Financial remedies: Summer 2019 update for Family Affairs

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This season's cases provide an interesting range of cases out of the conventional norm.

Although it was not a family case, the CA's decision in ***Schettini v Silvestri*** [2019] EWCA Civ 349 provides some further guidance, following *Birch v Birch* [2017] UKSC 53 and *Hart v Hart* [2018] EWCA Civ 1053, on the extent to which the Court will entertain an application for relief for a litigant who has given an undertaking. In brief, absent extraordinary circumstances, a claimant who gives an undertaking (even where it is given reluctantly in order to obtain the order sought) ought not to be entitled to pursue an appeal against that undertaking. Such a litigant is entitled to apply to be released from the undertaking (either unconditionally or on condition of offering a new undertaking) but as a general rule, such an application will not result in release unless there has been a change in circumstances since the undertaking was given.

Thum v Thum **[2019] EWFC 25** concerned a husband who sought to overturn a disclosure order he had not opposed when it was made**.** H had delayed W's FR claim by unsuccessfully challenging the jurisdiction over a period of 3 years, but during this time W claimed to have found a flash drive, conveniently complete with password, in a safe deposit box in Zurich to which both parties had access. Although claiming that this fell within the 'lying around the kitchen' category, to avoid further delay when H challenged her description of the circumstances in which she came by the flash drive she agreed to its treatment as an *Immerman*

document. H did not oppose a direction by Mostyn J that a number of documents from the flash drive (which W appeared to recall with a seemingly eidetic memory) should be disclosed, but then advanced a series of objections to producing them including a claim that H would be put in breach of civil and criminal provisions of German law, and of his duties of confidentiality to his employer, an argument demolished by W's German law experts whose evidence Mostyn J accepted. H sought to reverse the disclosure order under FPR 21.3(5) but that relates to third party disclosure and Mostyn J treated the application as made under FPR 4.1(6) – the power of the court to make an order varying or revoking an order (and/or s.31F(6) MFPA 1984). He rejected H's application. "In order to succeed on such an application the applicant must have acted promptly and must show either that there had been a material change of circumstances since the order was made; or that facts on which the original decision was made had been misstated; or that there had been a manifest mistake on the part of the judge in formulating the order (see *Tibbles v SIG Plc* [2012] EWCA Civ 518 at [39] and *Mitchell v News Group Newspapers Ltd* [2013] EWCA Civ 1537 at [44]). In addition, save in a case where fraud is alleged, the applicant must show that the evidence in support could not have been made available with due diligence at the original hearing (see *GM v KZ (No 2)* [2018] EWFC 6, [2018] 2 FLR 469, and *Takhar v Gracefield Developments Ltd & Ors* [2019] UKSC 13)." H failed on all limbs.

Issues of disclosure also arose in ***Purvis v Purvis*** **[2019] EWFC 31** in which Mostyn J refused an application under FPR 24.12 for an order that a letter of request be issued to the judicial authorities of the USA for the respondent wife to be examined in Florida and that she produce the documents specified an annexe to that application (relating to a property sold years before and a business that had been wound up), on the grounds that the application was both stale and a fishing exercise. However while the invocation of the procedure against a party to the proceedings, as opposed to a third party, was outwith the judge's (self-confessedly wide) experience, there was nothing on a literal reading of the rule to prevent the process from being so deployed, but equally the same principles should apply on an application for a letter of request where the object of the letter is a party as opposed to a non-party or third party. Thus it would be

unlawful to grant the relief where it was a 'fishing' application as discussed in *Charman v Charman* [2006] 2 FLR 422 (in effect where what is sought is not evidence as such, but information which it is hoped may lead to a line of inquiry which would disclose evidence).

