Financial remedies: Winter 2019 update for Family Affairs

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Procedure

There are several cases in the period which can loosely be categorised as addressing procedural issues.

What role can a FDR judge have outside the FDR? in ***Roya Shokrollah-Babaee v Kambiz Shokrollah-Babaee*** **[2019] EWHC 2135 (Fam)** Holman J ruled that FPR 9.17(2) was mandatory and, applying *Myerson v Myerson* [2008], 'completely debarred or precluded' a judge who had conducted an FDR from having any further involvement with the financial remedy application even where the parties invited him to do so, since there was no room for waiver, despite some *obiter* comments in *Myerson*, given the policy underlying r.9.17(2). The judge had been hearing applications regarding enforcement of a final order and a cross application to vary when it became apparent he had heard the FDR 18 months earlier. He stopped the proceedings and directed anything he had said regarding the applications was a nullity and they must be heard afresh by a different judge, notwithstanding the consequential costs and delay.

In ***AR v ML*** **[2019] EWFC 56** a FR case W failed to secure a housing fund sufficient to meet her (ambitious) aspirations having failed to adduce property particulars in the range of prices which the resources would allow and which in fact reflected her case. After judgment but before the order had been drawn up, and purportedly pursuant to the principle in *Re L-B (Children) (Care Proceedings: Power to Revise Judgment)* [2013] UKSC 8, W's counsel persuaded the deputy district judge to adjourn to allow the parties to adduce further particulars and reargue this issue. H appealed to Mostyn J (who commented yet again on the erroneous title given to several orders which should have been drawn in the Family Court and not the High Court: FPR PD 30A para 2.1, and further, since he was sitting in the Family Court held the case in private). Allowing the appeal and directing the judge to draw her order in accordance with her original judgment, Mostyn J stressed the importance of finality in FR proceedings. While the judge had, in giving W a second chance to produce evidence, recognised that W should have produced it at the final hearing, the judge had held this course was necessary to do justice to the case. However Mostyn J observed that no good reason had been given for the failure to adduce the evidence at the final hearing and there was no example of the *Re L-B* jurisdiction being exercised in such a case, as opposed to where there had been a plain mistake by the court, where the parties had failed to draw to the court's attention to plainly relevant facts or point of law, or where new facts had been discovered after judgment was delivered. While the principle of finality applies with less force where an application is made before the order has been perfected, he drew attention to

the necessary criteria to succeed in an application to set aside under FPR PD 9A para.13.5 (which W did not meet), nor did she meet the criteria which would be necessary to succeed in the closely allied procedure in FPR PD 30A para 4.6 for asking a judge to clarify and correct a draft judgment. Under that procedure, material omissions and perceived deficiencies would normally extend no further than obvious numerical errors or accidental failures to take into account some evidence showing existence of a material fact. W equally failed the *Ladd v Marshall* due diligence test which should be applied in FR cases and which was consistent with the finality principle. A final trial was not a dress rehearsal.

In *AR v ML* Mostyn J complained (para 38) that the case "was merely another example of counsel on behalf of a disappointed litigant seeking spuriously to try to get the judge to change her mind immediately after judgment has been delivered, to which the judge should not have succumbed. This syndrome is seemingly ineradicable. Francis Bacon condemned it long ago (*Essayes or Counsels, Civill and Morall: Of Judicature,* 1625) where he wrote in the 56th of the 58 essays: "let not counsel at the bar… wind himself into the handling of the cause anew after the judge hath declared his sentence". This was a theme to which he returned in yet another instalment of Capt Wilmot's 20 year campaign against his wife and her lawyers: ***Wilmot v Wilmot*** [2019] EWHC 2765 (Fam) at [29]. The case is however also useful as a point of reference for the procedure to be employed for civil restraint orders including a general civil restraint order and also an indefinite civil proceedings order made pursuant to section 42(1) of the Senior Courts Act 1981 which has to be made on application by the Attorney General to whom the matter was referred by the judge. Mostyn J also made orders under the
Protection from Harassment Act 1997 which should be issued in the QBD but he held he had full power to validate an application which is technically issued in the wrong division of the High Court (see para [27]).

