St John's CHAMBERS

Financial Remedies: Spring 2019 update for Family Affairs

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Published March 2019

In the last edition of Family Affairs reference was made to Baker J's comment in *XW v XH* that the law relating to financial remedies is becoming ever more complex with "an unacceptable level of uncertainty". In *IX v IY* (below) Williams J, faced with a wide range of issues, observed that "…the task of District Judges (including Deputies) and Recorders and Circuit Judges up and down the country in seeking to apply the law which now derives from a myriad of cases is not an enviable one. No doubt the advent of the financial remedy court will ease the situation to some degree but for the busy Family Court Judge having to determine whether the case might be a 'Charman (no.4)' case where awarding less than one third of the assets would be entering dangerous territory, or how the 'springboard' value of a pre-existing business is to be quantified or what indexation should be applied to passive growth of a non-marital asset, or whether the case was properly characterised as a short marriage, dual career case seems to me to be a big ask. Happily, recent decisions of the Court of Appeal in the field appear to support a less technical, more flexible and more common-sense approach to such issues." The extent to which practitioners can confidently advise on outcome must nevertheless become daily reduced.

As ever, the reported cases are skewed by a preponderance of cases dealing with assets whose values are wholly outwith the quotidian experience of most practitioners. Several cases involve the expenditure of literally millions of pounds in costs alone (total costs in *IX v IY* were some £1.33m). We are a long way from cases like *Stockford v Stockford* [1982] 3 FLR 58 when two leading silks debated the practicalities of 'net effect' and the

[1] Thanks to Bethany Hardwick of St John's Chambers for assistance in the preparation of this article.

impact of state benefits before the Court of Appeal. We can however start with two cases concerning more modest sums.

***Lemmens v Barbara Brouwers* [2018] EWCA Civ 2963** provides a reminder (see also *Q v Q* [2002] 2 FLR 668) that in many, if not most, financial remedy proceedings, there will be good reasons for the costs to be assessed summarily at the conclusion of the final hearing if the court is stepping outside the no costs guidance of r.28(3). H had successfully applied for variation of maintenance. W had incurred costs of £127,000, found by the judge to be disproportionate. She sought her costs. The judge awarded her £30,000 as reflecting the additional costs she had incurred as a result of H's "deliberately misleading" Form E and his failure until the final hearing to provide a fully intelligible explanation of his situation. H's appeal was dismissed. There was no procedural irregularity and nor any good reason not to assess the costs summarily, nor any sound basis for challenging the judge's exercise of his discretion where he had clearly addressed the provisions of r.28(3).

***BC v BG* [2019] EWFC 7** addressed the question as to what effect should be given to an arbitration award made when parties agree to arbitrate disputes arising in proceedings for financial remedies following a divorce. W's application that an arbitral award under the ILFA financial scheme not be made an order of the court (pursuant to *DB v DLJ* [2016] EWHC 324 (Fam)) and to be remitted back to the arbitrator was refused. Arbitration was chosen as financial resources were modest, requiring fair and efficient resolution without undue delay. The parties signed an agreement which acknowledged the award would be final and binding, subject to exceptions including the provisions of the Arbitration Act 1996 and any changes made by the Family Court on making the award an order. The (deputy) judge noted that disputes about distributing finances after a divorce are arbitrable and subject to the 1996 Act, and the courts support arbitration (eg *S v S (Arbitral Award: Approval) (Practice Note)*). While the parties cannot exclude the jurisdiction of the court, in the absence of some very compelling countervailing factor(s), the arbitral award should be determinative of the order the court makes. An arbitral award does not need to be made an order of the court to be binding between the parties but such an order will be necessary to bind third parties (eg pension providers) and will usually be appropriate. *DB v DLJ* sets out the very limited grounds for refusing to make the award an order, albeit these grounds

are not available under the 1996 Act, including, exceptionally, supervening events or mistake where this gives rise to a new and materially different dispute. However, the 1996 Act applies to strictly limit the extent of any challenge to the award, as to hold otherwise would run directly counter to the 1996 Act and the parties' intentions in agreeing to arbitrate. The terms of the ILFA Financial Scheme are not sufficiently clear as to enable the parties to contract out of the 1996 Act including the safeguards laid down under that Act. In any event, the parties cannot contract out of mandatory provisions such as s.68. The judge provided procedural guidance on how to challenge arbitral awards. W's case failed on the merits and, the case falling outside the general rule as to costs (r.28(3)) and being analogous to an application to set aside an order, costs would follow the event.