Another example of obstructive delay appeared manifest in *Grandison v Joseph* [2019] EWHC 977 (Fam). During their marriage the parties had built up a portfolio of 127 properties, most of them heavily mortgaged. The division of the properties was agreed in October 2015, and the parties agreed, in a deed executed following an order of the district judge, to use "best endeavours" to procure the release of the other from any liability under the mortgages secured on the properties that were to be transferred to each of them. H failed to comply. In October 2018 the judge ordered that unless H had by 23rd April 2019 transferred the legal title to 42 properties from either the joint names of the parties or W's name into his sole name and obtained the release of W from her obligations under the mortgages on the properties, the properties should be placed on the market for sale. H appealed on the basis that i) there was no requirement in the underlying order requiring him to transfer the legal, as opposed to the beneficial, ownership of the properties from either W's name or joint names into his own name; ii) that the judge was wrong to place a time limit on the requirement that he use his best endeavours to obtain W's release of her obligations under the mortgage and/or that he had failed to use his best endeavours; iii) that the judge should not have ordered a sale under Section 24A of the Matrimonial Causes Act 1973 as it amounted to a major variation of the final order in the case. As to (i) the beneficial ownership transferred at the latest on the signing of the deed but very probably on the making of the order. Beneficial interests are transferred at the moment when the order takes effect, namely on its making subject only to the decree absolute (*Mountney v Treharne* [2002] FLR 930). The deed provided a timeframe for completion which could only refer to completion of the transfer of the legal interest (with which W had complied in respect of her properties being transferred to H) and no other interpretation had previously been suggested by H. As to (ii) H argued (basing himself on commercial case law) that using best endeavours should not require a person to incur significant expense (such would not be reasonable conduct), but

he provided virtually no evidence as to what he had done to explore the possibilities. Cohen J agreed that best endeavours does not fall to be construed differently in commercial and family cases. However, each agreement must be seen in the context in which it arises, which in this case was that of a final order in financial proceedings agreed many years ago, and which had been implemented by one of the parties but still not implemented by the other. Moreover, re-mortgage was not the only way of removing W's liability from her. Sales of property were plainly an option as well. As to (iii) Cohen J held that the order for sale did not effect a variation of the original order, but was merely its implementation in circumstances where H had failed to use best endeavours. The court could not be toothless in such circumstances. Cohen J in effect rejected the submission that an order for sale should only be employed in 'extreme circumstances'.

A warning that financial remedy practitioners may need to consider wider ramifications (in this case, company law) arising from bespoke agreements arose in ***Simonon v Simonon*** (19.03.19), a decision in the Chancery Division involving former spouses who had agreed in a 2010 order settling the FR claims for royalty income of H (the bass player for The Clash) to be paid into a company of which H and W were equal shareholders, and from which distributions were made on accountancy advice. W wanted to sell her shares but H objected on the basis that a purchaser would not be bound by the same limitations on the withdrawal of funds. H's objection was upheld and a declaration was granted that W could not sell her shares. The 2010 order, made in divorce proceedings, did not bind the parties as shareholders or directors, but personally. An essential part of the making of the order and of giving effect to it was that parties would each retain their 50% shareholding.

In ***Cowan v Foreman*** **[2019] EWHC 349 (Fam)** Mostyn J raised some eyebrows when ruling, in the context of a claim under the Inheritance (Provision for Family and Dependants) Act 1975 that private agreements between parties, that no point would be taken on the issue of delay for a particular period for limitation purposes ('standstill agreements'), are not permissible. It was not for the parties

to give away time that belonged to the court. The widow's application was brought 17 months out of time and Mostyn J applied the principles concerning relief from sanctions, more familiar to civil practitioners and deriving from *Denton v TH White Ltd* [2014] EWCA Civ 906, and a robust application of the overriding objective. There were good reasons for a short 6 month time limit in 1975 Act cases and any delay must be measured in weeks not months to obtain an extension under s.4.

