Family Affairs: November 2017

Financial Remedy update (Summer to Autumn)

Christopher Sharp QC, Barrister,
St John's Chambers

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To keep these articles to a manageable length the editorial decision has been made to reduce the word-count. The following notes are therefore abbreviated and are no substitute for reading the cases! Husbands will be referred to as H and wives as W.

Procedure

The Supreme Court in ***Birch v Birch*** [2017] UKSC 53 allowed W's appeal, holding that the court had power to permit the release of a party from an undertaking to sell the family home (in which she and two minor children remained) in default of her securing the release of H from his covenants under the mortgage. W had wrongly framed her application as one to 'vary' her undertaking which, as a voluntary promise to the court, the court had no power to vary. It did have a power to release a party from an undertaking and (for instance) to permit an alternative undertaking or impose conditions for that release, but an applicant would have to show a significant change of circumstances. Her undertaking could have been framed as an order for sale under s.24A which would have been variable under s.31(2)(f) and the jurisdiction should be approached in the same way. The proceedings below had unhelpfully focussed on the existence of a jurisdiction to alter the undertaking rather than the exercise of such a jurisdiction. W's application was remitted to HHJ Waller to consider the merits in accordance with s.31(7) giving first consideration to the welfare of the children but weighing any prejudice to H by reason of a delay in sale which, if found, might justify compensating him by asking W to make provision for him out of the net proceeds of sale. *Omielan v Omielan* [1996] 2 FLR 306 (CA) disapproved.

In ***CH v CH*** [2017] EWHC Mostyn J, in a judgment approved by the President, addressed the issue of whether a court can order a party to use 'best endeavours' and to order a party to indemnify another. A draft financial remedies order provided for two jointly owned properties to be transferred respectively to W and H. The properties were mortgaged. The draft order provided that each party must use his or her best endeavours to procure the release of the other party from the mortgage on the property that he or she received and, in any event, must indemnify that other party against liability thereunder. Two district judges declined to make the

order on the basis that the 1973 Act contained no power make such orders. Mostyn J relied on the conclusions of the Financial Remedies Working Group (to which he had been an important contributor) to reject this view. The powers of the Family Court which has all the powers of the High Court are not confined to the four corners of the Matrimonial Causes Act. The High Court unquestionably has the power, as part of its equitable jurisdiction, to order an indemnity. If awarded, that represents a legal right in favour of the person so indemnified. The court can award an injunction in support of a legal right. To order someone who has been ordered to indemnify the other party in respect of a mortgage to use his or her best endeavours to keep up the payments on that mortgage is of the nature of an injunction in support of a legal right, and is squarely within the power of the High Court to order, and is therefore within the power of the Family Court.

Another indication of flexibility in addressing the requirements of financial remedy proceedings may be seen in the CA decision of ***Amin v Amin*** [2017] EWCA Civ 1114 when Moylan J was upheld in his approach in a Part III case. In 2014 Moylan J had held W to be entitled to capital provision of £880,000 of which £100,000 was to be satisfied by a transfer of property. The principal asset within the jurisdiction was H's £770,000 pension of which W was entitled to 50%. Rather than order a 100% PSO to W (which would not quite meet her award) the judge gave H the opportunity to sell property abroad and make a lump sum payment of £350,000 and adjourned the PSO claim, the size of which would be dependent on the lump sum paid. H made no payment and W applied to enforce and restored the pension claim. Moylan J heard this in 2015. H was selling a property from which he would receive £200,000 and the judge directed this sum to be added to W's share of the pension making a 76% PSO and leaving £150,000 to be enforced as a lump sum, with W undertaking not to enforce the £200,000 outside the PSO, and further directed the sale of another property from which W was to be paid interest on the delayed lump sum. H contended the judge had no jurisdiction to make the orders and specifically could not vary the initial indication of a 50% PSO. The CA upheld the orders. While the judge had no power either to vary the original lump sum order or to make a second lump sum order, he plainly did have jurisdiction in 2015, given the way in which his 2014 order had been expressed, (a) to make a pension sharing order and (b) to make supplemental orders by way of enforcement of his previous order. While the PSO was expressed as a percentage and the CE had increased, H had no-one but himself to blame, having paid nothing.