In ***LM v KD* [2018] EWHC 3057 (Fam)** Baker LJ sitting in the Family Division dismissed H's appeals against two decisions of separate courts refusing stays of Sched 1 Children Act and ToLATA proceedings brought by W while separate proceedings in respect of matrimonial status and spousal maintenance were proceeding in Italy. The child was habitually resident in London where the property, the subject of the ToLATA proceedings, was also situated. There was a multiplicity of proceedings extant. Baker LJ followed *A v B (Case C-184/14)* [2015] 2 FLR 637 holding that jurisdiction in respect of child maintenance lay with the English court. Where there are proceedings in one jurisdiction in respect of the status of the parents, and proceedings in another jurisdiction in respect of parental responsibility, an application relating to the maintenance of the child should be regarded as only ancillary to the latter proceedings. In respect of the ToLATA element the judge rejected the suggestion that the rights in the London property arose out of a matrimonial relationship so as to take the case outside the Brussels I Recast Regulation. While the fact of the marriage was important the rights in the property arose out of the express declaration of trust set out in the TR1 form, not from the matrimonial relationship. Further where the principal subject matter of a claim is to achieve a sale of the property, it involves, "the external relations of the trust, rather than (or at the very least, as well as) the internal relations of the trust" and rights *in rem* (*Komu v Komu* (Case C-605/14) [2016] 4 WLR 26; *Magiera* [2016] EWCA Civ 1292)**.** Moreover the English judge's exercise of discretion was unexceptionable while the Italian courts had accepted that the English courts had jurisdiction.

After a 20 year relationship during which the (Swedish) parties were married for 14 years and entered into 3 prenuptial agreements (PNAs) in the lead up to the 2000 wedding, the CA concluded in ***Brack v Brack* [2018] EWCA Civ 2862** that the English court was not excluded from ruling on financial remedies arising from the divorce and that upon a correct construction of the purported maintenance prorogation clause (MPC) in the PNA (prorogating any assessment of W's maintenance/needs to the Swedish Courts), it was incomplete and unclear and thus failed to comply with the requirements of Article 4 of Council Regulation (EC) No 4/2009 (the Maintenance Regulation) and its predecessors (including Brussels 1 Recast). There being no valid MPC, the judge's jurisdiction was not constrained so as to prevent him from considering and making orders in respect of W's needs. The judge had found the MPC was valid and there was a PNA in respect of which there were no vitiating features which (on the face of it) would serve to undermine its effectiveness. However, giving effect to the agreement in full would, "work unacceptable unfairness" and put the wife and, in particular, the children in a "predicament of real need". He had held he retained jurisdiction in respect of the "rights in property arising out of a matrimonial relationship". But while he held that those rights included any "sharing" claim made by W, they excluded 'needs' (which he had held, as part of 'maintenance', was prorogated to Sweden, consequent upon his finding as to the validity of the MPC) and in light of the valid PNA he held he would otherwise be limited to making a needs based order. He concluded he was thus limited to exercising powers in respect of the FMH under the MWPA 1882, and making an order under Sched 1 of the Children Act 1989. The CA allowed the appeal, remitting the case to the judge, and holding that while, in the ordinary course of events (eg *Z v Z*; *Luckwell v Limata*), where there is a valid PNA, the terms of which amount to W having contracted out of a division of the assets based on sharing, a court is likely to regard fairness as demanding that she receives a settlement that is limited to that which provides for her needs, that does not prescribe the outcome in every case. Even where there is an effective PNA, the court remains under an obligation to take into account all the factors in s25(2) MCA 1973, together with a proper consideration of all the circumstances, the first consideration being the welfare of any children. Such an approach may, albeit unusually, lead the court in its search for a fair outcome, to make an order which, contrary to the terms of an agreement, provides a settlement for W in excess of her needs. Even where a court considers a

needs-based approach to be fair, the court will, as in *KA v MA (Prenuptial Agreement: Needs)* [2018] EWHC 499, retain a degree of latitude when it comes to deciding on the level of generosity or frugality which should appropriately be brought to the assessment of those needs.

