

Financial remedies: Spring 2020 update for Family Affairs

*Christopher Sharp QC, Barrister, St John’s Chambers*

Published February 2020

# Some changes are afoot in the way financial remedy cases are conducted. Rule 30 of the Family Procedure (Amendment) Rules 2020 (with associated and consequential amendments) inserts a new Part 41 into the FPR, which makes provision for a practice direction to set out procedures to be followed in relation to cases proceeding by electronic means. Provision is also made for detailed costs estimates (r.9.27) and obligatory open offers after a FDR or where there is no FDR (r.9.27A) as well as under 9.28 prior to the final hearing.

Meanwhile, four years ago a business called E-Negotiation Ltd with a trading name of ‘amicable’ (all lower case) was established to help people navigate their divorce positively, to improve access to justice and to avoid the emotional pain inherent in confrontational proceedings. The founders discussed their business model with the SRA who supported the venture as increasing consumer choice and lowering the costs faced by couples who are divorcing and splitting their assets consensually. The business ensured it did not at any stage trespass into the reserved legal activities contained in the Legal Services Act 2007 and specifically ensured it did not engage in the conduct of litigation. Nevertheless its activities aroused concerns and in ***JK (Petitioner) v MK (Respondent) & (1) E-Negotiation Ltd (T/A 'Amicable') (2) The Queen’s Proctor (Interveners)* [2020] EWFC 2 Fam Ct** Mostyn J was required to rule upon their legality in the context of a case where a couple had used amicable’s services to help prepare a divorce petition (filed by H, not amicable), the application for Decree Nisi and a statement in support (again filed by H). amicable did not need to help the parties to negotiate the financial remedy order. They had agreed a simple clean-break themselves. But amicable drafted the order using the relevant Standard Family Orders precedent and helped to prepare the Form A, marked "For Dismissal Purposes Only". It also helped to prepare the statement of information for a consent order in relation to a financial remedy (Form D81) and a joint statement regarding legal responsibilities and disclosure of assets which was signed by both parties (and which, while not required by the rules, Mostyn J recognised as extremely helpful in enabling the court to scrutinise and to understand the net effect of the proposed consent order). All of these documents were sent to the court under cover of a letter written on amicable's headed notepaper but signed by H, and the court fee was paid from the account with the Ministry of Justice in the name of amicable. The judge concluded:

1. that in the circumstances there was no conflict of interest in amicable acting for both parties. The business has a ‘red flag’ system sufficient to alert it to a conflict where there is any domestic violence including psychological abuse; alcoholism or mental health issues; where one party has already instructed a solicitor; where one party is unprepared to negotiate; and where there is a suggestion that assets have not been fully disclosed.
2. On the question of whether amicable transgressed ss.12 and 14 and Sched 2 para 4 of the 2007 Act and were engaging in a reserved legal activity and in particular the conduct of litigation, it was appropriate to interpret these provisions, which provided a penal sanction, restrictively. There was no reason for a non-lawyer to be prevented from merely advising on the contents of a document to be filed with the court, or to construe the definition of the conduct of litigation as extending to any activities that take place prior to the issue of proceedings and which do not involve any contact with the court, although the covering letter should not have been on amicable’s headed notepaper.
3. As to para 5 of Sched 2, while a literal interpretation of para 5(1)(c) (“preparing any…. instrument relating to court proceedings in England and Wales”) might embrace at least some of the documents which amicable had helped to prepare, a contextual and purposive interpretation of Paragraph 5 led to the conclusion that the drafts which amicable had helped to come into existence were not within its scope. An over-literal interpretation should be avoided where it would give rise to an absurd consequence. Moreover, while currently amicable’s staff currently checked the documents and therefore had some hand in their preparation, soon such checking would be carried out by AI so that no-one at amicable will have prepared them.

Mostyn J stressed that amicable filed nothing at court (and in his view had not in any event generated “instruments” within the scope of para 5). In short amicable’s model (in the SRA’s words) “…deliver(s) significant social value..(and)… is an example of innovative working.” A declaration was issued accordingly.

