Financial Remedies Update

Bethany Scarsbrook & Sophie Smith-Holland | St John's Chambers

Bethany Scarsbrook Sophie Smith-Holland

HHJ Richard Robinson has provided two pertinent judgments concerning pensions. In ***KM v CV*** **[2022] EWFC 174** a PSO over W's police pension(s) was deemed inappropriate. This was in circumstances where every £90 loss to the wife would only achieve a £10 monthly increase for the husband. Instead, where the court was focussed with meeting needs, W was ordered to pay H a lump sum of £10,000 by February 2025. Whilst a PAO was considered, it was ultimately deemed unnecessarily complicated and expensive in proportion to the amounts involved in the case. Periodical payments were similarly dismissed as inappropriate due to consequential reduction in benefits for the recipient. A lump sum was therefore deemed the appropriate order in all the circumstances.

In ***S v S (Conduct: Pensions)*** **[2022] EWFC 176** H was a former police sergeant currently serving a 9-year prison sentence. H had been convicted of rape against W, in addition to stalking and perverting the course of justice. In proceedings brought by H's Local Police and Crime Commissioner, it was decided that H's pension forfeiture would, in the normal course, have attracted the most significant level of forfeiture deduction allowed. Whilst this would have meant a deduction of 65% (the employers' contribution), it was ultimately decided that this would not be appropriate in this case due to W being the victim, meaning she would suffer further detriment if the pension was forfeited to such a high level. Instead, a permanent pension deduction of 1% was decided. W argued that H would be benefitting from his own misconduct if he were to receive any of the pension that would otherwise have been deducted by the LPCC. It was therefore argued as a point of public policy that H should only receive a maximum of half of the balance of 35%. The court recognised the public policy argument but concluded that it did not need to be applied rigidly, observing further that, "'the most significant level of forfeiture' does not automatically mean 65%". The court concluded that a PSO of 65% was sufficient to meet W's needs. Overall, W's award provided her with 85% of the capital (including non-matrimonial inheritance). This disparity was justified by W's needs and the impact of H's conduct, which was deemed to be a magnifying factor in line with previous authorities.

In ***SS v RS*** **[2023] EWFC 32 (Fam)** Sir Jonathan Cohen dismissed a conduct argument which H sought to frame as economic abuse under the *Domestic Abuse Act 2021*. A final financial remedy order between the parties had been made in 2019. H did not appear at that hearing. The court had ordered the FMH be transferred to W on her undertaking to use best endeavours to release H from the mortgage and to indemnify him in respect of any liability arising under it. H's appeal against that final order had already been dismissed in June 2019. The FMH had been transferred but W had been unable to secure H's release from the mortgage until shortly before the hearing. H accepted in light of his release that he was no longer seeking an order for sale of the FMH. However, H continued to seek: (i) for W to pay him £80,000 in 'compensation'; and (ii) the court to contact Woolwich BS regarding his credit record. H argued that he had suffered economic abuse as a victim of domestic abuse by virtue of being unable to take out a mortgage on another property due to remaining on the FMH mortgage, and by having to pay larger interest sums on loans due to poor credit rating due to W's failure to keep up with mortgage repayments (the factual premise

which was in dispute between the parties). W brought two cross-applications, including for a strike out of H's application on the basis of no legal merit. H's claim was dismissed as misconceived. No power exists under the *DAA 2021* in the way H sought to argue. H's application was struck out and costs ordered against him.

In ***YC v ZC* [2022] EWFC 137** HHJ Hess determined highly acrimonious litigation where W had spent extensively, particularly on legal fees. The parties' long marriage ended after W discovered H's 'burner' telephone and learned that H had been secretly visiting prostitutes on a regular basis. HHJ Hess observed that the parties and their legal teams had embarked on a relentless and destructive path of conduct allegations against each other. He reminded the parties of Peel J's comments in ***WC v HC* [2022] EWFC 22** that it was high time parties and lawyers moved away from the erroneous notion that painting each other in unfavourable terms will assist their own case. One allegation brought by W was against the business valuation. W did not challenge the SJE's methodology or conclusions, but argued that H had habitually 'skimmed' cash from the business for years, making the presentation of the business to both the SJE and HMRC hugely fraudulent. Whilst it was clear that the parties did use cash extensively during the marriage, including paying school fees in cash for some years, HHJ Hess did not find on the balance of probabilities that the unusual use of cash by the family fell into the category of dishonest tax evasion. In reply, H made allegations against W concerning £450,000 that she removed from the parties joint account. This transaction was made by W within 48 hours of her discovering the burner telephone. W gave evidence that H had told her he had sent £300,000 on prostitutes and invited her to take the same sum out of the joint account as compensation. When considering what W had done with the removed money, the court concluded that: all of the money had been spent and none was left or hidden secretly by W's family members; and W took a considerable sum in cash which was spend on luxuries and unnecessary purchases. Undoubtedly a large portion of that money was dissipated in the spirit of vengeance. However, in spite of his dissipation, the court observed that H continued to live a high lifestyle himself post-separation. He also had failed to pay W any maintenance post-separation, which was