***Daga v Bangur* [2018] EWFC 91**: After a 9 year marriage with one child H, who had good employment earning £130K (more as the judge observed than the Master of the Rolls, and with a net income after rent and child maintenance equivalent to a circuit judge), while W earned some £40K, sought £1.5m from W whose father, towards the end of the marriage, had provided £17.6m to W from which, at his direction and as his nominee, she had established trusts. Whatever their origin these funds were not the money or funds of either H or W and never formed any part of the matrimonial assets or acquest. Indeed the costs (£1m) had entirely swallowed the parties' savings and there were no liquid matrimonial assets nor any "acquest" at all, but only large debts. H ran his case on need, in particular to buy a home, but the parties had never owned a property, preferring to rent (although part of the trust monies had at one time been intended for a family home). No distribution had ever been made from the trusts and the evidence of the father (who had always opposed the marriage and did not trust H) was that none would be in his lifetime. The judge concluded H was no longer a potential beneficiary under the trusts. W held some £2.6m in her own name largely in India but which she said was unrealisable, and advanced or controlled by or owed to her father. The judge carefully considered the s.25(2) factors, noting the relevant standard of living was that enjoyed prior to the separation, not that which might have been enjoyed had the marriage subsisted. H's case failed because the trust funds were not an available resource in reliance upon which any award could be made (there was no 'likelihood' of the trustees responding to any 'judicious encouragement') and further H had not demonstrated a need for any substantial capital payment. Holman J observed that "… this tragic and destructive case should stand as a cautionary tale to those who would embark on expensive litigation which they can ill afford in the hope of prising money from a discretionary trust." The judge declined to award a lump sum for H to pay debts incurred due to the litigation as this would amount to a costs order. He dismissed all claims including W's claim for nominal maintenance, imposing a full clean break save for child maintenance in the sum already paid by H.

The test of whether funds are "likely" to be forthcoming from a trust was discussed in *Whaley v Whaley* [2011] EWCA Civ 617 and featured again in the latest judgment in the ***Quan v Bray & Ors*** litigation viz **[2018] EWHC 3558 (Fam)**. The CA had previously confirmed that the Chinese Tigers South African Trust was solely for the Chinese Tigers Project and H and W were not beneficiaries. However this did not prevent the trust employing and remunerating H. Mostyn J did not accept the scale of such 'reward' would necessarily be modest and was very critical of H's gross litigation misconduct, his contemptuous and arrogant attitude, his disrespect for the court and his deficient disclosure. W had abandoned capital claims against the trusts and sought to adjourn her capital claims against H but claimed periodical payments. Finding that he could infer CTSAT was successfully active economically, with H as rainmaker, and that he had arranged for his commercial reward to be deferred until these proceedings were safely concluded, the judge found H could and should pay W £64K pa, having accepted W's budget. On the issue of a term, Mostyn J held that notwithstanding the general rule that a limited term should be imposed unless the court is satisfied that the claimant would not be able to adjust to a cut-off without undue hardship, and generally speaking, where a term maintenance order is to be made there would have to be shown good reasons why it should not be non-extendable, in this unusual case he was not satisfied that, were a term maintenance order to be imposed, even if extendable, W would be able to adjust without undue hardship to the prospective cut-off, because she had no capital base at all, had vast debts, and no safety-net to mitigate the prospective hardship. Therefore, exceptionally, he made a joint lives award and similarly, although capital claims should not usually be left indeterminately unresolved, in these exceptional circumstances it was foreseeable that at some stage in the future H would have accumulated sufficient sums to make a proper clean-break capital settlement. In this respect Mostyn J followed the example of Sir Peter Singer in the similar case of *Joy v Joy-Morancho and Others (No 3)*. Mostyn J made clear that an inchoate claim by H that W had agreed to accept property held by her brother in China and paid for by H in lieu of her claims against him would fail and any claim subsequently brought by H against the brother or his wife (the 8th and 9th respondents) should fail under the rule in *Henderson* since such should have been pursued in these proceedings.