In ***CM v CM*** **[2019] EWFC 16** Moor J at the First Appointment had listed the topics for consideration by a SJE accountant. The applicant then sought quite radically to amend the respondent's draft letter of instruction. The parties could not agree and cross applications to resolve the dispute came before Moor J who expressed dismay at the prospect, made clear that it was inappropriate for W or her accountant to be present at the SJE's meetings, and strongly recommended that such issues be referred to an arbitrator who is accredited by the Institute of Family Law Arbitrators. Specific issue arbitration is perfectly proper and appropriate even in cases that are proceeding through the court system. W was ordered to pay the costs of the cross applications, despite the presumption of no order.

Saxton v Bruzas **[2018] EWHC 3879** was a decision of the President on W's application made in June 2018 to set aside a 2017 decision made by Parker J which in turn dismissed W's application to set aside a substantive financial remedy order made in 2014 by a Deputy District Judge in the Principal Registry. The June 2018 application alleged that Parker J's decision had been achieved on the basis of perjury and perverting the course of justice by H and his legal team. This is the latest in the 'whistle blower' hearings in which a member of H's legal team disclosed material *prima facie* covered by legal professional privilege, The DDJ in 2014 had declined to make the consent order until its rationale (including the dismissal of W's maintenance claim) and its net effect had been explained. At the time W was not represented (although she had had some previous advice) and the DDJ's letter went only to H's lawyers who initially replied without copying W in, but subsequently did so. After some renegotiation a consent order

was approved, W receiving some extra provision and, at that stage, expecting she could generate for herself a significant income. In 2016 W applied to set aside for non-disclosure by H and during those proceedings Parker J received an anonymous email copying an exchange between H's counsel and solicitor suggesting the initial letter from the DDJ had been deliberately kept from W, although Parker J importantly found it was not proved that it was as a result of a deliberate cynical and manipulative tactic by the solicitor that W did not see that letter. W had alleged she did not sign the final consent order or the accompanying waiver but Parker J rejected that contention. She found that W would have acted no differently had she received the initial letter from the court, and she rejected W's application to set aside. The whistle blower then sent further material to the judge. Parker J sent this material to both parties, an action criticised by the President who advised a more carefully staged process would have been preferable. W now contended that this material entitled her to have Parker J's decision set aside. Parker J having recused herself, the President had to decide (1) whether the new material was covered by legal professional privilege; (2) if so, did the circumstances constitute grounds for setting aside any legal professional privilege, or holding that the material did not in fact attract legal professional privilege because, on either basis, it was evidence of fraud or more widely based 'iniquity'; (3) if potentially disclosable, what, if anything, in it was new, and was there a basis for allowing W's application to set aside to proceed? The President reviews the law, finding that fraud cuts through legal professional privilege, and legal professional privilege simply does not apply to material which is evidence of fraud and iniquity. In the context of family proceedings, fraud is not narrowly defined within what would normally be cast as either criminal or civil 'fraud'. However, it encompasses, 'All forms of fraud and dishonesty, such as fraudulent breach of trust, fraudulent conspiracy, trickery, and sham contrivances'. It is to be construed in a wide context, but what is *prima facie* to be proved is behaviour that really is dishonest, and not merely disreputable or a failure to maintain good ethical standards, for legal professional privilege is a very necessary thing and not lightly to be overthrown, although the interests of victims of fraud must not be overlooked. In the circumstances MacFarlane P found W's case of a conspiracy had not been made out, that the new material

fell well short of being capable of establishing fraud or iniquity that would justify overriding or ignoring the legal professional privilege which otherwise would attach to all that the whistle-blower's statement described, and in any event, even if it did, the material did not take W's case any further than it could have been taken before Parker J.

Staying with the theme of fraud, in ***Takhar v Gracefield Developments Limited and others*** [2019] UKSC 13 the SC held that when it is alleged that a judgment was obtained by fraud, it is not necessary for the applicant to demonstrate that the alleged fraud could not have been uncovered with reasonable diligence in advance of the obtaining of the judgment before that judgment may be set aside.

