Family Affairs
Financial remedies update: October 2021

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Published October 2021

In the summer edition of these updates attention was drawn to the role of private FDRs in the context of ADR (*AS v CS (Private FDR)* [2021] EWFC 34). As the courts struggle under the burden of the backlog and limited judicial resources, alternative means of dispute resolution become ever more attractive (for those who can afford them) and a body of law is building up as to how ADR can be made to work with the formal court-based regime. Increasing use is being made of arbitration. The popularity of arbitration was anecdotally thought by many to have suffered to some extent by reason of a perceived lack of opportunity to challenge the outcome. However, *Haley v Haley* [2020] EWCA Civ 1369 largely equated the means of challenging a financial remedy arbitral award to an appeal from a DJ to a CJ.

In ***A v A (Arbitration: Guidance)*** **[2021] EWHC 1889 (Fam)** Mostyn J provided guidance, approved by the President, on the correct procedural approach to challenge an arbitral award, seeking to address what he described as the 'procedural chaos' that had developed. In this case he was faced with (1) an application by W for H to show cause why he should not be held to the terms of the award, (2) H's application to challenge the award under s.68 of the Arbitration Act 1996, (3) H's application under s.69 to appeal on a point of law; and (4) H's invitation to the Family Court not to make an order in the terms of the award. The Family Court having no jurisdiction in respect of (2) and (3) the matter was transferred to the High Court. However, Mostyn J observed that the decision in *Haley* had rendered applications under ss.68 and 69 'entirely redundant'. On a challenge to the award a judge has to decide if the award is 'wrong' (simply). Mostyn J also noted that on an appeal the judge has power, if allowing the appeal on part of the order, to vary other parts of the order notwithstanding the lack of a cross-appeal, in order

to do justice or to give effect to the intention of the judge below. He proposed to exercise his powers analogously here. Each of H's challenges were dismissed, the only one of note being the judge's restatement of the principle (applying *Xhydias* and *Kelly v Corston*) that the court is not bound by the parties' agreement but may (and must) apply the principles of s.25 and also the overriding objective (in this case to obviate further litigation). The Guidance was attached in an Appendix. A challenge to an arbitral award shall be 'triaged' by a specialist FR judge on paper. If the challenge does not meet the *Haley* criteria it may be dismissed with costs, but if it does it may be set down for an *inter partes* hearing, and if satisfied the award was wrong, the court will make a new order superseding the award. The procedure should be initiated by the issue (or un-staying) of a Form A and an application in Form D11 using the Part 18 procedure (seeking to implement the award, or challenging it as appropriate). The conventional 'notice to show cause' has no basis in the rules and is superseded by Mostyn J's new procedural guidance in circumstances where a party seeks to uphold or challenge an arbitral award. There then follows detailed guidance as to procedure, supporting documentation and timescales. There is provision for initial directions by a 'gatekeeper' who will decide, on the parties' application, whether the matter should be heard at High Court judge level. In general costs will follow the event of the outcome of what will have been close to an appeal procedure. A pro-forma gatekeeper's order is also provided.

An issue of perhaps somewhat limited wider application was decided by Sir Jonathan Cohen in ***TMB v PLB*** **[2021] EWFC 66** where the application of W (a British subject domiciled in Britain but living in and habitually resident in the Philippines, while H was French and lived in Hong Kong) for maintenance was dismissed on the grounds that it was barred by Art 3(c) of the Maintenance Regulation ((EC) 4/2009). W relied on articles 4, 5 and 7 but the argument on art 7 was rejected for lack of expert evidence that she could not claim maintenance in other countries having jurisdiction, while England & Wales did have jurisdiction to direct financial provision, albeit excluding maintenance. There was no choice of court agreement in writing (art 4(2)). Whilst H raised his objection to jurisdiction on maintenance (as opposed to capital provision) late, he had not submitted to the court's jurisdiction on this element of W's FR claims (art 5).