"There is a lot to be said for keeping things simple" said Leggatt LJ in ***Read v Panzone***
[2019] EWCA Civ 1662 of a DJ who, on his own initiative while writing his judgment, introduced an unnecessary avoidance of disposition order into an otherwise predictable finding as to the beneficial interest in property. At the end of the marriage the only potential matrimonial property was a flat in Panama the purchase of which H had funded but the legal title to which he had had transferred to a company all of the shares of which were held by his mother (R). H contended (to avoid the suggestion of a resulting trust) that he had "allocated and hypothecated" the funds for the purchase, as a gift to R, although it was clear the funds were never received by her. The DJ found W was unaware of the company's ownership or of any gift to R, rejected the evidence of H and R and found that at all material times H had remained the beneficial owner, and made

a lump sum order for W of half its value. When writing his judgment, and although no application had been made, the possibility had not been floated at trial and R (acting in person) had not been present during argument, the DJ included a s.37(2) order: "The purported transfer by the [H] to the Company dated on or about 26 June 2010 is hereby set aside; if some other disposition of the Panama property to [R] occurred after 26 June 2010 that disposition is hereby set aside." The judgment was upheld by Parker J and R appealed. The CA allowed the appeal against the s.37 order on the basis of a serious procedural irregularity causing an unjust outcome (R had no notice and had not been heard on the issue, and there was no evidence heard to establish the necessary intention to defeat W's claims, the transaction, if any, having been more than 3 years earlier), and on the jurisdictional basis that not only was there no finding as to hostile intent, but no such order could be made when the judge had not identified the actual reviewable transaction which was to be set aside, H had never transferred the legal title to the company (which had received the title direct from the developers), and the judge had held that H at all times retained the beneficial ownership so had effected no disposal. The argument by H that a finding that he retained beneficial ownership was inconsistent with an avoidance of disposition order, so that the whole order should be set aside, was rejected. The essential (and on the evidence the inevitable) finding of the judge was that H had always held the beneficial interest, and the word "purported" in the order showed the judge was not satisfied there had been any actual transfer. The s.37 order was an unnecessary red herring as well as being legally misconceived. The appeal against the lump sum order was thus rejected.

<u>Arbitration</u>

Referring a financial remedies issue to arbitration is intended to save costs and to secure a rapid and final resolution. In arbitration finality is valued more than meticulous accuracy. These points were stressed in ***H v W*** **[2019] EWHC 1897 (Fam)** which concerned the limits on when an arbitrator can amend an award under section 57 Arbitration Act 1996 and how parties can challenge such an amendment. The parties had referred issues relating to pension division, division of assets (shares and a redundancy payment) and spousal maintenance. Both parties acted in person. Following an original award H applied for an amendment under s.57 (clerical omission or error) on the basis that the arbitrator had understated W's income from lodgers. The arbitrator initially declined but faced with a formal application and further submissions from both parties he issued an amended award by email having reviewed not only that income but the additional expenses W incurred in earning it. He reduced the maintenance from £500 to £300 pm. H then applied again (under s.57) for an amendment, complaining the arbitrator had introduced a new issue in respect of the expenses and claiming a clean break. The arbitrator declined to further alter his award. Both parties applied to the Court and the matter was transferred to the Family

