# Financial Remedies:

# Autumn 2018 update for Family Affairs

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Published October 2018

Several of the cases covered during this period are somewhat fact sensitive and to that extent somewhat *sui generis* but provide some interesting illustrations of the issues which may arise in this area of law which as Baker J (as he then was) observed in *XW v XH* (below) becomes ever more complex with "an unacceptable level of uncertainty"

***Mills v Mills*** [2018] UKSC 38 was arguably a strange case to be heard by the SC on such a limited issue and a lost opportunity to review the principles of maintenance. The parties, now aged 52, married in 1987 and divorced in 2002 with a consent order whereby, in addition to joint lives maintenance at £13,200 (not indexed), W received the great majority of the liquid capital, being £230,000 from the sale of the home which H reasonably anticipated she would apply to the purchase of a property for herself and their son. W had represented she could not work or raise a mortgage, but in the event did both and purchased a home for £345,000. Thereafter W purchased and sold several properties with increased mortgages, while apparently spending the equity, until from 2009 she was renting. In 2015, when she had debts of £42,000 and no capital, the judge heard cross applications by W for an increase in periodical payments and by H for discharge or downward variation. W's needs, excluding rent, could be met from her earnings and H's payments, with some £6,000 over towards her rent. There was a shortfall of over £4,000. The judge declined to alter the maintenance, on the basis that W had to live within her means, that her needs had been augmented by the choices she had made, that although H could afford £13,200 pa (and probably more) it was fair that his contribution to W's needs should not include a full

contribution to her housing costs. He declined to impose a term as W could not adjust without undue hardship to termination, and H could not afford to capitalise the order. The Court of Appeal allowed W's appeal, holding W should have sufficient to pay the rent. The Supreme Court limited H's appeal to the question whether, where W is awarded capital which enables her to purchase a home but later she exhausts the capital by entry into a series of unwise transactions and so develops a need to pay rent, the court is entitled (not, as Lord Wilson pointed out 'obliged') to decline to increase the order for the husband to make periodical payments to her so as to fund payment of all (or perhaps even any) of her rent, even if he could afford to do so. The answer was 'Yes'. Lord Wilson was unable to see any distinction between the rent in this case and the mortgage payments in *Pearce* (2003), *North* (2007) or *Yates (*2012) which Thorpe LJ had made clear were in the nature of capital payments, albeit incorporated within income needs, made necessary by unwise or improvident financial choices for which H was not an insurer. An obligation to duplicate provision in such circumstances was improbable.

Prior to Baker LJ's well deserved elevation he delivered a number of interesting decisions. In ***XW v XH*** [2017] EWFC 76 he reviewed a substantial body of case law (over 50 cases were cited) in respect of the impact of pre-nuptial agreements, pre-existing or unilateral assets, the latent potential value of assets and special contribution. The judgment extends to 252 paragraphs and the judge noted that Wilson LJ in *Jones v* Jones had criticised such long judgments but Baker J said:

> "But I venture to suggest that, in the period of seven years since that case was heard, the law in this area has become even more complex, demonstrated by the significant differences of opinion amongst even specialist judges described below. In other areas of family law, it is possible to reduce the guiding principles derived from case law to a set of propositions which other judges can then apply. The fact that this has not occurred in matrimonial finance law means that there is an unacceptable level of uncertainty, to the great disadvantage of parties, practitioners and judges, which continues to drive the campaign for root and branch reform in this area of the law."