Quan v Bray and Others [2017] EWCA Civ 405 was the CA's rejection of W's appeal against Coleridge J's decision in the Chinese Tiger Trust case. The central issue in this case was to examine the purpose of the trust which W alleged had been used by H to hold assets in which he retained an interest. The parties had accepted the issue was one of credibility and the judge found for H. W complained that his judgment was short on detail and he failed to address her *Barrell* application to effectively rewrite his judgment. King LJ had some criticisms of the judgment but having "stress tested" five evidentiary issues she concluded while the judge might have dealt with them in more detail there was nothing in them individually or cumulatively which would "cause this court to fear that in having failed to do so the wife has been the victim of an injustice."

A short form of procedure was imposed by Sir Peter Singer in ***Joy-Morancho v Joy*** [2017] EWHC 2086 (Fam) where the 'magnetic' factor of the judge's previous findings as to H's 'blatant dishonesty', and the need for active case management justified this. At paras [76-87] the judge reviews the case law and the need to further the overriding objective by actively managing cases, which, by Rule 1.4(2)(b)(i) and (c), includes promptly identifying the issues, isolating those which need full investigation and tailoring future procedure accordingly. H's application for a variation of maintenance did not necessarily require a full trial reviewing 'de novo' the s.25 factors. The court had flexibility to apply a 'light touch' review (*Morris v Morris*

[2016] EWCA Civ 812). The judge directed the matter to be dealt with on submissions and dismissed H's application

Service

In ***Wilmot v Maughan*** [2017] EWCA Civ 1668 the CA upheld Mostyn J's refusal of H's application to set aside orders made over a period of many years for service on him, outside the jurisdiction, by email. The arguments were not well articulated and Moylan LJ reviewed procedure outside the immediate bounds of the case but discusses the basis for the jurisdiction to set aside (including the need for promptitude) and upheld Mostyn J's rejection of H's application. He further held (*obiter*) that H's challenge to service by email failed (a) because Moylan LJ was not convinced such service was service "out of the jurisdiction" and (b) because compliance with FPR 6.43(3) (providing for service on a respondent outside of the jurisdiction) and 6.45 (providing for service on a respondent in a country which is party to the Hague Convention on the Service of Judicial and Extrajudicial Documents 1965) is not (contrary to H's case) mandatory but permissive.

Freezing orders

In ***Tobias v Tobias*** [2017] EWFC 46 Mostyn J was confronted by an application which had been made by H in person in the High Court without notice through the out of hours service for a freezing order which was both procedurally and substantively defective. It had been made in respect of a FMH (value £650K) which could not be sold without H's consent as it was subject to a notice of home rights under the FLA 1996 in H's favour (which he disclosed) but which was also heavily charged with debts (which he did not). Mostyn J stressed that while a search order could only be made by a judge of High Court level, a freezing order should always be made in the Family Court (pursuant to s.37 MCA 1973 or s.37 SCA 1981) not the High Court and should ordinarily be heard at District or Circuit Judge level, only being heard by a High Court judge if the assets to be frozen exceeded £15 million or, were over £7.5 million and accompanied by the factors of complexity set out in the Statement on the Efficient Conduct of Financial Remedy Hearings. Below £7.5 million, it would only be appropriate to approach a High Court judge if the application involved a novel and important point of law. It was virtually impossible to conceive of any circumstances in any money case where it would be appropriate to approach the out-of-hours judge for an injunction, except possibly where a vast sum of money was about to leave the jurisdiction for a safe haven or a contract was about to be signed. Without-notice applications would only normally be appropriate if "(a) there is an emergency or other great urgency so that it is impossible to give any notice, however short or informal, or (b) there is a real risk that, if alerted to what is proposed ... the respondent will take steps in advance of the hearing to thwart the court's order or otherwise defeat the ends of justice" (President's Guidance 18 January 2017). H's application was refused: there was no urgency, the application was procedurally defective in that it went to the wrong court at the wrong time for the wrong reasons. There was nothing to justify it being heard by a High Court judge. It was substantively defective in that the requirement of full candour was not complied with.