Holman J's reluctance in *Daga v Bangur* to make a capital order which would have the character of a costs order finds a reflection in Roberts J's comment in ***NN v AS & Ors* [2018] EWHC 2973 (Fam)** citing the CA's observation in *Zimin v Zimina*, that the court cannot and should not exercise its discretion under Part III simply because the costs of an unmeritorious Part III application have depleted the applicant's resources and given rise to a potential situation of need. *NN v AS* was a Part III claim by W who alleged H was worth over £100m but Roberts J found his assets to be worth £340,000 in this jurisdiction but neither of the parties had provided a clear account of the property assets which they may hold in Egypt. The judge summarises the applicable law in Part III cases derived from *Agbaje* and *Zimin* at paras 263-271 and considers the *Radmacher* test in relation to a nuptial agreement. The case largely turns on its own facts. W's claim failed save that the judge concluded the child's future security (and that of the wife as his primary carer) required her to make a Part III in terms of H's proposals in respect of their accommodation

***AR v JR* [2018] EWHC 3626 (Fam)** was an application under FPR 4.4(1)(b) that W's application for financial remedies in H's 5 year separation divorce suit be struck out on the basis that it was (a), vexatious, and/or duplicative and/or (b), on the basis there had been prior compromise, there having been an order in W's judicial separation proceedings brought in 2010. The parties were in their 70s, had 2 middle-aged children, and H held great wealth. In 2011 within the JS proceedings W received an agreed lump sum (c.$16m) expressed to be "in these proceedings", the order recording H had not given full financial disclosure. No mention of divorce was made in 2010/2011. Cohen J held that the parties negotiated an agreement that was meant to cover judicial separation and nothing more. It was a long marriage wherein great wealth was created which would inevitably lead to an award after divorce that was not needs-based, and an entitlement-based award was impossible in a total absence of information. Moreover the parties' financial affairs remained intertwined. W contended the $16m did not begin to represent a fair division of the assets which exceeded £500m. W issued Form A in 2015 but it was not until 2018 that H (apparently at the instigation of Mostyn J) contended W had no surviving claim. On the issue of the application of the rule in *Henderson v Henderson* [1843] 3 Hare 100, namely that a party is precluded from raising in subsequent proceedings matters which were not but

could and should have been raised in the earlier ones, Cohen J concluded H's argument that W should have brought any claim within the JS proceedings was unsustainable. There was no obligation to do so. Divorce and judicial separation are not the same cause of action. Divorce terminates a marriage; judicial separation does not. On the facts W did not have the material upon which she could assess the value of her sharing claim in 2011. Both parties knew W's entitlement claim had not been dealt with. W did not mislead H and H was not misled. H's application failed.

***Luxembourg v Luxembourg* [2018] EWFC 77** H, who was the third son of the Grand Duke, was married for 10 years to W, a former NCO in the Luxembourg army who had re-qualified and earned more than H's income from his family. The parties had exhausted their liquid funds (£½m) on costs (attracting adverse judicial comment at para 35) which significantly constrained the options open to the court. They had 2 children and lived in the US and then in London. A property was bought in Florida and then sold when the FMH was bought in London. H contended the beneficial ownership of the latter was 100% that of the ADB, a body established in the C18th to administer the funds of the Grand Duke, which the judge concluded had a separate legal entity and which had entirely funded the purchase, notwithstanding the TR1 which recorded H and his father as joint tenants. The judge, after reviewing the case law, held they never had a beneficial interest of which they could declare such a trust (s.53(1)(b) LPA 1925) so the beneficial interest remained with the ADB under a resulting trust. While the arrangements for W's occupation of the London house amounted to a post-nuptial settlement they extended to no more than a licence terminable on 6 months notice, which was the limit of the court's ability to vary the settlement in W's favour. H's prospective inheritance was too uncertain to represent a financial resource. Macdonald J rejected a *Thomas v Thomas* argument advanced by W (in person with a MacKenzie friend) on the basis that the royal family's evidence was very clear that no further funds would be advanced to H. Despite the presumption against it, and H's current inability to pay maintenance, the judge found this an appropriate case to make a nominal spousal maintenance order (against the inherent uncertainty of W's circumstances) but a substantive child maintenance order.