In *AJ v DM* [2019] EWHC 702 (Fam) Cohen J was concerned with jurisdiction and locus for financial remedy proceedings and reviews the circumstances where habitual residence may be established. While it can be established in a day, that depends on the circumstances. A change of mind while on holiday (as here) is very different from arriving in England with all one's belongings on a one way ticket. The subject of habitual residence was also addressed by Moor J in ***Pierburg v Pierburg*** [2019] EWFC 24. Under Article 3(1)(a) of Council Regulation (EC) No 2201/2003, jurisdiction in relation to divorce shall lie with the courts of the Member State (*inter alia*) in whose territory "the applicant is habitually resident if he or she resided there for at least a year immediately before the application was made; or the applicant is habitually resident if he or she resided there for at least six months immediately before the application was made and….in the case of the United Kingdom and Ireland, has his or her "domicile" there". Moor J had to resolve as an issue of law in relation to these grounds ("indents 5 and 6") the conflict between dicta in the cases of *Marinos v Marinos* [2007] EWHC 2047 (Fam) and *V v V* [2011] EWHC 1190 (Fam) which interpret the test as satisfied by habitual residence at the time of the petition and mere residence for the requisite period; and the observations of Bennett J in *Munro v Munro* [2007] EWHC 3315 (Fam) which requires habitual residence throughout. While one can only have one habitual residence (and domicile) one can have more than one residence at one time. Dicey and Morris support the

latter as does an Explanatory Report by Dr Alegria Borra and the French, Spanish, Italian, Portuguese and Dutch translation of the regulation (but not the German). After comparing the various sources and some other regulations Moor J came down firmly in favour of the *Munro* interpretation. He then reviewed the factual evidence of the parties who had held German domicile before moving to Switzerland, and after separation W moved to London where she petitioned. It was important to her to secure jurisdiction in England as H's German proceedings would be governed by a pre-nuptial agreement under which she would receive nothing notwithstanding a marriage to an exceptionally rich husband for 32 years which produced a son. While recognising the issue did not turn solely on a "night" count in various locations and involved concepts such as integration into society, the judge found on the facts that W was neither habitually resident nor 'resident' in England for the requisite period prior to issue of the petition on 12 January 2018, although habitually resident by then. Nor had she proved a change of domicile from Germany to this country. Accordingly Moor J rejected her claim to jurisdiction but observed she might claim under Part III of the 1985 Act after the German divorce, a potential application he reserved to himself. Meanwhile the decision offers some clarification of the 'forum-shopping' debate.

Another ant-nuptial agreement which would, if enforced, have given the applicant spouse nothing was rejected by Mostyn J in *Ipekci v McConnell* [2019] EWFC 19 on the grounds that after a 12 year cohabitative relationship during which two children were born, it would leave H, a hotel concierge earning £35,000 gross, in a predicament of real need, whilst leaving the wealthy American heiress W with 'a sufficiency or more' and would be unfair. Moreover, H had not received unbiased independent advice before signing the agreement shortly before marriage and due to a defect in its drafting it would have been accorded no or minimal weight in New York State, to whose laws it purported to require the parties to submit. Mostyn J analysed in some detail the various trusts interests under which W would or did benefit and concluded that the trustees would advance her monies if she required it. This was not "judicious encouragement", a concept which he believed should be abandoned (para 12) but a finding as a matter of fact on a balance of probabilities. All of the wealth

being extra-marital it was a needs case. In assessing H's need Mostyn J did not take the language used by the Supreme Court, namely "predicament of real need", as signifying that needs when assessed in circumstances where there is a valid prenuptial agreement in play should be markedly less than needs assessed in ordinary circumstances. Whether this observation is consistent with his own judgment in *N v F* [2011] EWHC 586 (Fam) at paras 17-19 may be a matter for further debate. However in the current case he identified factors which did inform the assessment of H's needs as including the length of the relationship, the fact that on the basis that the parties had arranged their affairs H had made no savings or provision for his future, the standard of living (while not determinative, it was relevant), the interests of the children (not to see H as a 'poor relation'), the fact he would not need to contribute to the children's maintenance and school fees, and that it was not necessary for H to receive all of his award outright. Accordingly half the cost of a modest 3-bed home would be subject to a charge back and, in addition to a housing budget, H was provided with a *Duxbury* lump sum and capital to meet debts. Total: £1,333,500 subject to a charge back of £375,000. Finally Mostyn J expressed profound disquiet at the wholesale non-compliance by both legal teams with FPR PD27A and the Efficiency Statement of 1 February 2016.