**XW v XH [2019] EWCA Civ 2262**emphasises how rare will be the circumstances in which that *rara avis,* the ‘special contribution’ will be established, and provides guidance on the approach to assessing the impact of ‘latent potential value’ and ‘unilateral assets’, with clarification of what Moylan LJ had said in *Hart v Hart*. This appeal from Baker J’s decision awarding W some 29% (£152m) of combined resources of £530 million (which included a significant sum acquired by the husband after selling shares in a company founded by him, with others, before the marriage) was allowed and an award of 34.5% (£182m) substituted. W’s case at trial had been for 50/50 while H argued she was entitled to no more than a needs based award. The bulk of the wealth was represented by the increase in value in H’s shares during the marriage. H was 50, W 48. They married in 2008 and separated in 2015. They had one significantly disabled child with a life threatening condition, the vast majority of whose care was provided by W although H was acknowledged to have played an important role. W was independently wealthy (£34m) and received the FMH (3.7m) under the order. In Moylan LJ’s (long) judgment he identified [84-86] the need for judgments to articulate “clear rationality and principle” and to “explain with sufficient clarity how the award has been calculated”. He also emphasised the requirement to recognise marriage as a partnership of equals and to avoid discrimination [88]. He traced the history through the case law of the concept of unilateral assets [91-106] but noted that the court had been referred to no authority where the concept of unilateral assets had been applied to support an unequal division of such assets beyond short, childless marriages. At [107-117] he addresses latent potential, notes that the concept applies to determining what part of the parties' current wealth is to be treated as matrimonial property and what part is not, and that while the court does not have to apply any particular mathematical or other specific methodology (*Hart*),it is essential that the judge indicates at least at the quantification stage how this factor impacted on the award. Contrary to Baker J's conclusion, the approaches of Holman J in *Robertson* and Mostyn J in *WM v HM*  were not examples of the "imposition of constraints which are not needed to achieve, and which deprive the court of the flexibility required to achieve a fair outcome", as referred to in *Hart*, at [97]. Rather, they were examples of the court undertaking the "broad assessment" endorsed by *Hart*, at [96] and can be seen to be consistent with the principle that there is no "single route to determining what assets are marital" (*Hart*, at [93-96] and *Martin*, at [112]). Addressing the issue of special contribution [118-124] Moylan LJ repeated the principle in *Gray v Work* that the focus should be on disparity of contribution and whether there is a sufficient disparity to make it inequitable to disregard. But he went on to advise that there should not be too great a descent into detail nor a mutual disparagement of the other’s contributions, especially when it is recognised that there have been very significant contributions to the ‘*welfare of the family’*. Rather the search for and analysis of whether a special contribution is established should be undertaken through a relatively general, or broad, assessment of the evidence. A good reason for departing from equality is not to be found in the "minutiae". It is of the very essence of special contribution that each party's contributions have to be balanced. W here did not have to establish a special contribution of her own. In summary, the concept of special contribution risks discrimination and is to be confined to *very* exceptional circumstances. At [133-145] Moylan LJ reviewed the development of the concept of unilateral assets through the case law since *Miller* and found it to be of limited application.In the instant case the judgement below did not identify sufficiently clearly what part of the assets were to be regarded as non-marital and therefore to what part of the assets the sharing principle applied, nor how the special contribution impacted on the sharing of the marital wealth. Baker J’s reasons for departure from equality were rejected. The separation of the parties’ finances and the fact that the wealth had been generated through H’s ‘business assets’ (the unilateral assets argument) could not stand because a different approach to a marital asset, merely because it was a "business" asset, in other than short, childless marriages, would be "deeply discriminatory" and would, therefore, "gravely undermine the sharing principle". As to the latent potential value, while the judge was entitled to conclude that there was such value in the company which excluded part of the initial value from marital assets and thus from the sharing principle, and while he was not obliged to adopt the accountant’s approach in assessing that value, the judge had not specified what sum or part of the value was to be so treated so the CA was unable to assess whether his ultimate determination would be susceptible to challenge. In terms of his finding of special contribution the judge focused on H’s contribution to the wealth creation and not on any disparity with W’s contributions that it would be inequitable to disregard. Moreover the lack of identification of the value of the marital wealth prevented any determination of the special contribution in respect of the creation of that wealth or how it should be shared. Having regard to what Baker J had found to be W’s ‘incalculable’ contribution the necessary disparity could not be shown. The CA was in a position to undertake the "broad assessment" of the non-marital element of the wealth and found it to be 40% of the value of the shares. The 60% together with the value of the FMH was therefore divided equally.