Three decisions address the issues of the identification of the value of marital and non-marital assets, and the impact on needs -v- sharing. In **IX v IY 2018 EWHC 3053 (Fam)**

after a 4 year marriage and 10 year relationship the agreed asset schedule lay between £38,946,372 (per W) or £38,274,048 (per H) of which the greater part was represented by the sale proceeds of H's business which he had brought to the relationship but developed substantially during it. The principal elements of W's claim were a lump sum of £16m plus £740K for litigation loans, to meet her 'needs' of housing (£6-7m) and capitalised maintenance (£8.5m to cover £500K to age 60 and £250K pa thereafter). This would also amount to a fair 'share' of 40%. H limited his offer to needs at housing of £3.5m falling subsequently to £2.3m which would release equity so that capitalised maintenance would be £1.6m (£200K pa x 5 yrs, £125K pa x 5 yrs and then 100K pa).The range of issues was very wide (para 6 of the judgment) which this note cannot hope to summarise. Para 17-44 provides a summary of the case law on sharing and the exceptions arising from non-matrimonial property, and the judge observes that the *Charman* range of 33.3 - 66.6% applies only to matrimonial property. Para 47-59 covers latent value in businesses, para 60-61 deals with contributions, para 62-63 deals with the maintenance of the marital standard of living during later life, and para 69-70 covers adverse inferences. At para 64-68 the judge addresses the issue of the impact of pre-marital cohabitation. The court will need to identify a time at which the relationship had acquired sufficient mutuality of commitment to equate to marriage and look to an accumulation of markers of marriage which eventually will take the relationship over the threshold into a quasi-marital relationship which may then either be added to the marriage to establish a longer marriage or which becomes a weightier factor as one of the circumstances of the case. Contrary to H's case that gave this marriage the equivalent length of 10 years. Part of Z Co's establishment and the development of its potential fell before that period. It was therefore a mixed asset of non-marital value and marital value and thus a mingled non-marital/marital asset. Williams J concluded valuation evidence, due to its "fragility", would have been of little assistance. Neither a straight line attribution, nor the application of any indexation to value (the choice of index being problematic) provided a clear indication of the non-marital element of the company's value, but using a strictly 'non-formulaic' approach and cross checking various methodologies he concluded 40% was non-marital. When pursuing the search for fairness he observed that it was "not fairness as viewed by the modern-day equivalent of 'the man on the Clapham omnibus' but fairness judged by the standards of this particular couple in their particular circumstances having regard to the principles

contained in the MCA 1973 as explained by the House of Lords". In the event the judge considered W's needs to amount to £8.94m while 40% would be a fair share, based on contributions, of what he assessed as the matrimonial property amounting to £9.31m In accordance with authority he awarded the greater of the sharing and needs figures, after cross checking the resulting figure against the assets as a whole and noting his proposed award amounted to 24.32% of the net assets of £38,274,048,.