In ***Hasan v Ul-Hasan (Deceased) and Anor*** **[2021] EWHC 1791 (Fam)** Mostyn J dismissed W's application under Part III when H had died before the matter had been adjudicated. The judge found the exercise to be undertaken under the 1984 Act was the same as under the MCA 1973 and that the Part II jurisprudence (under the 1973 Act) unambiguously states that a financial claim made during marriage or following divorce, but unadjudicated, expires with the death of the respondent (as opposed to cases like *Barder* where the spouse dies after adjudication). The case law (in particular *Sugden v Sugden* [1957] P 120 in the CA) was binding on him. He reviewed the authorities which established that unless there was an enforceable right against the deceased (which there is not until adjudication), the claim was a personal claim lapsing with the respondent's death, there being no cause of action surviving his death. However, Mostyn J's analysis of the law (see also his judgment in *Villiers v Villiers* [2021] EWFC 23) was that while all claims for maintenance are now made pursuant to statute, they have their origin in the common law duty to maintain (which subsists, as s.198 of the Equality Act 2010 which abolishes it has not been brought into force). Mostyn J expressed his disagreement with *Sugden* (for reasons which he set out and are worth a read: he proposes that such claims survive as causes of action under s.1(1) of the Law Reform (Miscellaneous Provisions) Act 1934) and proposed a leapfrog appeal to the Supreme Court should either party wish to apply for that. Further detailed discussion here should therefore await that possible appeal.

In ***Azarmi-Movafagh v Bassiri-Dezfouli*** **[2021] EWCA Civ 1184** the CA allowed a second appeal from Judd J in a needs case, providing helpful guidance on how to incorporate a party's costs liability. The case was characterised by extreme acrimony, litigation which had "become an exercise in self-destruction", and extreme positions adopted on both sides. Until the appeal before the CA W had contended that H (now 59) should have nothing after a marriage which had lasted 11 years with one child (T). While T lived with W, H had had substantial involvement in his care and T visited him. In Children Act proceedings, H had been found to have been violent to W (but was acquitted in criminal proceedings). At first instance from net assets (all non-matrimonial)

totalling £2.347m after CGT, but £1,781,389 after W's debts of £300,000 and H's debts of £257,000 (largely costs from all three proceedings), HHJ Robinson had awarded H (who had no assets, and rented a one room flat on universal credit) a sum of £625,000. The judge assessed H's accommodation needs at £400,000 and ordered a further sum of £25,000 to cover costs of purchase and a car. W did not challenge that figure before the CA. The additional £200,000, which W did challenge, was towards H's outstanding costs to enable his needs to be met (but leaving him with responsibility for his criminal costs and some Children Act costs). H's counsel had intimated that if such an award were not made H would apply for costs on the basis of W's litigation conduct. W was a barrister but her principal income derived from rental properties owned prior to the marriage. Judd J allowed W's appeal to the extent of ordering the £200,000 to be a *Mesher* charge to W on the property H purchased, to be triggered by his death or earlier remarriage or cohabitation (an order for which neither party had contended or been asked to address) and added £25,000 as a further charge to W in respect of her costs of the appeal. Both parties appealed to the CA. King LJ, referring to *Piglowska* reiterated the limitations upon the permissible interference of an appellate court with the decision at first instance to cases where that decision was wrong and beyond the ambit within which reasonable disagreement is possible (especially where costs are out of control and will have a significant impact on what may otherwise have been the outcome). King LJ regretted that Judd J had not sought submissions on the making of a *Mesher* order and set out some of the many dicta identifying its disadvantages to which she might have been directed had she done so. King LJ observed that the *Mesher* order is "regarded by many as outdated". It is only rarely that its advantages will outweigh its disadvantages (including that it is antithetical to a clean break). In respect of costs, while Judd J had appeared in part to justify her order on the basis of H's domestic abuse, the Children Act judge had made no costs order and H's actions did not fall within s.25(2)(g) conduct within the FR proceedings, nor had W run conduct as an issue. Insofar as Judd J had relied on the domestic abuse this was impermissible. W argued that she was worse off as a result of the judge's order than she would be had a costs order been made (whereby no more than 70% of the costs would be likely awarded on assessment on the standard basis) and the order approximated to an indemnity costs order. However, King LJ, having reviewed