***Behbehani v Behbehani* [2019] WECA Civ 2301** was W’s successful appeal against a decision to set aside a receivership order made to enforce a lump sum awarded in FR proceedings. H had tried to conceal the extent of his wealth with the assistance of an associate (T) and others including a Spanish company (S). W obtained receivership orders against two Irish companies’ shares in a further Spanish company (S97). T and S sought to set aside the order on the basis that they owned the shares and should have been joined in the original proceedings. Baker LJ held it was not always necessary in matrimonial proceedings to join every other person who asserts title to an asset, if the claim is not originally against that asset itself. The fact that T and S were not originally joined did not prevent her subsequently seeking to enforce the lump sum against other assets the legal title to which belonged to third parties but in which H had a beneficial interest. T and S should however be joined in the enforcement proceedings, when they submitted to the jurisdiction of the court.

In ***CB v KB* [2019] EWFC 78** Mostyn J addressed the division of the capitalised value of 5 income streams generated by H, a member of a pop group, after a marriage of 19 years. Publishing/composition royalties for 3 songs written by H, remuneration for broadcasting of the band’s songs on TV and radio, and H’s share of royalties under a seemingly gratuitous agreement between the band members, were to be paid into P Co Ltd (owned by H) while a one third share of recording royalties, were paid through a company T Ltd, owned equally by the band members. All these were the product of marital endeavour. The fifth income stream derived from H’s share of ticketing and merchandising income generated by touring. This income was received by two companies co-owned by the band members. The latter Mostyn J rejected as matrimonial property equating the future work of touring to a footballer playing matches after the marriage ended (cf *B v S* [2012] EWHC 265 (Fam)). W contended they would be playing songs written during the marriage but Mostyn J held: *‘The fans are coming to see the band performing, not to listen to songs being played by a machine and pumped out of loudspeakers’.* The projected income from and the dates of the tours were relevant to the assessment of child maintenance and the timing of the lump sum payment (£5,110,079) which would be paid in instalments with reducing interim maintenance as they were paid. As to child maintenance the judge reiterated guidance in *Re TW & TM (Minors)* [2015] EWHC 3054 (Fam) at [19] that the CMS calculation is the starting point, which gave a figure of £12,567 p.a. per child, rounded to £12,600. While there could be good reason to do so, here there was no good reason (para [50-51]) materially to depart from this starting point. Given the length of the relationship and the fact that there were 6 children, it was be reasonable despite W’s young age, for W to be provided for until end of life (implicit in the Duxbury formula). W’s needs would be amply met if she amortised the Duxbury fund she would receive from capitalisation of income streams 1 to 4 (as well as child maintenance) *‘I struggle to conceive of a case where in the assessment of a claimant’s needs it could be tenably argued that it was reasonable for her not to have to spend her own money in meeting them’* [53]. She would be expected to downsize her home and release equity by age 60 and reduce her outgoings by a third. She should reasonably be expected to try and find work. It would be “good for her spiritually” and an income of £25,000 pa was attributed to her from age 49-60. As to whether her income would meet her reasonable needs the judge observed that it “is almost a truism that someone living in the Home Counties with assets of £3 million has sufficient to meet her needs. A fortiori, if you have just over £5 million. However, the law requires that a more detailed needs analysis is undertaken”. Her budget was pared down from £324K to £222K which would “very amply meet the wife’s reasonable needs”.

***TT v CDS*** **[2019] EWHC 3572 (Fam)** was a case described by Cohen J as “this unusual and unfortunate case” in which H’s conduct was described as lamentable and although some of it had been punished by costs orders other aspects were not so easily recompensed. He had alienated his children and caused significant legal costs. Since the breakdown of the marriage he had acted destructively and throughout the litigation (comprising Hague Convention and Chancery proceedings as well as the financial remedies claim), in which ultimately he was a LIP, and without any regard to the normal rules. If there had been more money in the case it might have been necessary to seek to put a financial value on this conduct. But, the sad fact was that the assets were simply not available to seek to do other than meet needs with the first consideration being the welfare of the vulnerable children (who had particular needs) in W’s care. Cohen J therefore avoided resolving issues of conduct and several issues of valuation which would ultimately not assist in resolving the outcome. Everything the parties now had had been built up during the course of the marriage. H could not be trusted to provide for W and the children and so she had to retain the company, in which she had always been involved, as the only way in which she could be provided for. H’s abilities meant he could and would start again. There would be clean break. H kept a Miami apartment and a London property, W kept a Florida cabana and two London properties. There would need to be sales to meet debts but the judge separated the parties so as to obviate any further litigation, requiring H to indemnify W in respect of any claims on W by H’s mother. In short, the case illustrates the pragmatic decisions a judge may have to make to achieve a fair outcome.