Short marriages

In allowing an appeal from Sir Peter Singer in ***JS v RS*** (aka *Sharp v Sharp*) [2017] EWCA Civ 408 the CA clarified that after a short (6 year) childless marriage where both parties worked but one (W) received significant bonuses (£10.5m) while H's bonuses were trivial, and only some of their finances were pooled, the court may depart from the equal-sharing principle. It was a mistake to interpret the CA's decision in *Charman* as preferring the minority view of Ld Nicholls in *Miller v Miller* [2006] UKHL 24 suggesting a contrary view. *Charman* had not concerned a short childless marriage, and any such view was thus *obiter* while even Ld Nicholls had recognised the

potential for some departure. The CA here therefore rejected the suggestion of the judge that the parties in effect subscribe to equal sharing when they marry unless they choose to opt out with a pre-nuptial agreement. The parties had bought a property prior to marriage in joint names for £1.02 million with funds provided exclusively by W. During the marriage they bought a second property in joint names for £2 million, and H took voluntary redundancy. H conceded the first property should be excluded from the division. The CA disagreed, holding it was matrimonial property. He would be entitled to half the matrimonial property (£1.3m) and £700,000 in addition to reflect the living standard during the marriage, his need for modest capital to support his living costs, and some share in W's assets. His award thus amounted to £2m or 29%. The CA stressed it did not seek to undermine the general post-*White* understanding of the equal sharing principle. However, an automatic or blind application of a 50/50 split in every case could only be an impermissible judicial gloss on the statute, which expressly requires the court to consider all the circumstances of the case.

Non-matrimonial assets

The CA in ***Hart v Hart*** [2017] EWCA Civ 1306 reviewed the question of whether, when determining a claim by the application of the sharing principle, in a case of non-matrimonial property, the court's approach should be "formulaic" or can be broader. It was a 23 year relationship; W 59, H 80; 2 adult children; assets of £9.4m, of which £1.64m was in joint names, £490,000 in H's sole name, £1.75m in W's name (of which £928K was non-matrimonial) and £5.5m was held in a trust, treated by the judge as available to H. H brought substantial wealth to the marriage but had been guilty of litigation misconduct rendering it practicably impossible accurately to assess the value of what he had introduced, and what remained 'non-matrimonial'. In a "multi-faceted" approach the judge had assessed W's claims on (i) a needs basis (producing a figure of £3.47m), (ii) a 'mingled assets' calculation based on providing W with half of the assets in the parties' joint names, half the assets in W's sole-name, W's own non-marital assets, and 25% of the trust funds (£3.53m); (iii) a more formulaic analysis predicated on removing non-matrimonial property and dividing the remainder, leading to a "guess" of £3.85m; and finally (iv) half the assets in the parties' joint names, the assets in the wife's name and 25% of the trust's assets, giving £3.94m. The judge took the view (i) and (ii) gave figures not materially different and (i) was the "most scientific and also the most principled", while (iii) and (iv) were unreliable and (iv) ignored the origin of the capital and, on an "overview", was too high. He awarded £3.47m plus arrears of maintenance, total £3.56m. In upholding the judgment Moylan LJ concluded (perhaps unsurprisingly in light of his previous judicial pronouncements) that a strict formulaic approach is not required. The use of both a mathematical and a broad approach provide a permissible route to arriving at a fair determination (as was the case in *Jones*). Property is not necessarily solely matrimonial or non-matrimonial, for some may be a mix and it can be artificial to seek thus to categorize it. A case management decision must be made as to the proportionality of the investigation. Moylan LJ rejected Mostyn J's view in *N v F* that a party must prove the existence of pre-marital assets "by clear documentary evidence". There is no reason to limit the form or scope of the evidence by which the existence of such property can be established. The normal evidential rules apply including the court's ability to draw inferences if such are warranted. Finally, the court must undertake the discretionary exercise as to how to arrive at a fair division giving a fair allowance for the parties' wealth in part comprising or reflecting the product of non-marital endeavour. Ultimately the judge need not have regarded himself as bound to attempt the formulaic approach. (For a recent case showing the difficulty of valuing a party's original interest see *WM v HM* [2017] EWFC 25 Mostyn J).