This summary can therefore do no more than alert readers to the issues covered (and reference to the judgment is advised). The Italian H and Asian W married in Italy in 2008, separating in 2015 having lived in England. They had one child with special needs for whom W was the principal carer. They had elected an Italian separation of goods regime but had not entered into a bespoke nuptial agreement. The assets were assessed at £530m to include £23m in a discretionary trust of which Baker J held W was the effective beneficiary and which, while non-matrimonial, H contended was relevant to an assessment of her needs, he having asserted this was a needs case. The value attributable to H's shares increased from a pre-marital £28.6m (indexed up) to a net figure of £460m after a sale effected during the marriage. W sought 50% of the increase, without any inflation of the initial base value for latent potential, on the sharing principle. H argued that on the basis of the *separazione dei beni* regime, that the parties had maintained their finances separately during the marriage, that the shares were his unilateral property, that the shares had substantial pre-existing latent potential, and due to his 'special contribution, the value in the shares should be excluded from division. Baker J held it would be manifestly unfair to hold the wife to the *separazione dei beni* agreement, and that no weight should be attached to the agreement in determining the division of the matrimonial assets. There had been a significant change in financial circumstances since the marriage. W had not understood the meaning and implications of the agreement, which was in Italian, in particular as to whether it would apply in the event of the breakdown of the marriage and, in particular, in divorce proceedings in a jurisdiction which provided for the discretionary equitable distribution of matrimonial assets. However, he departed from equality on several grounds. The parties had kept their affairs separate. There was no authority for the proposition that the concept of "unilateral assets" should be extended to cases in which there are children of the marriage. Nevertheless, the assets which grew so substantially in value during the latter years of the marriage were the husband's business assets which were never pooled. The label, whether matrimonial or non-matrimonial, would not itself matter, the business assets were not to be excluded, but the nature and source of the property was relevant to deciding how the assets should be shared. Baker J found there had been an unquantifiable but significant latent potential in the shares and preferred the "broader" approach of Moylan LJ (*Hart v* Hart) to the "formulaic" approach of Mostyn J (eg *WM v HM*) and Holman J (*Robertson*) in

addressing how that latent potential should be taken into account. (That places two adherents to the broader approach in the CA). As the evidence did not establish a clear dividing line between matrimonial and non-matrimonial property and it was neither proportionate nor feasible to seek to determine a clear line, he adopted a broad evidential assessment before deciding how the wealth should be divided. The latent potential had to be taken into account when determining the extent to which there should be a departure from the sharing principle. Lastly, after a careful review of the authorities, he concluded that the exceptional circumstances, and H's contribution to the growth in value was such that it would very obviously be inconsistent with the objective of achieving fairness for it to be ignored. He stressed the (ongoing) contribution of W to the welfare of the family and her care of the child, but held a departure from equality was nevertheless justified. The award to W was 25% of the growth plus her own assets and a property in Asia, giving her an overall share of 28.75%. While recognising that this was outside the *Charman* bracket (66.66-33.33) the judge held that were other features unrelated to special contribution which justified a greater departure from equality. The decision is under appeal.

In the subsequent decision ***XW v XH (No:2)*** [2018] EWFC 44 Baker J made a reporting restriction order precluding the publication of any information relating to the case save for an anonymised and redacted version of the judgment. The judgment summarises the applicable principles and carries out the balancing exercise between Art 10 and 8. One important element was the interest of the child in the case.

In ***A v B*** [2018] EWFC 4 Baker J refused W's application under FPR 4.4(1) for the striking out of H's application for financial remedies in a case brought 25 years after their divorce (when the parties voluntarily agreed on a division of their modest assets) during which time she (and her second husband) had continued to support him, including buying a property for him and the children of whom he was the primary carer, and where H and his second wife then lived. The parties even holidayed together. In 2014, and after the financial crash when W's husband's circumstances were reduced, she sought a sale of the property which H resisted on the grounds that it had been acquired on the basis of his ill health. Baker J distinguished *Vince v Wyatt* where the parties had lived quite separate lives with the husband providing no financial support. Without making findings of fact he could not say H's delay was unreasonable. The

judge rejected W's case that there could not now be a fair trial not least because H's case was based on the continuing support since the marriage, rather than prior to the divorce. While the delay would be a relevant factor in deciding the substantive relief, if any, the case would primarily turn on the conflicting evidence of the parties in particular relating to the terms on which the property was acquired. The strike out was refused but the case was appropriate for an abbreviated hearing. The substantive decision followed (***A v B (No. 2)*** [2018] EWFC 45) when Baker J dismissed H's application, preferring W's evidence as to the circumstances in which the property was bought (and rejecting the case that it was for H's occupation for life). While H was not prevented by delay from bringing a claim, unlike previous cases (*Pearce*, *M v L*, and *Wyatt v Vince*) these parties had reached a comprehensive resolution of the financial arrangements arising from the marriage and divorce in 1994 (H only bringing his claim when he learned in 2015 he could), and, also unlike those cases, the respondent wife had continued to provide for the applicant and children throughout the period. Although H had financial needs they were not on a par with the applicants in those cases, nor had H suffered a disadvantage in his career despite his care of the children. Finally, unlike the husband in *Wyatt*, here W had assumed financial obligations towards H and arranged her financial affairs on the assumption that H could not and would not make any claim against her. In so far as H now had needs, they were not the consequence of the parties' relationship, nor of his responsibilities to the children, but rather of the way he has chosen to run his life.