authority, noted the discretion of the judge to make an order which enabled H to meet his housing need, especially where his litigation conduct and the level of his costs was not criticised. While there is no specific rule requiring the first instance judge to carry out an analysis by reference to the principles applicable to costs orders, to so require would not be compatible with the wide discretion of the judge to determine the extent of a party's needs and the extent to which they should be met. However, if an order substantially in excess of the sum required to meet a party's assessed needs is sought in order to settle the outstanding costs (or debts referrable to costs) of that party, the judge should:

i) consider whether in any event the case is one in which consideration should be given as to the making of an order for costs under FPR 28(6) and (7) in particular by reference to FPR PD 28 para 4.4; and

ii) whilst not carrying out a full costs analysis, nevertheless have firmly in mind what the order which they propose to make by way of additional lump sum to meet a party's costs would represent if expressed in terms of an order for costs. To do this would act as a cross check of the fairness of the proposed order.

In the circumstances the order of Judge Robinson had not been outside his wide discretion and the appeal from Judd J was allowed and the charge removed.

Another case involving the consequences of incurring excessive costs was Cobb J's decision in ***Re Z (No 2) Schedule 1: Further legal costs funding order; further interim financial provision)*** **[2021] EWFC 72** which, while a Schedule 1 case is nevertheless of interest. It follows his earlier decision in the same case at [2020] EWFC 80. The case had now reached First Appointment stage but the costs were already nearly £500,000 and £130,000 would be spent in preparation for a private FDR. Cobb J expressed "disquiet". F was running the Millionaire's Defence and resisting replying to a questionnaire. Cobb J accepted that in the context of a Schedule 1 case (therefore not a sharing case) and in the interests of the overriding objective and proportionality, F did not need to provide more than details of his gross and net income over the previous 3 years. M was seeking a significant increase to maintenance provision. Z had recently been diagnosed with a heart condition for which surgery was awaited. The judge allowed a

temporary increase in nanny costs but rejected additional domestic cleaning costs. M sought additional legal costs provision. Mostyn J had set a budget for a welfare hearing before the President (which M lost) in June (less than 3 weeks before the hearing) of £80,000 and M had overspent by £52,088. M's solicitors were now seeking significant sums for the FDR and had further overspent. While Cobb J noted that lawyers are not charities, nor obliged to work on credit, the solicitors were not entitled to overspend on the budgets set by the court and assume the overspend would be retrospectively authorised. Cobb J had carefully assessed a budget which would be reasonable and proportionate to the circumstances of the case and expected the lawyers conscientiously to work within it. "Sadly, I sense that they have not tried very hard to do so." They had showed "insufficient restraint when accumulating their billable hours". He was not prepared for M's representation to be compromised but nor was he prepared to have his orders disregarded. He allowed M 2/3 of the overspend less 30% for a notional standard assessment. M's projected spend to the FDR would double the original estimate but was largely allowed because of the level of F's spending. The judge cut M's estimate for welfare hearings from £5.5k to £1.5K pcm with encouragement to mediate. He set a "marker" that a projected cost of £42,000 for a possible short welfare hearing "seems an excessive sum". M had repeatedly pressed for an interim sum of £25K to repay a loan from her father. Shortly before Cobb J adjudicated on this, she admitted she had deceived the court. There was no such loan. Cobb J declined to expose M to further satellite litigation in respect of perjury (he was not persuaded that a 'statement of truth' in a witness statement could be said to be "on oath" for the purposes of s.1 Perjury Act 1911 although they might fall within s.5 'false statements without oath'), but her credibility was materially damaged. The case perhaps epitomises the dysfunctionality of some family cases, but should stand as a marker for judicial disapprobation of incontinent cost building.