***C v C* [2018] EWHC 3186 (Fam)** concerned H's contention that £6.5m of £26.3m of assets represented non-matrimonial property being earned post the separation in 2016. H was a senior investment banker earning £3 - 4m pa net in salary, additional allowance and bonus payments awarded as deferred equity participation or Restrictive Stock Units (RSUs). W had left investment banking (earning $1.3m in 2006) to care for the two children (9 and 6). W sought 50% of the income earned in the year of separation and the year following, claiming a series of lump sums representing 50% of H's future receipts from the RSUs awarded for the performance years 2014 to 2017 and equalisation of other assets. H initially sought to ring fence £6.5m as non-matrimonial (which he had calculated by a series of detailed accounting exercises and evidenced in discrete bank accounts set up after the separation) and then subsequently proposed a 60:40 division of all assets. W would be left with £10.2m. The parties were £3.37 million apart. H contended that the RSUs were dependent on future performance which was post separation and therefore should be excluded. The judge ultimately accepted this, but not all his contended unmatched contribution. While W's ongoing contributions to the general welfare of the family were not irrelevant as part and parcel of the over-arching circumstances of the case in terms of an assessment of needs or fairness of outcome, Roberts J rejected W's contention that they matched those of H and/or gave rise to any *entitlement* to an equal share in H's post-separation earnings. Applying *Waggott* the judge rejected any suggestion that an earning capacity is capable of being a matrimonial asset as a result of which the applicant spouse has an entitlement to share in its product, and this clearly applies to an earning capacity in terms of its present and future potential to generate income, the product of which may well be savings, investments or any tangible accretion to future capital wealth, which is property generated after the marriage. Any other approach would strike at the roots of the clean break. Nevertheless such future resources may be relevant to a fair outcome and be relevant for s.25 purposes. Roberts J then applied the process of determining

where and how the line was to be drawn in the identification of matrimonial and non-matrimonial property as set out in *Hart v Hart* (which she found applied equally to post separation accrual as to pre-marital property), and then moving to the mandatory holistic assessment of fairness by deploying all and any relevant factors identified in s 25 of the 1973 Act so as to reach a fair outcome as between the parties, regardless of whether or not the component elements of the global wealth available to a couple has been identified as matrimonial or non-matrimonial property, although this may lead to a departure from equality. Thus the judgment breaks no new ground but provides a helpful example of the required judicial approach. In the event the judge largely accepted H's case whereby W received nearly 40% of the total assets (c.£10.2m) or over 52% of the matrimonial acquest. W's housing needs were met by retention of the family home, mortgage free; and the balance of c.£5.2m would provide her with an appropriate income fund on a full-life basis in excess of her stated income needs and ignoring her own future earnings. This was an entitlement W had earned as a result of the contributions she had made, and would make, to the welfare of the family over the years of the marriage and beyond, and the consequent impact on her career. Child maintenance was agreed at £25K pa per child. H was ordered to pay school fees. Unsurprisingly the costs incurred by H alone were over £1m. The judge had included costs in her assessment of the assets and no further order was made.

The issues of principle raised in ***Martin v Martin*** **[2018] EWCA Civ 2866** were summarised as: '(a) What approach should the court take to the valuation of shares in a private company when determining how to divide the marital wealth; and (b) What approach should the court take when determining what part of the parties' current wealth is properly to be defined as non-marital in circumstances where that wealth includes shares in a private company which was founded by a spouse prior to the date when the parties married or started living together.' Moylan LJ concluded that Mostyn J had been entitled both as a matter of principle and on the evidence to adopt a straight line apportionment in assessing the value of the company brought by H to the marriage, and to exclude 20% of its value as non-matrimonial, despite the methodology of the SJE suggesting a much lower proportion. Moylan LJ, noting his own frequent refrain that the court is engaged on a broad analysis of fairness, observed that there is no single route to determining what assets are marital but the method elected should give "to the contribution made by one party's non-matrimonial property