There have been two cases on *Hadkinson* orders in this period. In ***Rogan v Rogan* [2019] 11 WLUK 518** H had been consistently in breach of a spousal maintenance order and subsequent agreements under which he was to pay arrears. W had applied to commit him to prison for contempt of court for non-payment of a judgment summons. Holman J had previously allowed H to make a variation application which W now sought to block by a *Hadkinson* order until H purged his contempt. Holman declined to accede to W’s application. There was a risk of creating a vicious circle if H was denied the opportunity to prove the order was too high. It was not appropriate to make the *Hadkinson* order, which is discretionary, until the conclusion of the variation application for which directions, including full and frank disclosure, would be made. He would be required to make some payments pending the final hearing, and in default his variation application would be stayed or dismissed. The sanction for contempt would await the outcome of the variation hearing which would be taken into account in deciding the sanction.

In ***DS v HR* [2019] EWHC 2425 (Fam) H had engineered an application by his daughter to exclude W’s new husband from the FMH which was dismissed with an order that H pay the husband’s costs. H stopped paying child maintenance and sought permission to appeal the costs order. H threatened to make W homeless by forcing a sale of the house on the basis he had no other asset within the jurisdiction against which W’s husband could enforce the costs order. He refused to pay maintenance unless the husband would forego his costs.** W sought a *Hadkinson* order to bar H from proceeding with his appeal unless he made good the admitted default in his payments of child maintenance. Cohen J (describing the litigation as some of the least attractive and commercially suicidal that he had seen for a long while) reviewed the authorities and pointed out that *Hadkinson* orders curtail the ability to litigate and the power must be exercised judicially, sparingly and proportionately. The tests were well established: a) was the husband in contempt? Yes on his admission. He was rich and could pay but refused; b) was there an impediment to the course of justice? Yes, where a father chose to pay nothing whatsoever towards the support of his children, particularly when there was a consent order, and argued he should pay nothing towards the failed litigation he had instigated; c) was there any other effective means of securing compliance for the Court's orders? No, where there were no other assets in the jurisdiction. H’s best point was that the costs order was made in separate FLA proceedings by the daughter against her step father, whereas the child maintenance order was made in the divorce between H and W. Cohen J was unimpressed since H plainly regarded the two as intrinsically connected. While this may have been the first time in which the *Hadkinson* principle has been extended to cover proceedings which are not identical, albeit related, it is not a remedy which is so closely confined or inflexible that it could not be extended to this situation.  It might be seen to be a draconian order but there was a clear breach, it was not disproportionate and the sum, for H, was a small sum he could easily pay. The judge ordered that unless H paid the specified maintenance payments he would be barred from pursuing his costs appeal.

***Neil v Neil* [2019] EWHC 3330 (Fam)** was an application by H to set aside part of a final order for W’s fraud. After a 22 year marriage with a child now 22 (living with W) during which the parties had set up a company, they had engaged in mediation and agreed a without prejudice “memorandum of understanding” which stated it did not record or create a legally binding agreement. This provided for a sale of the FMH and an equal division of the proceeds with W to get the first £1m (to rehouse with the daughter) with a charge back to H if this was more than 50%. A clean break was agreed with no spousal maintenance considered necessary, but then there was an agreement that H would pay £5,500 pm for FMH expenses. W however then instructed solicitors to draft a consent order in different terms, omitting the charge and providing for nominal periodical payments. This was sent to H as reflecting the agreement, who signed it without reading it. W then discovered that to raise a mortgage she needed an income and falsified the consent order to provide for £66,000 pa maintenance and inserted H’s signature from another document, and hacked his email account and sent a confirmatory email from it. The order, without reference to an equal split of sale proceeds was sealed. The house was sold. H received £100,000 (not £348,930). The company got into difficulties, W was convicted and imprisoned. The company went into administration. W had significant debts. H applied to set aside the order and enforce his entitlement to over £½ m. Moor J found W’s conduct to be of the most serious nature and “one of those rare cases where I must take account of W’s conduct” and not allow her to pursue a claim for maintenance, despite the long marriage and the child. The provision in the order for maintenance was set aside and a clean break ordered. W was declared to owe H £248,930 and indemnity costs of £250,000. Moor J relied on *Kingdon v Kingdon* [2010] to avoid a full hearing on the issue of maintenance and dispose of the matter finally. H had been allowed to rely on the Memorandum of Understanding since W waived privilege when she instructed the solicitors.