The complaint about costs is a recurrent refrain and arose again in the latest reported decision in ***Crowther v Crowther*** **[2021] EWFC 88** where W asserted the net assets were a little over £1.3m (the judge found them to be £738K) and the costs were £2.3m. Peel J commented that "The only beneficiaries of this nihilistic litigation have been the

specialist and high-quality lawyers. The main losers are probably the children ….” The case generates no new law but provides some examples of inferences drawn as to H’s income (but rejecting a finding of hidden assets), rejects allegations of (relevant) cohabitation, and identifies conduct both financial and in the litigation which results in adjustments. The judge was keen to make orders which would bring the ruinous litigation to a close.

David Salter sitting as a recorder delivered a judgment in ***W v H (Financial Remedies: Pensions)*** **[2021] EWFC B63** which contains a useful summary of applicable principles in standard FR cases. Although the case is largely fact specific it is a useful example of the approach to disputed findings as to cohabitation (including the application of the *Kimber v Kimber* [2000] criteria, and importantly the impact, if any, on the outcome of the case). It is also particularly useful on the subject of the application of the Pensions Advisory Group’s Guide to the Treatment of Pensions on Divorce published in July 2019 (the PAG Report). The judge considered the difficulties inherent in offsets, and especially the concept of deferred offsets (in this case the offset of a potential future receipt by W of an interest in her mother’s home against her entitlement to share in H’s pension) and decided the case upon equating pension incomes. The judge recognised the problem posed by moving target syndrome but noted (when counsel sought to question the award after the draft judgment was circulated) that no up-dated pension report had been sought and noted Moylan LJ’s comments in *Finch v Baker* [2021] that inevitably there will be delay between the date of the pension sharing order and its implementation. As a result, depending on its form, the order may well have a different effect to that assumed by the court. The judge observed “The message is clear: first, if parties wish to adduce an updated pension report prior to a final hearing, permission should be sought in advance of the final hearing, usually at the conclusion of an unsuccessful FDR appointment in accordance with FPR 2010, r 9.17(9) and, secondly, the parties should be advised of the impact of moving target syndrome generally and particularly between the making and implementation of a pension sharing order. This will be of particular relevance where the member is continuing to make contributions into a defined contribution pension”. Finally, there is useful content on the court assuming jurisdiction to make an order for child

maintenance where the child is cared for equally by each parent so that there is no 'non-resident parent' (see Regulation 50 of the Child Support Maintenance Calculation Regulations 2012). Although W received the child benefit the evidence established care was provided equally. The court therefore made an order calculated on a CMS basis but indexed to the CPI. The case was yet another example of bitterness generating excessive costs which compromised both parties' ability to rehouse as they would like.

In ***E v L* [2021] EWFC 60 (Fam)** Mostyn J rejected H's argument (based on *Sharp v Sharp* [2017]) that, in a short and childless marriage, W's FR claims should be reduced to meeting her (very) conservatively assessed needs. H was 66, W 61. There was a dispute over the length of cohabitation. W sought £5.5m as half her estimate of the matrimonial acquest. H offered £600,000. Joint costs were £900K. The judge found the overall assets to be £9.2m. In addition to the SJE, both parties adduced accountancy evidence. Mostyn J rejected childlessness as a valid consideration of whether there should be a departure from the application of the equal sharing principle. A marriage is a marriage. Moreover, only in very rare cases (another 'white leopard') would the shortness of a marriage represent a reason to depart from equal sharing of matrimonial property 'earned' during the marriage ('earned' being used to distinguish between money generated during a marriage, and assets brought into the marriage and 'matrimonialised', such as a home where, however, there may be grounds for unequal sharing). There was no logical reason to distinguish between accrual over a short and a long period. This is not to reject the concept that some assets may be excluded from the acquest when they represent, for instance, the fruits of a pre-relationship project (as in *Miller*), where they have not been 'matrimonialised' over a longer marriage, or non-family assets generated by one spouse alone during a short marriage when such assets have been kept separate and the spouses were both financially and independently active. Nevertheless, to avoid unacceptable discrimination, the Orwellian oxymoron of some contributions being more equal than others should be rejected and the exception to equal sharing should be confined to extremely rare cases. Turning to the evaluation of the acquest and the valuation of the company, the judge noted the judicially recognised fragility of company valuations, and while accepting that pure valuation theory required historic valuations to be assessed