The conflict between *NLW v ARC* [2012] 2 FLR 129 (Mostyn J) and Moor J's decision in *AV v RM (Appeal)* [2012] 2 FLR 709 as to the relevant test under CPR r.52.6(1) for permission to appeal was resolved in ***Re R (A Child)*** **[2019] EWCA Civ 895** in favour of Moor J's formulation namely whether there is **a real prospect of success, which means a realistic, as opposed to fanciful, prospect of success.** There is no requirement that success should be probable, or more likely than not (see also *Tanfern v Cameron-MacDonald (Practice Note)* [2001] 1 WLR 1311 CA at [21], and *Swain v Hillman* [2001] 1 AER 91 CA).

What happens when the judge realises he got it wrong before the order is perfected? McDonald J was faced with this issue in ***H v T (Judicial Change of Mind)*** [2018] EWHC 3962 (Fam). Having circulated a draft judgment allowing H's appeal in a FR case, but (importantly) before it was handed down, the judge received a submission from W's counsel inviting him to reconsider his conclusions

given what she contended was a significant material omission in the figures that underpinned those conclusions in respect of purchase costs for a new property. The judge reconsidered his decision, invited further sequential written submissions and offered an oral hearing which the parties accepted. Ultimately he reversed his initial decision. While recognising "judicial tergiversation" is not encouraged, and that a change of outcome would be disappointing to H, nevertheless a judge must have the courage and intellectual honesty to admit and correct an error or omission, and since the judgment had not been handed down there was nothing to prevent a change of mind after careful reconsideration (*L and B (Children)* [2013] UKSC 8). Indeed he was duty bound to do so as to fail to do so would be a breach of the judicial oath (per Rimer LJ *Re LB (Children)* [2012] EWCA Civ 984) and would not be just.

Wodehouse v Wodehouse [2018] EWCA Civ 3009 was a second appeal where the President commented that a deputy district judge's order that a third party trust pay a lump sum which had to be set aside for lack of jurisdiction, was evidence of the value of creating a Financial Remedies Court with specialist judges. There had been no evidence that the trust could or would (on a *Thomas v Thomas* basis) advance money to or for H if (as seemed probable) he was unable to satisfy the primary liability to pay W, and s.23(1) (c) gave the court no power to make any order directly against the trust. Other aspects of the appeal were fact specific.

Vilinova v Vilinova **[2019] EWHC 1107 (Fam)** was a Part III case involving a Russian couple who were divorced in Russia in 2016, but W had been living in England since 2011. H had become very rich during the marriage and in 2013, the year the marriage broke down, he had secured W's signature to two loan agreements under which she ostensibly owed £2m to a company, Hinaly, which he had established to manage his wealth. W secured very little in the Russian divorce and sought relief in England under Part III. H had not engaged in the English proceeding although Hinaly had been represented at an earlier stage. Holman J concluded the loan agreements were shams into which W had been "ensnared" and so as to ensure Hinaly could not (as threatened) bring any proceedings against W in respect of them, he granted declarations to that effect.