Division. H in effect sought to vary the amended award to remove spousal maintenance, whereas W's application was to show cause why the original award, or the amended award, should not be given effect by being made an order of the court. The central issue was whether the amended award should be given effect or whether it should be remitted, set aside or varied under s.68 (serious irregularity, failure to allow H's to put his case etc) and/or s.69 (error of law, plainly wrong etc) of the 1996 Act. W argued that the arbitral award was and had been intended by the parties to be final and H was raising new issues. W contended for serious irregularity in that H's applications under s.57 should not have been entertained, so the initial award should stand (but conceded at the hearing the amended order should stand) and that H's case under ss.68,69 were without merit. The judge rejected H's s.69 arguments. As to s.68 and applying *DB v DLJ* **[2016] EWHC 324** she stressed that grounds of challenge are very circumscribed indeed, and moreover it is necessary also to show that the irregularity has caused or will cause substantial injustice to the applicant, a test which will only be met in extreme cases. Moreover if a court finds such irregularity it cannot vary the award but must remit the case to the arbitrator. In entering arbitration the parties signed the ARBF1S on the express basis that challenge to court was limited and a variation would only be justified in an exceptional case. S.57 does not allow an arbitrator to give effect to second thoughts nor to improve or revisit his decision or correct a mistaken assessment of the facts or the law. If an arbitrator "assesses the evidence wrongly or misappreciates the law" this error does not come within s. 57. Whether an error comes within s. 57 is an objective matter, and not for the arbitrator's discretion under the slip rule. If an arbitrator admits there is an error in an award there are usually only three ways to correct it: by the parties' agreement, by a correction if it falls under s.57, or by an order of the court under s.68(2)(i) for an admitted error. Here the arbitrator should not have allowed H's initial application under s.57, however even if the errors were not within s.57, both H and W's application to challenge the amended award on grounds of the arbitrator exceeding his powers under section 68 failed for want of substantial injustice. The judge rejected the rest of H's case under s.68 and awarded W her costs.

Exercise of s.25 discretion

Francis J applied the principle in *Waggott* [2018] in ***O'Dwyer v O'Dwyer*** **[2019] EWHC 1838 (Fam)** when reducing periodical payments to be paid by H to W where his income stream from his business after the separation was clearly not a matrimonial asset to which the sharing principle applied but property generated after the marriage, and so should not have been taken into account in determining either the needs of W or the level of the periodical payments order. The correct approach was to assess W's reasonable needs, determine what capital she would have after housing, what income that would generate (he adopted a return of 3.75%), and then decide whether W should be required to

amortise her capital, in respect of which there should be flexibility and given the length of the marriage and W's full contribution, and the development of the business during the marriage, here there should be no amortisation. W's needs were £120,000, her income from capital £52,000, so she required a PPO of £68,000.

While much of the detail of the case turned on its facts, ***FW v FH*** **[2019] EWHC 1338 (Fam)** was another case where the court was minded to treat the valuations of private companies with caution (see *Veersteegh* and *Martin* recently). On the facts Cohen J rejected W's valuation of the company which included a terminal value on the basis that the projects which would support such a value were uncertain, too remote and would be the product of post matrimonial endeavour. Cohen J also refused to order the immediate sale of H's shares. It was not a propitious time to sell, W was not in immediate need of funds and it was not in either party's interest to do so (but was in their interest to defer). W was to receive a lump sum equivalent to one half of the value of H's shareholding deferred to an expected 'liquidity event' in 2023 before when there was insufficient liquidity to fund a lump sum. Interest was to run from dates of payment (and not the date of the order: cf *Moher v Moher* below) because W was to receive a share of dividends and thus a share in the success of the company. A smaller lump sum was to be paid to equalise personal assets with one part payable on 1.10.2019 and the balance in 2021 with interest thereon payable from 1.10.2019. Until payment of the lump sum W was to receive periodical payments of £50K pa (equivalent to 35% of H's salary) plus 35% of his net bonus/dividends plus child maintenance and school fees.

In cases of non-disclosure the court may be prevented from meeting the need under s.25 to determine the extent of the financial resources of the non-disclosing parties. In ***Moher v Moher*** **[2019] EWCA Civ 1482**, a case covering several issues, one question was whether a judge's failure to identify a precise figure or bracket for the undisclosed resources invalidated the order for a lump sum of £1.4m (H had contended for £960K and W for £1.5m and the "visible" net resources were said by H to be £1.7m). Reviewing the authorities back to 1955 Moylan LJ concluded that H's contention that the court "must" attempt a quantification of undisclosed funds was not supported by the case law nor by Mostyn J's judgment in *NG v SG (Appeal: Non-Disclosure)* [2012] 1 FLR 1211 on which H's contention was based. Further, the overriding objective requires the court to deal with a case in a proportionate manner, to save expense and to allocate to a case an appropriate share of the court's resources. To impose this additional requirement would be to compound the problem of the disproportionate costs incurred in such cases. The court must be astute to ensure that the non-discloser does not obtain a better outcome than that which would have been ordered if they had complied with their disclosure obligations. While

