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# A baker's dozen of financial remedy cases (June to September 2015)

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**The article covers a selection of 13 of the more important financial remedy cases decided in the period from June until September 2015. This article is a follow up article to the one Christopher published in the Summer edition of Family Affairs, reviewing the previous 15 months of financial remedy cases.**

*Arbili v Arbili* [2015] EWCA Civ 542 was a needs case where the relevant assets were barely more than £1m. The principal appeal against the exercise of the judge's discretion was dismissed on the facts but H had also, but illegally, obtained information from W's computer which led him to mount an application to set aside the judge's order for non-disclosure. Neither the judge below nor the CA were prepared to read a document setting out H's instructions of what was contained within W's e-mail account. Macur LJ applied the guidance in *Imerman v Tchenguiz and others* [2010] EWCA Civ 908 as sufficient. The unlawfully obtained materials must be returned. The recipient's duty to make any relevant disclosure arising from them within the proceedings is triggered. 'The ability of the wrongdoer, or their principal, to challenge the sufficiency of the disclosure, is confined to evidence of their memory of the contents of the materials [*which*] is admissible'. She cited the concluding paragraph (177) in *Imerman* summarising the available remedies:

> "...in ancillary relief proceedings, while the court can admit such evidence, it has power to exclude it if unlawfully obtained, including

> power to exclude documents whose existence has only been established by unlawful means. In exercising that power, the court will be guided by what is 'necessary for disposing fairly of the application for ancillary relief or for saving costs', and will take into account the importance of the evidence, 'the conduct of the parties', and any other relevant factors, including the normal case management aspects. Ultimately, this requires the court to carry out a balancing exercise..."

The procedure to be adopted is a matter for the judge seized of the application and will be fact specific. The judge had conducted the hearing appropriately, and on the facts was right not to allow H's application. In short, the manner in which the materials were obtained; the husband's persistent failure candidly to describe the means utilised to do so; the wife's subsequent and corroborated disclosure; apparent lack of, or minimal relevance to the issues in the case, as demonstrated by subsequent events; the delay; and, the costs – financial and emotional - all pointed to stopping the matter from proceeding further.

In *R v R* [2015] EWCA Civ 796 the CA rejected an argument by a Russian husband that an interim maintenance order requiring him to make payments in Russia to W's Russian account should not have been made because it sought to circumvent the EU sanctions to which he was subject. Briggs LJ categorised the order as taking a lawful route to a lawful objective and circumvented nothing.

*KG v LG (No 2)* [2015] EWFC 64 (following on from *G v G* [2015] EWHC 1512 qv). Moor J set aside the original consent order in light of H's failure to disclose his personal benefit from a trust from which he had received £9m since the divorce. The amount was material. W had acted promptly.

*WW v HW* [2015] EWHC 1844 (Fam) was "a paradigm" case exemplifying the need for more certainty in cases involving a pre-nuptial agreement (PNA). W had insisted on a PNA before the marriage in 2002 to protect her considerable wealth. Neither party would claim against the other in the event of divorce and non-marital property should remain in the parties' respective ownership. The assessment of H's claim was needs based. The judge found him evasive, unhelpful, even untruthful as a witness, and he

had overstated his own resources, especially his income, during financial disclosure prior to the PNA, to "procure the agreement and so the marriage". The judge was satisfied that the *Radmacher* conditions were satisfied so that H was to be held to the agreement unless his needs dictated otherwise, but in assessing his needs the judge noted from *Kremen v Agrest (No 11)* [2012] EWHC 45 (Fam) Mostyn J's reference to "the minimal amount to keep a spouse from destitution" and how Ld Philips in *Radmacher* had observed that the agreement could alter what is "fair". Moreover H's irresponsibility and dishonesty impacted on how his needs should be assessed. His housing fund would reduce when the youngest child reached 23 (the balance returning to W) and maintenance was modestly capitalised.

In *WA v Executors of the Estate of HA & Others* [2015] EWHC 2233 (Fam) Moor J ruled on W's appeal (pursuant to *Barder v Caluori* [1988] AC 20) against a consent order for financial provision in the light of H's suicide 22 days after the making of the order for a lump sum of £17.34m to be paid in 2 tranches of £8.67m. W sought the return of the first tranche and the setting aside of the order which she said, being needs based, had been invalidated. The case illustrates the inter-connecting of principles deriving from *Miller; McFarlane* (sharing, needs and compensation), *Charman v Charman (No 4)* (the sharing principle *"applies to all the parties' property but, to the extent that their property is non-matrimonial, there is likely to be better reason for departure from equality"*) and *Radmacher* (the effect of pre-nuptial agreements) as well as the *Barder* line of cases.

W was an extremely wealthy heiress (in excess of £250m net). All the assets in the case came to W by inheritance/gift. H retained his assets separately. The parties had entered into a PNA before the marriage in 1997 which prevented either party claiming against the other in the event of divorce, but the process leading to it had been limited and it had not figured significantly in the pre-settlement negotiations. The parties and their minor children lived on a large estate. The Husband's elderly mother occupied a property on the estate. Moor J asked himself three questions:

(a) Was the Husband's death foreseeable? (relevant under *Barder* as developed in *Cornick v Cornick* [1994] 2 FLR 530). It was not.