He noted that he was sitting in the High Court which has a wide power to grant the discretionary remedy of a declaration, albeit it is a rare remedy in private law civil disputes such as a claim for repayment of a loan, and should only be granted very sparingly and rarely. Declaratory relief will only be granted where there is a real dispute between the parties and where the terms of the declaration sought are specified with precision. The jurisdiction is confined to declaring contested legal rights of the parties represented in the litigation before it, the court taking into account justice to the claimant, justice to the defendant, whether the declaration would serve a useful purpose, and whether there are any other special reasons why, or why not, the court should grant the declaration. Those conditions were satisfied, and insofar as Hinaly was not now represented, that was its choice. Within the Part III claim he would therefore assume W had no debt to Hinaly (had he reached a different conclusion he would have increased the Part III award by £2m). Within the Part III claim he bore in mind W's connection with England (giving weight to sharing H's conservatively assessed wealth of £22m) and her minimum *Duxbury* needs of £1.1m (he having concluded she retained a property and assets worth £1.6m meeting her accommodation needs) and concluded a mid-figure of £5m was an appropriate lump sum, plus costs.

Vasilyeva v Shemyakin [2019] EWHC 932 (Fam) was another Part III case in which Williams J had to consider the "substantial ground" test under s.13 Matrimonial and Family Proceedings Act 1984 to apply for the leave of the court to apply for financial relief in England and Wales. He reviewed the dicta of Lord Collins in *Agbaje* and of Thorpe LJ in *Traversa v Freddi* [2011] 2 FLR 272 and formulated the test on the basis that 'substantial' "does not equate to showing a more than 50% prospect of an order ultimately being made but that there is something which can sensibly be said to amount to more than substantial issues of fact or law that require determination, more than good arguments, that the application raises substantial issues which as a matter of justice require determination, and that the application is not wholly unmeritorious or capable of being determined by a knockout blow." While W's arguments individually may not have amounted to such substantial grounds taken together he considered that W had demonstrated that "there is a substantial ground for me to grant

leave. Her claim in my view plainly cannot be characterised as wholly unmeritorious. In the circumstances it would be unjust to close the door. Whether the grant of leave ultimately translates into a decision following detailed consideration of the section 16 factors that it is appropriate for the English court to grant relief, or whether it is appropriate to make an order after detailed consideration of the section 18 factors, is to prejudge the ultimate questions."

The problems arising from the absence of legal representation in difficult cases were illustrated in a case decided in 2017 but only published this month. s.31G(6) of the Matrimonial and Family Proceedings Act 1984, provides that:

> "(6) Where in any proceedings in the family court it appears to the court that any party to the proceedings who is not legally represented is unable to examine or cross-examine a witness effectively, the court is to—
>
> (a) ascertain from that party the matters about which the witness may be able to depose or on which the witness ought to be cross-examined, and
>
> (b) put, or cause to be put, to the witness such questions in the interests of that party as may appear to the court to be proper."

In ***Crowther v Crowther*** **[2017] EWCA Civ 2698** the trial judge had been confronted with a litigant in person wife who was mentally vulnerable and whose mental capacity had been in doubt, opposing a claim by a fully represented husband, himself apparently physically disabled but whose disability had a significant functional element. The dispute turned principally upon whether H should have a share (requiring a sale) of the FMH which had been entirely funded by W's inheritance from her parents. The judge had cross examined H, without warning H or his representatives during any of the previous case management by the same judge as to the topic, on whether H was able to live independently, a line of questioning which W told the CA did not form part of her case. What apparently might form part of her case, which the judge did not question H on, was a suggestion that H's conduct during the marriage made it inequitable that he should share in the home or its value. The CA concluded that H was right in asserting that this point about independent living did indeed

arise for the first time when the judge began asking questions and that the judge's questioning, while seeking to be fair did unfortunately go beyond simply assisting the litigant in person to present her case, which was on a different basis, and that the process was thus inadvertently unfair. H had other arguments in addition. The CA remitted the case for rehearing while recommending very strongly that if at all possible, W needed competent legal representation and it was a case which ought to justify exceptional funding by the Legal Aid Agency.

As a heads up it is noted that *the Supreme Court has granted permission to appeal in* ***Villiers v Villiers*** **[2018] EWCA Civ 1120** which addresses the ability of the English court to consider applications for maintenance under section 27, MCA 1973 when the Scottish court is seized of the divorce.

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