***R v K*** [2018] EWFC 59 concerned a 25 year marriage (with three children) during which the parties' financial circumstances developed from modest to luxurious due to H's successful property development business (which was therefore to be treated as matrimonial property). However, although H had provided W in 2016 with a one page summary of his affairs suggesting net assets of around £22m, he now claimed their lifestyle and his business were based on borrowings which exceeded his assets. He was guilty of serious litigation misconduct and was in arrears on an MPS order to the tune of £483-485,000. During the separation H had continued the extravagant lifestyle the parties had previously enjoyed and W sought an add-back of £1.2m. Baker J however identified the fundamental and dominating issue as whether H, and his business associates, had fabricated or exaggerated liabilities he alleged to two entities in an

attempt to defeat the wife's claim (while W accepted H owed other debts to another business colleague), subject to which the other issues including the addback were of limited relevance. The judge rejected the contested loans as a fiction and found H had procured the assistance of off-shore acquaintances and associates to try to create evidence to defeat the wife's claim. He found there were undisclosed business activities and that H had spent money on himself in a cavalier fashion (wanton and deliberate dissipation) and failed to comply with his obligations to support the wife under the MPS order which he was well able to afford. The judge declined to remit the MPS arrears, however to include in the lump sum for W both the arrears and the add-back would be double recovery. While the statement of assets in 2016 was found to have been accurate there had been a genuine increase in H's liabilities and he had been affected by the down turn in the property market. The order made was fact dependent but the sale of certain property although ordered would not produce enough capital to meet W's liabilities let alone buy her a home and a further lump sum was directed, to be derived from the completion of property developments by H. However in assessing the share of the proceeds for W there had to be a realistic recognition of the financial circumstances, and a reflection that the realisation would be dependent on H's efforts and that he would need to have an incentive. A lump sum was ordered of £2m by 2021 with interest in default and maintenance in the meantime.

***A v A*** Case No LV15D009589 was a county court level case decided in Blackburn and reported in Family Law Week involving two 50 year olds (with three children) divorcing after a 21 year marriage during which the standard of living was described as "very high". The parties had a property portfolio worth £5.49m but after borrowing only some £75k net. H had been guilty of litigation misconduct. The case makes no new law but contains a helpful *vade mecum* of principles and case references addressing general principles (ss.25(2), 25A(1)), the assessment of need, the impact of having a child, how to approach the issue of add-backs and conduct, and non-disclosure and the drawing of inferences.

***Tattersall v Tattersall*** [2018] EWCA Civ 1978 was a case of some procedural complexity but principally involved enforcement of unpaid maintenance. Some principles emerge from Moylan LJ's judgment. First, there is no formal process stipulated or required for an application for permission to enforce arrears more than 12

months old (s.32 MCA 1973). What is procedurally required will depend on the particular circumstances, but the judge hearing the enforcement application is entitled to decide on this issue and may well hear the permission application on an informal oral application. Second, while it is preferable for a variation application to be heard before an enforcement application, there is no requirement to do so. To decide otherwise could allow a respondent to manipulate or subvert the process. Third, while the CA would normally expect a judge to use the *Duxbury* formula to capitalise an entitlement to periodical payments (see *Pearce v Pearce* and *Vaughan v Vaughan*), the use of the *Ogden* tables (usually used in personal injury claims) for that purpose is not wrong in law. It is suggested that the reference to *Pearce* and *Vaughan* is not actually directly relevant as *Ogden* was not there proposed as an alternative (albeit both cases refer to a narrow discretion to depart from a *Duxbury* calculation) but in *HC v FW (Financial Remedies: Assessment of General & Special Needs)* [2018] 2 FLR 70 the court was concerned with a wife who had significant care needs where her claim had a "quasi personal injury character". Cobb J specifically considered whether he should use the *Ogden* tables or *Duxbury* and referred to the differences in the underlying assumptions used in the *Ogden* and *Duxbury* tables. The former "contemplate virtually no growth on an investment of virtually no risk, whereas Duxbury contemplates an element of risk" (para [79]). Despite the nature of W's claim, Cobb J nevertheless, calculated the relevant part of his capital award by reference to *Duxbury.* It is not clear why the judge in *Tattersall* employed *Ogden,* but he did so in 2015 (the appeal was very stale) before the changes in the discount rate. Nevertheless, Moylan LJ's openness to the use of alternatives to *Duxbury* (which has its critics) is of interest.