(b) If not, was his award a sharing award (and hence not susceptible to challenge) or a needs based award? It was principally needs based.

(c) If it was a needs based award, and the *Barder* tests being satisfied, what order would have been appropriate had a judge known that H would be dead within a month?

After a 16 year marriage, some element of sharing would be appropriate having regard to H's contributions as husband and father and the central place within the marriage of the family home. The parties had accepted responsibilities towards H's mother. An award to enable H to make bequests would not be unreasonable. An award of £5m would reflect needs and sharing.

*Nasim v Nasim* [2015] EWHC 2620 (Fam) was another *Barder* case at the opposite end of the wealth spectrum. At first instance a sale of the FMH had been inevitable and due to the children living 70% with W, and H's stronger financial position, the equity of £225K would be split 70/30 to W. Holman J granted H permission to appeal after a criminal incident involving W resulted in the children moving to H. The judge stressed settlement was essential in light of the disproportionate cost of the litigation and indicated he frequently refuses permission where the costs are disproportionate to the sums in issue.

In *Birch v Birch* [2015] EWCA Civ 833 the CA having considered the extent of its jurisdiction, as discussed in *Omielan v Omielan* [1996] 2 FLR 306, refused to vary the terms of an undertaking by W to release H from the mortgage or sell the house by September 2012 and substitute the date of the majority of the youngest child. The effect would be to "undermine the substratum of the final order" contrary to the decision of the House of Lords in *Dinch v Dinch* [1987] 2 FLR 162. While there did exist a formal jurisdiction in the court to vary this undertaking, when the variation sought is, in effect, an attempt to substitute an entirely different outcome from that provided for by the original consent order, the scope for the exercise of the jurisdiction must be extremely limited indeed (eg fraud, mistake, material non-disclosure, *Barder* events).

Post separation accrual of value was considered in *JB v MB* [2015] EWHC 1846 (Fam). H set up a business a year before the parties cohabited in 1990. At separation in 2006/7

H's 70% share was valued at £1.73m but by the hearing was between £7.4-8.5m. H offered 10%, W sought 25%. H attributed the increase in value to work done since 2012 funded by heavy shareholder investment through reduced dividends from 2011 but the judge observed that H had thus invested W's undivided share. However, it was not merely passive growth (which would be shared equally) but also represented post separation endeavour over many years assessed at 60% of the value and W would receive half of the balance (i.e. 20%) on sale and thus 25% of the total asset 'pot' to meet her needs.

The continuing saga of the Prests was manifest in *Prest v Prest* [2015] EWCA 714. H had failed to pay periodical payments (to be paid pending payment of £17.5m lump sum/property transfer) totalling £428K and W issued a judgment summons and H's committal to prison. H failed to attend citing ill health, which did not prevent him holidaying with his children in the USA. Moylan J went ahead with the hearing, found him in wilful default in respect of £360,000 and that he had the means to pay, did not give credit for some school fees and running costs on the FMH, and sentenced him to 4 weeks prison suspended if he paid by October 2014. H appealed. McFarlane LJ considered the procedure adopted and held Moylan J entitled to proceed with the hearing in H's absence. The fact of H's outstanding application to vary the maintenance should not have impeded the judge. He rejected the (late) suggestion that the judge employed findings made on the balance of probability in the financial proceedings in the judgment summons proceedings, but while stressing the burden of proof on W and the need to apply the criminal standard of proof, found Moylan J to have done so. H could not choose how to meet his liabilities and W had not acquiesced in his making payments on his own terms rather than discharging the court order. 4 weeks was not excessive but the committal would not be executed if H paid by 28.09.15.

The conflicting views of Mostyn J and Holman J in respect of privacy and reporting restrictions in financial provision cases, exemplified by *Luckwell v Limata* [2014] EWHC 502 Fam and *Fields v Fields* [2015] EWHC 1670 (Holman J) and *DL v SL* [2015] EWHC 2621 (Fam) (Mostyn J) crystallized in *Appleton v Gallagher v NGN Ltd* [2015] EWHC 2689 (Fam) when Mostyn gave NGN permission to appeal to resolve the conflict. Holman J's view is that the effect of FPR r 27.10(1), read with subparagraph (b), is that it merely provides a starting or default position, that in the absence of the

court directing otherwise, proceedings for a financial remedy after divorce will be held in private, with 'duly accredited representatives' of the press normally being permitted, but not ordinary members of the public. Rule 27.10 does not contain any presumption that financial remedy proceedings should be heard in private and the question whether a given case should or should not be is entirely in the discretion of the court. Mostyn J, however, believes *Clibbery v Allen (No 2)* , albeit pre FPR, remains good law and a sound rationale for such proceedings being held in private. The obligation to make full disclosure is subject to an implied undertaking not to use such information other than in the proceedings and this binds the press too. Rule 27.10 specifically provides that these proceedings should be in private. He points to Art 14 of the 1996 International Covenant on Civil and Political Rights and contends that the Judicial Proceedings (Regulation of Reports) Act 1926 covers financial remedies cases. If all that is wrong then the balancing exercise required under *re S* [2004] UKHL 47 between Art 8 and Art 10 would be weighted in favour of privacy in such cases save in the defined exceptions of "proof of iniquity" or to correct erroneous impressions, and the implied undertaking would remain. The CA's views will be instructive.

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