if it can the court should, as required by s.25, determine the extent of the financial resources of the non-disclosing party, the inquiry should not be disproportionate and while the court must not speculate it can, in appropriate cases, draw adverse inferences, properly drawn and reasonable and taking account of the inherent probabilities to infer that the resources are sufficient or are such that the proposed award does represent a fair outcome. The court also addressed the issue of when a lump sum is payable and when interest begins to run. It held that a lump sum order (and other relevant orders) should make clear that, as set out in *Robson v Robson*, it is payable on the stated date or the decree absolute, *whichever is the later,* if the former might occur before the latter. Once a lump sum order is effective, interest will automatically accrue on the lump sum as a judgment debt, subject to any other order made by the court. However, the court may order interest to accrue from the date of the order (not the date when the sum becomes payable): s.23(6) MCA 1973. In this case periodical payments were additionally ordered to continue until final payment of the lump sum. There can be an element of double counting if maintenance pending suit/periodical payments are contemplated to continue for some time after judgment but at the same time the calculation of the lump sum is made on the basis that it included those payments from the time the judgment is made. On the other hand, hardship may be suffered by the wife if she has no maintenance for her support while she waits for payment of her lump sum. The judge may apply a broad brush to achieve fairness, and some modest discount of the lump sum may be called for depending on how the figures look when one stands back to view the case in the round. Here the judge's award was intended to provide the wife with periodical payments to meet her additional income needs pending receipt of the lump sum. There was, therefore, no double counting. The periodical payments were also to continue until the later of "the grant of a Get" by H or "the payment in full of the lump sum together with any interest accrued thereon". H argued that this amounted to an impermissible compulsion to grant the get, which moreover might invalidate it. Moylan LJ held that a court does have jurisdiction expressly to order periodical payments to continue until the husband has taken the steps necessary to grant a Get. The order did not compel H to grant a Get, but allowed him to make a choice (cf s10A MCA 1973 which provides that a husband may not be granted a civil divorce where he has not yet granted a Get). The court order provided only that until he grants a Get he has to pay periodical payments to the wife. Further, H could apply to vary the periodical payments if he has a sound basis on which to do so. The award of periodical payments may be justified by the financial consequences for W of having no Get, or (as here) by the compelling need for a "clean break" between the parties because of H's conduct. Finally, the court stressed the necessity for a judge to set out the reasoning behind his order, noting at [114]:

(i) Every financial remedy judgment should clearly set out the judge's conclusions in respect of each of the relevant section 25 factors as part of the substantive structure of the judgment and/or by way of a summary. This is not for the purposes of demonstrating that the judge has had regard to those factors, although it will do this, but so that the parties and anyone else reading the judgment can easily understand the judge's conclusions as to these factors which, in every case, underpin the ultimate award;
(ii) This includes by providing, even in a non-disclosure case, a schedule "of the parties' *visible* net assets", to adopt the words from *Behzadi v Behzadi*, even though in such a case this will comprise only part of the parties' resources; and
(iii) Every financial remedy judgment should clearly set out how the award has been calculated.

This is because a fair outcome in financial remedy cases is in part process driven, as in applying section 25, but also significantly outcome driven in the sense of explaining the basis of the award either by reference to needs or sharing."

AF v SF **[2019] EWHC 1224 (Fam)** raised no new principles but, save for the significant sums involved, provides some useful examples of the application of established principles. H who had not engaged with the proceedings or provided adequate disclosure, did not have capacity and was represented by the Official Solicitor. He was a life tenant of a trust fund (his share exceeded £100m) which being dynastic in nature, and from which there was no history of capital advances, the trustees of which were unlikely to agree to any significant advance of capital for H to pay to W (although the judge declined to place a lot of weight on the trustees' contention that H's wish not to pay would be a factor in their decision). There were limited assets outside the trusts beside the family home (£2.63m), a South American holiday home (valued by W at £772,500) and some monies in H's accounts, frozen by W (£1.75m). The judge was keen to avoid any possibility of future litigation. While citing the dicta in *Thomas v Thomas* and acknowledging that '*the central question is simply whether, if the husband were to request [the trustee] to advance the whole (or part) of the capital of the trust to him, the trustee would be likely to do so*" (*Charman*) and that it would not be "*undue pressure*" if the interests of the other beneficiaries would not be appreciably damaged by the exercise of the trustees' discretion in H's favour (*Whaley*), nevertheless he held that there is a difference between a dynastic trust and one settled by H himself. Although H had not co-operated with the proceedings and had behaved offensively, and despite having failed to 'open the cupboard to show it was bare' the judge declined either to categorise his conduct as gross and obvious so as to affect W's needs, or to attribute to H undisclosed assets, but did accept W's estimate of the value of the S. American home and assumed H had retained over £1m in Monacco.. W did not seek a