without the hindsight of subsequent developments, nevertheless he concluded (from case law) that in financial remedy cases, to achieve a fair outcome and a 'broad analysis of fairness', it was necessary to have regard to actual subsequent events when assessing the value of the business at the outset of the cohabitation. To do otherwise would be unreal and a likely source of real injustice. As to when the clock stops for the purposes of calculating the acquest, convention and tradition dictate that, save in cases were there has been undue delay between separation and trial, the end date for calculation of the acquest should be the date of trial, especially where the assets were in place at separation and their value has shifted (save, presumably, *per* Thorpe LJ in *Cowan* where a party has recklessly dissipated assets in anticipation of the trial). In the instant case there would be equal sharing of the acquest from January 2016 (by which date, although W had not fully moved in, there had been "a committed sexual, emotional, physical and psychological, if somewhat itinerant, relationship") to trial (notwithstanding the separation in December 2019, H having traded with W's share from that date). The acquest was calculated by reference to the equity values of the company at the start and end of the period, being the enterprise value plus (only) the surplus assets. The current enterprise value, calculated by reference to future maintainable earnings, would be discounted for (i) the uncertainty induced by the pandemic, (ii) the likely insistence of H's business partner for a share in future projects, (iii) the substantial post separation endeavour of H which would be required were the enterprise value to be saleable, and (iv) the fact that future maintainable earnings would in part represent the fruit of H's personal earning capacity, skills and attributes which would be unlikely to be reproduced by a purchaser. This indefinable quality could not be monetised because it is impermissible and wrong to seek to place a capital value on H as a person (*Waggott*). The overall discount would be 45% which represented a subjective, broad, discretionary analysis of fairness by the judge. Allowing for tax the business value acquest was just over £3m. Overall the balancing figure for W was £1.515m on a clean break, giving her (although the judge said it was "barely relevant") 21% of the £9.2m assets. A dispute over chattels was remitted to a DJ to be heard on a s.24 discretionary, rather than proprietary, basis. Costs would depend on an analysis of compliance with the obligation to negotiate openly and reasonably but would also consider the (poor) conduct of both parties during the case.

There have been a couple of committal decisions to be noted. One was a decision of HHJ Gibbons at the Central Family Court: ***Dhillon v Sampuran*** **[2021] EWFC B49**. H had failed to pay the second instalment of over £200,00 being part of a lump sum under a consent order, despite repeatedly claiming the money was being or was about to be paid. By the consent order he had also secured the release of a protective order securing an ISA. He failed to attend hearings including the instant hearing. The judge noted the maximum sentence under a judgment summons was 6 weeks and reviewed authorities that suggested the sentence would depend on the sum due. However, she observed that £200,000 to one litigant might be as or more important as £2m to another. In this case H's conduct had been an aggravating factor. The sentence was 4 weeks imprisonment suspended for 14 days to allow H to comply. The other case was ***Haskell v Haskell*** **[2021] EWCA Civ 1295**. It was an appeal from an order of Moor J committing H to prison for 6 weeks unless he paid W £50,000. The order was made under section 5 of the Debtors Act 1869 and the judgment summons procedure in order 28 of the County Court Rules 1984, which remain in force. A judgment debtor can only be committed if the creditor proves to the criminal standard that they had at the date of payment specified by the judgment order, or have had since that date, the means to pay the sum in question, but have refused or neglected to pay that sum. The £50,000 was ordered by Mostyn J to be paid on 20.02.20 as a first instalment (of over £5.5m). H had told the court on 31.01.20 that he had the money in an account but subsequently claimed he did not. Moor J was satisfied beyond reasonable doubt that H had had the money on 31.01.20 and 'satisfied so that I am sure' he still had it on 20.02.20, and had since had the means to pay but had not paid. H appealed (*inter alia*) on the basis that W's oral evidence had been that she was unsure what sums H had paid (although her witness statements affirmed she had not been paid) and that there needed to be updating evidence to prove the sum due had not been paid. Underhill LJ rejected the appeal, finding that there is no rule that the only way in which a judge could be sure of that point was by explicit evidence given at the time of the committal hearing that the position had not changed since the statement in support of the original judgment summons. What was required would depend on all the circumstances of the case, including such inferences as it was proper