Guidance on how to proceed where one party illegitimately obtains confidential information or privileged documents belonging to another party where that party is a litigant in person or is not engaging in the proceedings was provided by Knowles J in ***Akhmedova v Akhmedov* [2019] EWHC 3140 (Fam)**  (a further instalment in W’s attempts to enforce the FR order made by Haddon-Cave J in 2016 of which H has paid nothing and has not engaged with the court) supplementing guidance provided in *UL v BK (Freezing Orders: Safeguards: Standard Examples)* [2013] the relevant part of which requires solicitors who receive confidential documents: (a) to return the documents to the other party's solicitors, who (as officers of the court) can then ensure they are preserved and that proper disclosure is given, or (b) in the event that the other party does not have solicitors acting for him, to obtain directions from the court. In such circumstances the court is likely to direct that independent counsel be appointed to give proper disclosure. *UL v BK* represented the practical application of the principles set out by the CA in *Tchenguiz v Imerman* [2011]. The court will wish to strike a fair balance between two competing concerns, being (a) that X should not obtain an improper benefit of being able to use Y's confidential documents which have been unlawfully obtained, and (b) that Y should not dispose of or hide documents which he is or may become obliged to produce, and that Y should find it more difficult to hide his assets. In the instant case H’s former employee provided a quantity of documents to W’s lawyers, Withers, who passed them to an independent barrister (BW) for review. BW advised the majority of the documents were prima facie privileged but the fraud/iniquity exception applied because there was a very strong prima facie case that H instructed his lawyers to defeat W’s attempts at enforcement.On this basis, 244 documents were identified as reviewable and provided to Withers (and some subsequently to W’s lawyers around the world) but not to W herself. Withers however failed to follow the *UL v BK* guidance and made no application to the court for directions (mandatory, as Knowles J observed, where the other party is not represented). W’s current lawyers (PCB) on realising this applied to the court. Knowles J reviews the authorities which justify refusal of relief for breach of confidence, and provide exceptions to the protection of privilege, in the case of impropriety and fraud. She declined to enter the debate on the validity of the ‘iniquity’ test deriving from *Barclays Bank v Eustice* [[1995] 1 WLR 1238](https://www.bailii.org/cgi-bin/redirect.cgi?path=/ew/cases/EWCA/Civ/1995/29.html). H did not engage in this hearing but the judge was satisfied he had had adequate notice. While W had not previously sought appropriate directions the judge accepted that to prevent her relying on the documents would be disproportionate given H’s conduct and background which would have resulted in a direction for their use (had an application been made), and that this was not a case of W unlawfully obtaining the documents which had been offered to her by another, and she had trusted her lawyers to act appropriately. Moreover she had not yet deployed them in the proceedings. In these circumstances Knowles J having read and approved BW’s review directed that W and her lawyers were entitled to retain the Reviewable Documents, and to use them as if they had been disclosed by H in the proceedings; she was not required to cause a further independent review to be undertaken; and should provide a copy of them to H by email if he so requests. W was entitled to retain the documents notwithstanding that the majority were prima facie privileged. The judge explained this conclusion on the basis of the background and that she was satisfied that the Reviewable Documents were not confidential (or that no relief should be granted to protect any confidentiality) and that the *'fraud'* exception to privilege applied. Knowles J then went on to expand on the guidance in *UL v BK*. She noted that the role of an independent counsel reviewing the documents is advisory only. The decision is the judge’s. Where Y’s documents come into X’s possession, if Y is unrepresented an application must be made to the court, and as soon as possible. Delay is unacceptable as the documents are Y’s. Y should be able to make representations to the independent counsel whose report should go to Y and X, and in the event of dispute as to the outcome, or the reviewing lawyer seeking directions an application must be made to the court by X’s lawyers. She also noted an inconsistency between the form of search order contained in PD 25A of the CPR, paragraph 11 of which provides for the independent lawyer to exclude documents from the search, and to retain them in his or her possession pending further order of the court, in the event that (a) he/she believes that the respondent *"may be entitled*" to withhold production on the grounds of privilege, or (b) the respondent claims to be entitled to withhold production (whether or not the supervising solicitor agrees). The equivalent order in the Family Division, "Order 3.2" differs from the PD25A standard order significantly as regards claims to privilege against self-incrimination and legal professional privilege. The judge suggested that the "*Restrictions on Search*" provisions in PD25A should be incorporated into Order 3.2 to remedy any inadvertent omission.