capital advance from the trust but did seek capitalised income provision on a generous basis. H's projected net annual income from the trust was at least £1.185m. Maintenance would be assessed on a needs basis which would reflect but not be determined by the marital standard of living, with the court considering there had been over spending. This was not a case for compensation although W had given up a career for the children, since her award was bound to exceed anything she could have generated. W had virtually the sole care of the children, was aged 49 and could not be expected to adjust to independence and the termination of maintenance without a substantial *Duxbury* lump sum. While her earning capacity (c.£20-25K pa) was ignored, W's income budget was halved and her expressed need for a London property (which there had not been during the marriage) rejected. She retained the FMH but did not recover an unparticularised fund of £500k to refurbish it. No contingent litigation fund was allowed on the basis that there was no immediate need for litigation nor any sign of unjustified Children Act proceedings which would in any event attract adverse orders for costs. Nor was it appropriate to fund potential litigation for defamation (which W might be entitled to pursue). W's award would be £7m requiring H to pay £4.25m, £1.75m of which would come from the frozen sums and the balance to be paid at £500k pa, with maintenance continuing in addition to the annual instalments, but reducing as the capital is paid. In addition H should pay school fees. On this basis there would be a clean break and no order for costs.

The saga of Mrs Joy's pursuit of a capital settlement continues: in ***Joy v Joy*** **[2019] EWHC 2152 (Fam)** Cohen J further adjourned her capital claims but on terms that she must apply to restore them by 31 July 2022. H's wealth derived from a business conducted through an offshore company the shares of which had always been registered to a trust, of which H and the children had been the sole beneficiaries, but from which H claimed to be irrevocably excluded since 2013, after the marriage broke down. W sought £27m. H, who had initially sought to avoid the jurisdiction of the court, claimed to have no assets available to him, notwithstanding his lifestyle. Sir Peter Singer held that H had been blatantly dishonest and that his exclusion from the trust was a deliberate device to try and defeat the wife's claim, and expressed confidence that when the time is ripe a way would be found to extract H from his purported penury, and he would be able to support a very affluent lifestyle. Sir Peter therefore made a PPO of £120,000 a year in favour of W and adjourned her capital claims. In 2017 Sir Peter dismissed H's application to vary the PPO. In 2015 he had ordered W's claims to be restored and Cohen J was hearing that application. H was substantially in arrears with his payments and W had huge debts. Despite a very comfortable lifestyle and the private education of three children, apparently funded by gifts and loans from friends, including the protector of his trust. He alleged massive loans which he contended he intended to repay, leading W to argue that he must be expecting resources from which to do

so. However, H argued that 4 years after the original hearing there was no still no evidence that he had capital resources and W's claims should be dismissed to comply with case law on adjourned claims, the principle of a clean break, and his human rights. Cohen J concluded that since H did not challenge the PPO a clean break was unachievable. W's capital claims should not be limited to capitalisation of her maintenance (which might be varied down in future). Not only H but also W had human rights. He reviewed the authorities and especially noted *MT v MT* [1992] 1 FLR 362 (where Bracewell had expressed considerable concern as to W's financial future and H was bound to inherit substantial resources on his father's death) and *Quan v Bray and Ors* [2019] 1 FLR 1114 (where Mostyn J was very critical of H's conduct) in which adjournments were granted. Cohen J concluded that dismissing W's claim against this background was a matter of last resort. He was not so pessimistic about the future ability or likelihood of H receiving funds that he was prepared to take that step and so adjourned her capital claims and ordered H to provide regular information about his financial circumstances.

