplementary periodical payments order in favour of W (subject to dissuading H from frustrating them). H had failed to obtain good employment and his reduced circumstances justified a reduced periodical payments order. The PPO would be in two parts, the first would be the monthly amount payable by H under Judge Brasse's order as varied (as above). The second limb would provide that H would pay to W two-thirds of the quarterly income deriving from the annuity policy as it arises. There would be a bolstering injunction made against H requiring him to procure that these payments go to W, made pursuant to *Blight v Brewster* [2012] 1 WLR 2841 following *Tasarruf Mevduati Sigorta Fonu v Merrill Lynch Bank and Trust Company (Cayman) Limited* [2011] UKPC 17.

See also *Henry v Horton* (above): A bankrupt cannot be required to obtain property that was excluded from the bankrupt estate and convert it into income receivable by the trustee.

Publicity and anonymisation

Wyatt v Vince [2016] EWHC 1368 itself was the subject of a further decision when the issue of publicity arose. Following the Supreme Court allowing W's FR claim to proceed (after a significant delay of 19 years) and Lord Wilson's reference to the wife's "real prospect of comparatively modest success" in her claim, the parties reached a compromise whereby H was to pay W a lump sum of £300,000 and permit her to retain the £200,000 paid by him on account of her costs of the appeal to the

Supreme Court and the £125,000 paid earlier, but she would have to meet the as yet unquantified costs of her solicitors. Only when the order was being drafted did H introduce his requirement for mutual confidentiality undertakings. W did not agree and threatened a *Dean v Dean* application for an order in the agreed terms. H subsequently backed down so the application was not made. By the time the matter came before Cobb J the issue on publicity was reduced to whether H could publish the "net effect" of W's recovery by reference to an estimate of her costs. The judge rejected this on the basis that the sum was unknown and it was not in the public interest for potentially misleading information to be published. More generally, and after referring to *W v M (TOLATA proceedings: Anonymity)* [2012] EWHC 1679 (Fam); *Luckwell v Limata* [2014] EWHC 502 (Fam); *Fields v Fields* [2015] EWHC 1670 (Fam); *Cooper-Hohn v Hohn* [2014] EWHC 2314; *DL v SL* [2015] EWHC 2621 (Fam); and *Appleton v Gallagher* [2015] EWHC 2689 (Fam), he held the parties should be at liberty to publish the final order agreed between them, on the basis that (i) The starting point of privacy for these parties in respect of the proceedings was readily displaced here, given that the lives and financial circumstances of the parties had already been trailed extensively in the public domain. (ii) This was not a case in which H had disclosed any, or any material, financial evidence under compulsion which might attract protection; he had run the 'rich man's defence'. There was, further, no commercially sensitive (or other similar) financial information to protect in this case – none had been vouchsafed; it was W who sought the right to publish, and her financial circumstances were reasonably apparent from the publicly reported documents in existence; (iii) It was in the public interest that the outcome of the case should be revealed; W's application had generated considerable attention and speculation in legal circles, and in the national

media. There was a legitimate interest in the publication of its conclusion, and specifically the figure which – whether a conscientious appraisal of the merits, or a figure computed by reference to strictly commercial considerations – the parties agreed would be the right one to reflect an appropriate award to W; (iv) Further, and of importance, there was a public interest in disseminating the fact that these parties had, in the end, been able to reach a negotiated settlement without a trial. Given the ambitious objectives of each party along the way (their open positions, widely publicised, pitched them £2m apart), and the heavily contested litigation to the Supreme Court and back to the High Court, the public should know that compromise is achievable and (he added) highly desirable, even at a late stage of such a hard-fought case. H was ordered to pay £1,000 towards the *Dean* application but otherwise there would be no order for costs on the publicity issue where both parties had retreated from their initial positions.

In ***Norman v Norman [2017] EWCA Civ 49*** when refusing W's application for anonymity and while stressing that nothing in their judgment affected the judicial disagreement (arising out of the interpretation of FPR r.27.10) as to whether financial relief hearings at first instance should be heard in public or private, or as to the extent to which such proceedings can be reported, the CA made clear that the usual rule in financial remedy appeals would be that hearings would be in public and there would be no anonymity unless: (i) it is established that a party's article 8 rights are engaged; and (ii) on an application of the relevant balancing exercise described in the authorities, a private hearing, or some lesser measure such as anonymisation, is required (the law requiring the least interference with open justice compatible with a proven right to privacy). Where Articles 8 and 10 are both engaged they have equal status and neither has automatic precedence over the other:

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In re S (A Child) (Identification: Restrictions on Publication) [2005] 1 AC 593, para 17. The balancing exercise will focus on the specifics of the rights and interests in the individual case. S.1 of the Judicial Proceedings (Regulation of Reports) Act 1926 does not prevent the reporting of financial remedy appeals. If a party seeks such an order, however, the court needs to have a properly formulated paper application, rather than some vague oral application or one that is made by letter. In future (and subject to the exception below), the CA will expect that any application for the court to hear an appeal, or an application for permission to appeal, relating to financial relief proceedings either in private, or subject to reporting restrictions which anonymise the parties or prevent publication of information relating to the application ("an anonymity application"), will be the subject of a formal court application, setting out the grounds and supported by necessary evidence, upon which the anonymity application is based. Notice of the intended anonymity application, a copy of the Notice of Appeal and any evidence in support of the anonymity application should also be given by the applicant to media organisations by service on the Press Association's Copy Direct Service. The exception would be in a financial remedy appeal where, if all that is sought is to anonymise the names, dates of birth or other details of minor children, and the parties agree, a formal application may not be necessary. However, even then, a letter should be sent to the court indicating that such an application will be made and stating that the court may wish to consider whether the press should be informed. The three judgments should be read in full.