Sham transactions

In ***ND V SD and Ors*** [2017] EWHC 1507 (Fam) Roberts J determined a preliminary issue (in 268 paragraphs) relating to a trust purportedly set up for the benefit of the parties' children and upon which the vast majority of the parties' wealth had been settled, but which the wife claimed either (1) to be a sham or (2) (if genuine) should be set aside under s.37 MCA 1973. A further issue was whether company shares which constituted the trust property were beneficially owned jointly or by the husband alone. Much of the judgment is concerned with factual and evidential matters. There is, however, a useful summary of the law in relation to sham instruments at paras [176-190]. The party contending for a sham must prove a dishonest intention by the settlor (H) *in addition to* a dishonest intention, or at least recklessness, on the part of the trustees in relation to the legal rights and obligations which the parties purported to create. Where instruments or agreements are properly and formally drawn (i.e. "perfectly proper agreements on their face"), absent a dishonest intent, there is a strong presumption that the parties intend to honour their rights and obligations thereunder. Roberts J noted a key distinction between 'intention' and 'motive' and did not find that the husband had the requisite intention, despite the many other inadequacies of his evidence. However, she did find (by way of factual determinations) the company shares to be half-owned by the wife, thereby restricting the trust property to the husband's shares. Consequently, the issue of s.37 MCA fell away as only the husband's half share had been settled (and 7 years before any litigation) and as such was not a disposition intended to frustrate the wife's claims.

Needs

Alireza v Radwan [2017] EWCA Civ 1545: In a needs case where all the assets were inherited, W sought provision for housing and capital to produce income, and expressed an intention to downsize her home to release further capital in due course. W was 37, having the care of 3 children (one with significant learning difficulties). In addition to an agreed £2m she was given a right to remain in the London property until she remarried or inherited from her father. The CA held the prospective inheritance, while properly regarded as a future resource (which might justify a lesser capital award and defeat the need to release capital in future), would not fall in for 16+ years and taking account of W's past and future contribution as (wife and) mother, recognition of her need for personal financial autonomy, W's lack of resources once her capitalised maintenance ran out in 14 years, H's sufficient resources, and the strained family relationships affecting the tenure of her occupancy, the Mesher order was not justified. The remarriage trigger was inappropriate. When the Mesher order bit, W would have nothing until she inherited. H should fund the purchase of a property outright.

Describing ***R v B and Capita Trustees*** [2017] EWFC 33 as 'the worst example of how not to deal with the division of finances following marital breakdown' that he had encountered, and in which the costs amounted to 'financial suicide' for the parties, Moor J addressed the role of s.25(2)(g) conduct (found against both parties) in a 'needs' case (much of the property being inherited). The facts were unusual (H had, on principle, owned virtually no property during his lifetime nor had ever paid any tax). Moor J rejected the submission that conduct could not be relevant to a needs case (eg *Clark v Clark* [1999] 2 FLR 498), while accepting it should not reduce a party to 'real need' (cf *Radmacher v* Granatino) and adopted a balance sheet approach weighing positive contributions against conduct. In light of the effect of H's conduct, which offset his positive contributions, the judge assessed his needs 'in the light of what is available' and accepted W's proposal of a modest Duxbury fund representing £50,000 p.a. alongside other assets but leaving him with substantial liabilities

Part III

Zimina v Zimin [2017] EWCA Civ 1429 was an appeal from a Pt III award by Roberts J. H and W had engaged in proceedings in Russia in 2009 in which W received more than 50% of the assets including a flat in Moscow. No provision was made for accommodation in London but by an agreement with H's family trustees she remained in a London property during the children's minority. W sold the Moscow flat in 2014 ($4.9m) and then started the Pt III claim, in which she secured a lump sum for accommodation needs. The CA allowed H's appeal partly due to W's (tactical) delay, but also in light of the totality of the financial benefit W had obtained previously; the circumstances both in 2009 and at trial, and the lack of change in W's circumstances; the circumstances of the agreement (*Radmacher* and *Edgar* considered); the lack of relationship generated need; and that W could not establish injustice or hardship absent a Pt III order. No Pt III order was appropriate (*Agbaje*). King LJ reviews the law at [36-47] and the case provides helpful guidance in Pt III cases.

Christopher Sharp QC
St John's Chambers

christopher.sharpQCf@stjohnschambers.co.uk
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