***Pontanin v Potanina* [2019] EWHC 2956 (Fam)** was a MFPA 1984 Part III application by W for permission to bring the claim which, while initially granted *ex* parte, was dismissed on H’s application and his case that W had misled the court, misrepresenting Russian law as recognising beneficial interests and trust concepts (which it does not). H and W, both Russian nationals, married in Russia in 1983, lived only in Russia throughout their marriage and were divorced in Russia under Russian law in 2014.  By the time of the divorce, H was very wealthy, on W’s case he was worth $21 bn. H had transferred to the wife about $71million under their Russian divorce settlement.  W contended her award from the Russian court did not reflect H’s immense wealth and did not meet her needs (she sought $6 bn). H agreed he had great wealth in the form of shares in companies held in trust and so not in his name. Cohen J found that the Russian courts had consistently and properly applied Russian law on the basis of its residence provisions as they applied to W’s circumstances. W had also misrepresented the amount of child maintenance she had received ($2.3m rather than $7.3m) and she had not presented a needs argument before the Russian court. In this case W had previously pursued proceedings in Russia, Cyprus and various states in the USA and Cohen J was unpersuaded that she had any genuine connection to England. The judge emphasised the duty for full and frank disclosure on ex parte applications when there is no evidence from the respondent. It was also repeated (*Agbaje*) that the purpose of Part III is not to allow a spouse with some English connection to take advantage of what may be a more generous financial provision regime in England or to correct what may be thought to be the deficiencies of another country’s legal system. Mere disparity between the foreign award and the (possible) English award will be insufficient to trigger the application of Part III.

***Derhalli v Derhalli* [2019] EWHC 3286 (Ch)** concerned the interpretation of a consent order made by Holman J in 2016. The parties were wealthy and after an acrimonious divorce agreed an order in full and final settlement of all claims each had against the other. This included the sale of a house in H’s name in which W and her adult daughters had lived for two years prior to the settlement, and payment out of the proceeds of a lump sum to W in addition to an equal division of those proceeds. The order was for immediate sale but the sale took 2½ years during which W remained, meeting the outgoings. H however brought proceedings for possession and a claim for mesne profits for use and occupation at £5,000 pw. The County Court judge decided the case for H and declared W to have been a gratuitous licensee whose licence had been determined. W appealed to Fancourt J who allowed the appeal. He had to construe the consent order and did so on conventional grounds for the interpretation of a contract. Its clauses had to be assessed in the light of (1) the natural and ordinary meaning of the clause; (2) any other relevant provisions of the contract; (3) the overall purpose of the clause and the contract; (4) the facts and circumstances known or assumed by the parties at the time the document was executed, and (5) commercial common sense but (6) disregarding subjective evidence of any party's intentions. The meaning of a contract was to be assessed by reference to "what a reasonable person, having all the background knowledge which would have been available to the parties, would have understood them to be using the language in the contract to mean." It would be very peculiar if the consent order was intended to allow the disruption to W and the daughters’ occupation of what had been the family home so that H (who had his own separate homes) could move in or rent the property in the short time before sale. Moreover until decree absolute W had occupation rights so the judge was wrong to have found her to be a licensee. The order had not identified how long she was to remain but it also provided that H had to give notice before visiting the property. All the surrounding facts (set out in the judgment) pointed to a right to remain until sale, the parties having not expected that to be so long, and that the clean break meant there remained no claims by either party against the other. H sought to rely on the terms of some negotiation over the wording of the order but Fancourt J rejected this as an impermissible aid to interpretation of a contract, save perhaps where the document could only be understood by reference to a different documents, one of which modifies the terms of another (*Narandas-Girdhar v Bradstock* [[2016] EWCA Civ 88](https://www.bailii.org/ew/cases/EWCA/Civ/2016/88.html" \o "Link to BAILII version)), but this was not such a case.