***Harris v Harris*** [2018] EWHC 1836 (Fam) was an appeal to Cohen J by H in respect of a variation and capitalisation of spousal and child maintenance. H's income was £11,000 a month, taxed in the UK and W's income in Belgium was £2,000 pm. The parties, who met and married in Belgium, had been married for three years, separating shortly before the birth of a child, now 10, who was cared for by W. A final order in 2009 dealt with capital and provided for spousal maintenance at £1,250 pm and child maintenance at £850 pm, which was supposed to be indexed but this provision was never complied with. In 2015 H's application to vary was resolved by consent with spousal maintenance, expressed as "representing only childcare costs", in the sum of £500 per month until the end of June 2017, and then £250 per month until the end of

June 2018, when it would cease altogether, with a section 28(1A) bar. It also required the wife to provide the husband annually with copies of her employment contact, a breakdown of past childcare costs, and an estimate for future childcare costs. When W did not provide these documents H stopped paying and applied for W to repay "overpaid" child care costs. W responded with an application to capitalise the maintenance and when H's earnings became apparent, to increase the child maintenance. The first instance judge ordered capitalisation in the sum of £9,500 (13 x £500 + 12 x £250), with interest thereon if not paid by 7 December 2017 (a sum of £443) and that child maintenance at £250 pm x 7 months should continue from that date until the capitalised sum was paid. This would result in H paying £11,693. In addition the judge allowed the variation of the child maintenance to provide £900 pm in W's hands (a little more than the original £850 pm) by ordering H to pay £1,600 pm (backdated to 1 June 2017) as that sum would be taxed in W's hands in Belgium at over 40%. Cohen J concluded that the interest and the £250pm amounted to double recovery and allowed the appeal on that issue, dismissing the £250pm but leaving the interest (at 8%) to run from 1 January 2017. There appears to have been no consideration of Mostyn J's views in *Re TW v TM (Minors)* [2015] EWFC 3054 (Fam) at paras [16-19] where he concludes there is no jurisdiction to award interest in the Family Court on arrears of maintenance. This was an issue raised in *R v K* (above) but not decided by Baker J and remains a question to be resolved. Cohen J varied the capitalisation to £6,500 (13 x £500), but dismissed H's appeal against the child maintenance holding that the net sum met her needs and the judge was not bound to restrict the award to a subsistence level, and was entitled to take into account the significant difference in incomes between H and W, and the fact that the parties' relationship had been conducted in Belgium, in placing the tax burden entirely on H's shoulders (he was in effect paying tax twice). No order was made for costs on the appeal but H had to pay 60% of the costs below, largely due to his litigation conduct.

In ***LKH v TQA Al Z (Interim maintenance and pound for pound costs funding)*** [2018] EWHC 2436 (Fam) Holman J was confronted with H being in serious breach of his obligation to file Form E, to pay interim periodical payments (arrears of £100,000), a costs allowance for W's solicitors (arrears of £120,000) and costs of £10,000, a total of £230,000, but meanwhile paying his own solicitors £95,000 in the previous month. W owed her solicitors in excess of £200,000. W sought a "pound for pound order"

(*Mubarak v Mubarik* [2007] 1 FLR 722) at the rate of £100 for every £1 H paid to his own solicitors. Holman J refused to make other than a simple pound for pound order (with an injunction preventing H from paying any money to his lawyers unless he paid an equal sum to W's lawyers) noting that H had neither appealed nor sought to vary the existing orders which remained extent, and observing that the rationale of the pound for pound order must be that of an equal or level playing field. The *Mubarak* jurisdiction could not properly be applied to require a payer (usually the husband) to pay substantially more to the other party than to his own solicitors. Holman J also refused to make a barring order against H in default of his compliance with this order. The court should give maximum encouragement to both parties being fully engaged and heard so that the court has the maximum opportunity of arriving at the correct and fair overall outcome. There was a distinction between the *Hadkinson* jurisdiction to prevent a party who is in contumacious breach of orders from making some further application himself and the very different and extreme step of debarring somebody from being heard and defending an application against him which would deny a court the opportunity of being as fully informed as it would wish to be on the issues in question.