Contrast this case with ***FF v KF* [2017] EWHC 1093 (Fam)** where Mostyn J held that appeals to the High Court from the Family Court are governed by FPR 27.10 so that the default position is that they are heard in private, but representatives of the media may attend by virtue of FPR

27.11 and PD 27B and if they do in a case concerning children, section 97 of the Children Act 1989 will prevent identification of the child. In any event, a reporting restriction order preventing identification of the parties and of their financial affairs may be made (see *Appleton v News Group Newspapers Ltd* [2015] EWHC 2689 (Fam)). In this case no order was made under rule 27.10 on the granting of permission directing that the appeal be heard in open court, so it was heard in the usual way, in private. There was no good reason why the parties should be identified. The judgment was therefore anonymised.

In ***X v X [2016] EWHC 3512 (Fam)*** Bodey J considered anonymisation of a judgment where the parties had been named and photographed attending the hearing but the judgment contained personal information not wholly in the public domain. H, while wealthy, was no celebrity. Bodey J, after carrying out the balancing of Art 8 and 10 rights against the specific facts of the case, in particular the nature of the information contained in the judgment, the previously (relatively) low public profile of the parties, and the effect of press intrusion on the husband and the children of the family, concluded anonymisation was justified (although H subsequently waived that right).

The husband in **Giggs v Giggs [2017] EWHC 822 (Fam)** initially applied to exclude the press from the financial hearing. Although he did not pursue this Cobb J made clear that the burden would have been on him to satisfy the court such an order was necessary. H also sought a reporting restriction order in respect of the parties' financial information whether of a personal or business nature. Financial Remedy disputes are private proceedings under the definition of FPR 2010 r.27.10. As they concern inherently private matters, there is a strong 'starting point' that

they should be conducted in private (see *DL v. SL* [2015] EWHC 2621 (Fam), [13]);

There is also an implied undertaking in financial remedy proceedings that information provided under compulsion, for example under FPR 2010 r.9.14, will not be used for other purposes (see *Clibbery v. Allen* [2002] EWCA Civ 45). Exceptions do apply if information is already in the public domain, or if the facts show such disgraceful conduct by one or more parties that they forfeit the right to such protection (see *Lykiardopulo v. Lykiardopulo* [2011] 1 FLR 1427; *Wyatt v. Vince* [2016] EWHC 1368 (Fam)). However, not only do the adults have (qualified) rights to respect for their private and family life (under Article 8), but the parties' children had their own Article 8 rights which deserved protection. The press had rights to freedom of expression (albeit subject to some restrictions) (Article 10 ECHR) and when Article 8 and Article 10 rights both arise, the court must consider how these rights interact and/or collide, exercising its judgment upon the individual facts of the case. The children's Article 8 rights are likely to be affected by a breach of their parent's privacy interests, but the children also have independent privacy interests of their own. Exceptional public interest must be demonstrated by editors to override the normally paramount interests of children under 16 (see *PJS v. News Group Newspapers Limited* [2016] 2 WLR 1253, [72-74]). In the circumstances, any public interest in media access to the parties' financial information was significantly outweighed by the rights of the parties, and their children, to privacy in the circumstances.

St John's CHAMBERS

Xhydias agreement

***G v S* [2017] EWHC 365 (Fam)** concerned Swedish parties who agreed heads of agreement in respect of a Sched 1 claim including a £2.1m housing fund, agreeing to be bound by *Xydhias* principles, but leaving some issue unresolved. The father sought to include a clause preventing the mother from obtaining a replacement property outside England and Wales before the child completed her primary education. Hayden J accepted the mother's case that this would be "wrong in principle", the child's welfare being a "constant influence on the discretionary outcome," in Schedule 1 proceedings, and the provision would not be ordered even if the parties agreed, and *Xhydias* was disapplied. Other issues concerned a mutual confidentiality agreement which went (well) beyond Practice Direction 12G - Communication of Information and Mostyn J's draft. Hayden J did not have the material upon which he could balance the Art 8 and 10 considerations but concluded H's proposed terms were too ambitious and the restrictive orders should be confined to those set out in the guidelines. The judge observed that a strength of *Xydhias* agreements is that they are not constrained by the language of the statutes by which they are framed. He was content to permit the inclusion of "innocuous, anodyne or ultimately meaningless phrases" if they facilitated settlement which in this case included that 'the mother agrees that she has no present intention of seeking a further lump sum'.

Keeping a note

In **Smith v BSB [2016] EWHC (Admin)** a barrister faced disciplinary proceedings when his client alleged he had been told the barrister had

secured a clean break in FDR negotiations, when in fact it was a nominal order for periodical payments. The solicitors who had been present had a conflict of interest and supported the complaint. The barrister had no contemporaneous note of the advice given, the solicitors had thrown away their original notes and there was an issue whether the attendance note they produced may have been prepared for the proceedings. Had the barrister kept a full note his position would have been easier. In the event the judge found that it would have been "ridiculous" for the barrister to have told the client and solicitors he had achieved a clean break when the draft order clearly did not achieve one, and moreover the deal negotiated was arguably very favourable to the client. The barrister's appeal against the BSB finding against him was allowed.

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CFS QC

13.05.17