# *MB v EB* [2019] EWHC 3676 (Fam) was an example of need justifying departure from an otherwise valid separation agreement, and was the final resolution of the strange case of the 59 year old struggling artist and the wealthy wife (£50m +) who had been unable to effect their emotional separation long after their physical separation. In June 2019 Cohen J had decided (in W’s favour), first, that the marriage in the sense of the marital partnership had come to an end in 2004 (it was thus a short marriage of 4 years, despite the continuing emotional (and to an extent financial) entanglement, the judge finding that a relationship of sorts continued between the parties until 2016), secondly, that there were no grounds for vitiating a deed of separation made in full and final satisfaction of all financial claims between them made in 2011 (save potentially to the extent that it failed to meet his needs), and thirdly, that there was no marital acquest. Now Cohen J had to assess whether the husband had an outstanding needs claim which the wife should meet, upon which he did not previously have the relevant information. The judge found H to have no meaningful prospects of employment (also admitting some medical evidence of cognitive difficulties) and found an income need of £25,000 pa after deducting £5,000 costs of exhibiting his art, a loss making endeavour W should not have to fund. The 2011 agreement had given H exactly what he wanted but made no income provision (H over estimated his abilities as an artist) and inadequate accommodation (in a studio over a flat he let out). W argued that the parties’ autonomy to enter into the 2011 agreement should be respected when the marriage is over and the parties are looking to the future. ”On a fine balance” the judge rejected this, for the following case-specific reasons: (1) The agreement never provided satisfactorily for the meeting of H’s income needs and capital needs.  It could meet one, but not both.  (2)  W knew at all material times that H could not provide for himself in income terms and that he had nowhere settled to live without provision being made by her.  (3)  In particular, she knew of his health difficulties.  (4)  Notwithstanding what he asked for, it was not a satisfactory way of life that H should live in a small converted garage, now the studio, so that he could let out his house to provide an income.  (5)  Although the marriage ended in 2004 as a partnership, the extent of the parties' co-dependence thereafter could not be completely disregarded.  (6)  The award to meet H’s needs in the circumstances would only be a small pinprick to her wealth.  (7)  This was not providing an 'after the event' insurance.  It was meeting a need that was always there. Aside from costs an award of £325,000 to meet income needs and £10,000 for a car was appropriate. However, the costs had been wholly disproportionate as a consequence of H’s conduct of the case which was held to be irresponsible and unreasonable. While W’s offers had been light had there been any response to them there would have been negotiations which should have settled the claim. H had made no offer until just before the final hearing and that offer was quite unrealistic. The judge drew attention to FPR 28.3(7) and Practice Direction 28A, and quoted from the Family Procedure Rule Committee Costs Working Group, and para.5 with its emphasis on encouraging parties to engage reasonably and responsibly in negotiations and the need to “assist the parties to understand the likely costs consequences of failing to litigate sensibly and failing to engage in sensible negotiations and/or of making an open proposal which is significantly higher or lower than the award ultimately made by the court." With the consequent amendment of para 4.4 of PD.28A to include, with effect from 27 May 2019 a warning that courts will consider making an order for costs, including in a 'needs' case, where the applicant litigates unreasonably resulting in the costs incurred by each party becoming disproportionate to the award made by the court. So here H’s “bold” submission that W should pay all his costs was rejected and her contribution was capped at £150,000 (she had already contributed £236K under an earlier LASPO order) which would leave H in debt to his solicitors but that was a matter for him and them. Since this decision the new Family Procedure (Amendment) Rules 2020 have been published.

# © Christopher Sharp QC February 2020

**Christopher Sharp QC**

St John's Chambers

February 2020