Separation Agreement

The facts of ***MB v EB*** **[2019] EWHC 1649 (Fam)** were on any view unusual. This was a preliminary issues hearing before Cohen J to determine i) the length of the marriage between the parties; ii) the impact of a separation agreement entered into in 2011; and iii) whether there had been any marital acquest. W was worth in the region of £50m and Cohen J found H was in practice bankrupt, the parties having spent a disproportionate £1m on costs. The background covering a relationship of 20 years during which the parties remained married and in what the judge accepted was a "toxic co-dependent relationship" in which money continued to pass from time to time from W to H. While the judge found that they had separated in 2004 (after which H had had several partners with whom he lived) and thereafter they only ever spent the minority of their time together, always had separate homes to which the other did not regularly have access and met only when it suited them, nevertheless there remained a clear emotional involvement between them and neither of them, in truth, had really moved on emotionally before 2016. He therefore found it inappropriate to exclude from all further consideration the whole of the period after 2004. Whether in fact this will have any impact on the financial outcome of the case (he said) is another matter altogether. Cohen J found there to have been no marital acquest either before or after 2004. In 2011, initially at the behest of H, the parties entered into a separation agreement. H now attacked this for duress, undue influence and abuse of a dominant position. Cohen J reviewed *Radmacher* and noted the terms of the agreement were in fact as H had sought. There had been no disclosure but H knew that and did not need to know more than that W was wealthy (*Veerstegh*). Each had independent advice and H did not argue that the advice was bad. It was plain that the agreement was intended to cover all situations, current and future and was in full and final settlement.

There was no evidence of W abusing a dominant position. While not conclusive it was significant that (as the judge found) had the parties been asked in 2011 whether either had a claim left against the other, they would have answered in the negative (*A v B (No 2)* [2018] EWFC 45). The judge's only concern was that the agreement made inadequate provision for H's needs. While "Fairness" does not require a court to ignore the precept upon which the parties have governed their affairs for over 20 years (during which W never made income provision for H) the judge had to carry out an objective assessment of whether H's income needs were met and, if they were not, whether further provision should be made. He was unable to answer that question which would be for a further hearing which should be conducted with minimal further expense (but the judge did not encourage H to expect a significant maintenance award, which would inevitably be capitalised).

Enforcement

Akhmedova v Akhmedov & Ors (Injunctive Relief) [2019] EWHC 1705 (Fam) concerned the use of injunctions to preserve an asset (a ship, owned by one of H's alter-egos, under arrest in Dubai) as part satisfaction of a (very substantial) FR award in respect of which W had recovered virtually nothing. The judgment provides a close analysis of the rules on service overseas and the application of penal notices on directors of corporate bodies, the question of whether or not a person is a de facto director (*HMRC v Holland (In re Paycheck Services)* [2010] UKSC 51), and how the applicant's solicitors had sought to give notice of the application.

Miscellaneous

Although not FR cases a couple of CA judgments are worthy of note. One is *Cowan v Foreman* [2019] EWCA 1336 (yet more litigation for the Cowan family) in which the CA overturned the first instance decision of Mostyn J and granted permission to the applicant to bring a claim under the Inheritance (Provision for Family and Dependants) Act 1975 17 months out of time. Mostyn J had been very critical of 'stand still' agreements, designed to pause the limitation clock. The CA thought that in such sensitive cases as Inheritance Act claims there remained a place for them where there was a clear written agreement setting out the terms/duration of the agreement in which each of the potential parties was included. In such a case, it was unlikely that in the ordinary way, a judge would dismiss an application for an extension of time. The other is a private law children case, *Timokhina v Timokhin* [2019] EWCA Civ 1284, involving a bitter dispute between Russian parents leading to the mother's appeal against an order she pay £109,394 in respect of costs. King LJ outlines the rules and authorities governing costs in family proceedings (albeit with a focus on children disputes) and addresses interpretation of the "general" rule in CPR 44.10, the approach to the basis of indemnity or standard assessment, and when it is

appropriate to effect a summary assessment. The appeal was allowed in part in respect of the excessive "unreasonable" fees of counsel.

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