Analysis of legal costs was considered separately by the court. In this instance, the court did judge that a sum of £200,000 was appropriate to be added-back on to W's side of the asset schedule to reflect her grossly disproportionate spending on legal fees... HHJ Hess gave helpful guidance for situations where one party has incurred much higher legal fees than the other

in contrast to the consent order previously made by Recorder Campbell KC. HHJ Hess therefore concluded that it would not be appropriate to make any add-back adjustments to the asset schedule in this case. Both parties had made poor decisions, and overall the fairest way to treat these was for them to broadly cancel each other out.

Analysis of legal costs was considered separately by the court. In this instance, the court did judge that a sum of £200,000 was appropriate to be added-back on to W's side of the asset schedule to reflect her grossly disproportionate spending on legal fees. While H had incurred legal fees of £159,044, W's total legal costs were almost three times higher at £463,331. HHJ Hess gave helpful guidance for situations where one party has incurred much higher legal fees than the other as follows:

i. where one party has incurred legal costs at a moderate and sensible level, and the other in a grossly disproportionate manner, it is unlikely to be fair to the former to simply include both debts in the court's asset schedule. This remains the case whether they are already paid or still owing;

ii. the court should be slow to let the disproportionate spender, and/or their representative, feel that there is no check on such expenditure. The proportionality of the spending should be checked against the context of the value of the financial dispute;

iii. in obvious cases, where any proper explanation for the costs is absent, the court may address the unfairness arising from the disparity by excluding a portion of unpaid costs and/

or adding back legal fees already paid; and

iv. while any such decision must be carried out with a careful thought to needs, a party might, in the right circumstances, expect to a receive an award which meets their needs at a lower level than might otherwise have been the case.

Conduct was similarly a key feature in ***CC v LC* [2023] EWFC 52**. This was a needs-based case where the FMH was the primary asset. It was noteworthy however due to H's persistent and determined failure to engage in the proceedings, even when faced with penal notices and committal proceedings. The parties married in 2009 and separated 10 years later. W was 42 and H 46 at the time of the hearing. There were three children of the marriage, aged 10, 8 and 5, all of whom had additional needs. The children were spending six nights per fortnight with H following Children Act proceedings. H worked as a journalist and W as a teacher (part-time).

The key issue was to determine the appropriate order to be made regarding the FMH. HHJ Wildblood KC ordered that the FMH should be transferred into W's sole name subject to a lump sum paid to H. The lump sum of £70,000 was reduced due to H's outstanding costs orders owed to W, meaning £64,500 was to be paid. The court agreed with W that the needs of the children were such that she should retain the FMH. The judge further agreed with W that to leave H with any further share of the FMH would not be appropriate. Not only was this not deemed to be required for H's needs, but W argued that maintaining such a connection between the parties would be utilised by H as a mechanism of control over her into the future.

The court thoroughly analysed income needs. It was clear that money was extremely tight for W and the children, even with the £1,062pcm maintenance that H paid to W. HHJ Wildblood KC agreed with W's argument that this sum should be converted into a global order, with £415pcm being for child maintenance and the remaining sum being allocated as spousal periodical payments. It was accepted that W was unable to increase her earning capacity for at least 6 years, and that the children might be dependent beyond their minority. The court therefore agreed with W that it was not possible to identify a time when W would be able to adjust to the end of maintenance payments without undue hardship. Accordingly, no income clean break was ordered.

H's conduct was carefully analysed. H's behaviour in this case was held to fall squarely into both the third and fourth categories of conduct set out by Mostyn J in ***OG v AG* [2020] EWFC 52**. The more structured approach of *OG v. AG* was considered alongside the more fluid approach taken in ***RR v CDS* [2020] EWCA Civ 1212**. In this instance, it was held that the approach taken by both authorities led to the same conclusion: Penalising H in costs for his non-disclosure would not reflect the extent of his misconduct and failure to engage. His failure to give full and frank disclosure led to inferences that he had more financial resources than disclosed and he wasis able to meet his needs regardless of the outcome of the proceedings. More broadly, it was held that taking H's conduct into account alongside all the other *s.25(2) MCA 1973* factors, the overall outcome ordered was fair.