for the judge to draw from the evidence that he did hear, which might include an inference that, unless there were some reason to believe to the contrary, the original default was continuing.

The issue of how to approach allegations of fraudulent non-disclosure was addressed by Mostyn J in ***Cathcart v Owens*** [2021] EWFC 86. H sought to set aside a range of orders made in Schedule I proceedings in 2002, 2011, 2019 and 2020 on the basis that W had failed to disclose relevant events which vitiated those orders. His application (which related to W's allegedly fraudulent failure to disclose attempts to have children by IVF) was found to be wholly without merit (W was not obliged to disclose very preparatory steps which she had not pursued) and the relevance of the judgment lies in the judge's approach to allegations of fraud. Fraud, classically defined as wrongful deception intended to result in financial or personal gain, he said, only unravels an advantage which has been obtained by that very fraud. Further, the fraud has to be distinctly pleaded, and distinctly proved, by the person alleging it. With non-disclosure, it represents a conventional basis for setting aside an FR order, but not all non-disclosure is to be categorised as fraudulent. He emphasised, following dicta in *Jenkins v Livesey* [1985] that not every failure of frank and full disclosure (whether fraudulent or innocent) would justify a court in setting aside an order. "On the contrary, it will only be in cases when the absence of full and frank disclosure has led to the court making, either in contested proceedings or by consent, an order which is substantially different from the order which it would have made if such disclosure had taken place that a case for setting aside can possibly be made good." Mostyn J then addressed the question of where the burden of proof lay and having reviewed dicta that appeared to conflict, he concluded he was bound by Baroness Hale's observations in *Sharland v Sharland* [2016] that the initial burden remains on the party alleging it (A) to prove that the other (B) practised deception with a view to personal or financial advantage. But once that is proved it is then for B to prove both that a reasonable person would not have withdrawn his consent had he known about the concealed matters, and that the fraud was not materially causative of a seriously wrong order being made. He went on to observe that a burden of proof operates in the same way as a presumption. Where evidence is lacking, an applicable

burden of proof will not be discharged and there will arise a predetermined legal consequence namely that the proposition in question will be answered negatively. Equivalently, where evidence is lacking an applicable presumption will not be overreached and there will arise a predetermined legal consequence, namely that the proposition in question will be answered positively. The approach to the issue was therefore contained within three questions. Standing in the shoes of the court that made the impugned order, the later court asks first: "Did the respondent in the period leading up to the making of the order, practise a deception on the applicant with the intention of gaining a personal or financial advantage for herself?" If "yes" or "probably" (in the sense that it is more likely than not), then the court moves to the second question if the order was made by consent, otherwise to the third question. If the answer is "no" or "probably not", or if the applicant (who bears the burden of proof at this stage) has not adduced evidence sufficient to answer the question positively, then the set-aside application is dismissed. The second question is "Would a reasonable person have nonetheless agreed to this if he had known about the matters concealed?" If the answer on the available evidence is "yes" or "probably" then the court moves to the third question. If the answer is "no" or "probably not", or if the respondent (who now bears the burden of proof) has not adduced evidence sufficient to answer the question positively, then the order is set aside. The third question is: "Would the court have made a substantially different final order had it known about the matters concealed?" If the answer on the available evidence is "yes" or "probably", or if the respondent (who continues to bear the burden of proof) has not adduced evidence sufficient to answer the question negatively, then the order is set aside. If the answer is "no" or "probably not" then the set-aside application is dismissed.

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