This decision can be contrasted with *de Gafforj v de Gafforj* [2018] EWCA Civ 2070 in which the CA did grant a *Hadkinson* order. The parties had been married in France but W moved to England, where the children were being educated, and petitioned for divorce. H petitioned in France and sought an order staying W's proceedings on grounds of jurisdiction (residence). The DJ found against H who was given permission to appeal on the interpretation of Article 3 of the Council Regulation 2201/2003 and DJ's to refusal to make a CJEU reference. Baker J transferred the matter to the CA, the substantive appeal to be heard at the end of October 2018. In November 2017 H was ordered to pay maintenance pending suit and costs of £8695. He paid the maintenance up to April 2018 but did not pay the costs. W then applied for, and in June 2018 obtained, an increase in maintenance and a legal services payments order (s.22Z) for £80,099 to cover her debt to her former solicitors, and an ongoing order of £12,000 pm to finance her ongoing litigation through her current solicitors. H paid nothing under this order and had disengaged from the proceedings in around May and had not appeared since. His solicitors had come off the record. W sought an order preventing him from pursuing his appeal unless he complied with the orders and paid her costs of this application (a total of £165,561). The history and modern development

of the *Hadkinson* order is set out in *C v C (Appeal: Hadkinson Order)* [2011] 1 FLR (Eleanor King J at [27]-[41]). Citing *Assoun v Assoun [No 1]* [2017] EWCA Civ 21 at [3] Peter Jackson LJ stressed that such an order is draconian in its effect because it goes directly to a litigant's right of access to a court. Noting that the order can be made at any stage of proceedings, both at first instance and on appeal, and its exceptional nature, he summarised its conditions:

1. The respondent is in contempt.
2. The contempt is deliberate and continuing.
3. As a result, there is an impediment to the course of justice.
4. There is no other realistic and effective remedy.
5. The order is proportionate to the problem and goes no further than necessary to remedy it.

As to (1) and (2), non-payment in breach of a maintenance order is in itself a contempt of court, regardless of ability to pay, although questions of ability to pay come into play when the court decides whether and how to act on the contempt *Mubarak v Mubarik* [2006] EWHC 1260 (Fam) (Bodey J at [65, 66]). As to (3) without limiting the condition, it included 'making it more difficult for the court to ascertain the truth or to enforce the orders it makes' *Laing v Laing* [2005] EWHC (Fam) at [18]. As to (4) a *Hadkinson* order will not be made if the court has other powers that can be effectively deployed, and as to (5) a *Hadkinson* order is a flexible one with a range of possible sanctions (of which the court gave examples). What is important is that the sanction is no stronger than it need be to remove the impediment to justice. In the instant case the failure to pay the maintenance did not itself impede justice but the default on the legal services payment order plainly did and the other conditions were satisfied. H was therefore ordered to pay £140,000 by 8.10.18 or the appeal would be dismissed.

For those following the drawn out saga of the ***Hart v Hart*** litigation there have been two judgments [2018] EWHC 2894 (Fam) and [2018] EWHC 2966 (Fam), the former recording the grounds upon which Judge Wildblood QC found H's sister (Mrs Byrne) and her company to be in contempt following their refusal to comply with orders made (and consented to) in 2016. The second judgment dealt with sentencing. As the company was in effect Mrs Byrne, no separate penalty was imposed upon it but her

contempt was found to have been deliberate, damaging, sustained and motivated which were serious aggravating factors, and as was the case with Mr Hart, in the language of section 143 of The Criminal Justice Act 2003, her contempt had caused deliberate financial and emotional harm to Mrs Hart. The learned judge referred to the sentencing principles he had set out in greater detail in sentencing H. He referred to *Hale v Tanner* [2000] 1 WLR 2377 and explained that the process should be first to decide on the term, and then decide whether the circumstances justified suspension. Despite mitigating factors advanced on her behalf (including her age, previous good character, numerous testimonials, and misguided loyalty to her brother), nothing short of an immediate sentence of 3 months would meet the gravity of the contempt. There had to be a very clear message that, where people are given every opportunity to comply with court orders as here but still chose to ignore them, firm punishment will follow. He did not include any coercive element in the penalty as it had not been effective with H and the judge did not regard it as likely to be so here, referring to *JSC BTA Bank v Solodchenko (No 2)* [2012] 1 WLR 350.

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October 2018