the weight [the judge] considers just … with such generality or particularity as he considers appropriate in the circumstances of the case". This provides the same perspective as Wilson LJ's observation in *Jones v Jones* about "fair overall allowance". This was why Holman J was entitled in *Robertson v Robertson* to reject the "accountancy" approach, not only because it seemed unfair to the husband, but because he did not consider that this fairly reflected the relevant considerations in the "overall exercise of (his) discretion". Further, here, the valuation of the company had changed significantly between two reports less than a year apart. This only showed how fragile the valuations of private companies can be and the need to treat them with caution (*Versteegh v Versteegh*; *H v H*). While H's challenge to the value adopted by the judge failed, Mostyn J had however been wrong to treat the value attributed to the company as equivalent to cash and to reject the convention (eg *Chai v Peng*) of discounting for risk and liquidity. The court has to assess the weight which can be placed on the value even when using a fixed value for the purposes of determining what award to make. This applies both to the amount and to the structure of the award, issues which are interconnected, so that the overall allocation of the parties' assets by application of the sharing principle also effects a fair balance of risk and illiquidity between the parties. There is a "difference in quality" between a value attributed to a private company and other assets. This is a relevant factor when the court is determining how to distribute the assets between the parties to achieve a fair outcome. Mostyn J had also failed to allow investigations into liquidity and the CA substituted four annual payments of £5m for a £20m lump sum.

In ***A v A* [2018] EWHC 2194 (Fam)** Cohen J dealt with the consequences of the appeal he allowed in February 2018 (*A v A* [2018] EWHC 340 (Fam)) releasing W from undertakings she had given in a 2011 consent order which included a clean break, which had been implemented in a number of respects and whose terms had been honoured by H making payments for W in the expectation of being repaid those sums by W as provided in the order. While W was released from her undertakings this could only be on the basis of replacement undertakings and the current judgment addresses the replacement undertakings. Cohen J observed that "it goes without saying" that the same *Radmacher v Granatino* principles as to when it will be fair to hold parties to an agreement applied to a consent order made at the end of the marriage as to an ante-nuptial agreement. What had happened since 2011 was beyond the parties'

anticipation. What W received from the sale of properties would determine her financial future, and was significantly reduced from what she expected in 2011, whereas H had become very successful and would not feel it if he was not repaid. While the length of the marriage and the standard of living in particular were two relevant factors this was not a first instance financial remedies application but a consideration of the extent to which it was fair to release the wife from undertakings into which she entered. However, the judge rejected the "real need" test, derived from *Granatino* and relied on by H, as alone justifying any relief for W. Nevertheless needs as a concept is elastic enough to be judged against particular circumstances, including here the fact of the agreement. Similarly the fact of the agreement influenced the decision as to whether and the extent to which W should be required to amortise her capital to provide her income, as contended for by H. On the facts she should be required to amortise only part of her capital other than her home. On this basis the sums she was required to undertake to repay to H were reduced, albeit less than under the order under appeal.

In another case arising out of changed circumstances ***US v SR (No 4)*** **[2018] EWHC 3207 (Fam)** Roberts J was confronted with yet more litigation in this long running saga were the assets of £6m available on separation in 2010 and £5m in 2015 have been significantly reduced. In circumstances where it was acknowledged that significant elements of a final FR order (in 2015) had not been implemented, what jurisdiction did the court have to disturb the terms of the substantive order and/or to provide for a different outcome? The hearing was the effective rehearing envisaged by rule 9.9A(5) in terms of the (unrepresented) parties' request for the court to rehear the financial remedy proceedings or "otherwise make such other orders as may be appropriate to dispose of the application". While Roberts J agreed with Mostyn J in *SR v HR and SC (his trustee in bankruptcy)* [2018] EWHC 606 (Fam) that "mere delay in implementing a routine property adjustment order" could never amount to a ground for a set aside under rule 9.9A, here circumstances had changed radically since 2015 and a property in Moscow which was central to the original order had not sold and would not produce the expected value due to the collapse of the Russian property market. This necessitated a revisiting of the 2015 order. Basing herself on the *Thwaites* jurisdiction employed by the CA in *Bezelianasky v Bezelianskaya* and the jurisdiction conferred by FPR 2010, (and noting this had not been a consent order but made following a contested hearing). she

concluded she had jurisdiction to revisit the 2015 order albeit, following *SR v HR*, any such revision had to be contained and, so far as possible, should reflect the underlying intention of the original extraction route embodied in the 2015 order. The ultimate decision on the facts was then cross checked against the proportions awarded in the original order.

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March 2019