***Goddard-Watts v. Goddard-Watts* [2023] EWCA Civ 115** concerned W's appeal in respect of Sir Jonathan Cohen's decision in January 2022, dealt with in an earlier issue. Readers will remember that the parties had settled matters by consent in 2010 but on two separate occasions thereafter, final orders had been set aside because H had been found to have misrepresented assets and failed to make appropriate disclosure of likely significant capital accumulations in the foreseeable future.

"*The Kingdon approach*" had been used – the Judge relied upon the determination of Moylan J in the first rehearing of W's financial remedy application in 2016, that she had received an appropriate share of H's company known as 'CBA' in 2010.

At the root of W's appeal was the submission that the judge failed to accord due weight to H's fraud when considering the approach to take in determining her restored financial relief application; see *Takhar v Gracefield Developments* [2019] UKSC 13. Consequently, in that he wrongly isolated W's interest in CBA by reference to the tainted orders made in 2010 and 2016, H benefitted from the fraud he had

perpetrated, since W was precluded from having her claim fully and fairly determined in 2022 (or previously) based on the actual and real-time financial landscape, even if subject to consideration of post-separation accrual.

Macur LJ concluded that H's fraudulent non-disclosure in 2016 when seen in the context of his previous fraudulent non-disclosure was so far reaching that it positively required the judge to consider "the entire financial landscape" completely anew [See *Kingdon* [36]). The judge had been wrong to determine W's applicant by segregation of the capital award agreed in 2010 and 2016.

In ***Cummings v. Fawn* [2023] EWHC 830 (Fam)**, the parties had reached a *Xydhias* agreement. It provided that W would retain £33,750 which had been paid by H under a LSPO, but which had not been spent; receive £173,240 being the retained portion of the net proceeds of sale of a jointly owned investment property; and be paid two lump sums totalling £362,000. Less than 2 weeks later, she repudiated the agreement and asked the judge for a hearing to determine whether it was fair. She said it did not meet her needs and material non-disclosure should negate the agreement completely. No consent order was ever made by the court.

The Judge held that the agreement was not negated by H's non-disclosure; that it was fair; and that it should be made an order of the court. W's appeal came before Mostyn J. She was successful on grounds 4 (failure to assess how her financial needs could be met through the agreement, and failure to take into account her liabilities) and 1 (approach towards H's non-disclosure of inheritance).

In respect of ground 4, the decision was wrong because the judge did not make findings as to which of W's debts were more likely than not to require repayment, the sum that W would reasonably need for alternative accommodation and the sum she could raise by way of mortgage.

In respect of ground 1, Mostyn J considered paras 32 and 33 of *Sharland v Sharland* [2016] AC 871 and concluded that the principles apply equally to a *Xydhias* agreement (or for that matter an *Edgar* separation agreement) which had not been converted into a consent order by the time that the balloon went up.

Mostyn J held that the Judge's reasons did not come close to satisfying the stringent test in *Sharland*, which should be applied rigorously where non-disclosure is proved. He warned that "*Litigants must understand that if they practise non-disclosure then the almost invariable consequence will be a set-aside with costs. The exceptions should be construed very narrowly indeed*". He gave guidance about what the court should do when 1) dealing with an application to set aside a consent order (or an application that a draft consent order should be rejected) on the ground of fraudulent non-disclosure and 2) dealing with an application to set aside a judgment reached after a fully contested hearing on the ground of non-disclosure.

H had not come close to discharging the onus on him to show that a reasonable person in the position of W, but in possession of full disclosure of the size of the husband's inheritance, would have nonetheless made the same agreement. In light of *Goddard-Watts*, it was held that the retrial required a hearing of all issues *de novo*.

In ***HP v. AP* [2023] EWFC 49** HHJ Willans considered an application to set aside an agreement to compromise financial remedy proceedings on the basis of non-disclosure. The FMH was to be transferred to W subject to a charge in favour of H. W asserted that had there been full disclosure, she would not have entered into the agreement.

There had been a dispute about the parties' beneficial interests in a property and, whether H's father had transferred his beneficial interest over to H. H said that he held the legal title as a bare trustee with his father being the absolute beneficial owner with a right to demand return of the legal title. H's father was joined to the proceedings and agreed with H. They said that the legal title had been transferred to allow H to borrow on the property so as to invest in additional property or a home in which the family could live. W disagreed and said that beneficial interests followed the legal interest.

At a round table meeting W had indicated she

would not be pursuing an interest in the property and so the meeting proceeded on the basis of a negotiation of the agreed matrimonial assets. An agreement was reached and approved by the court.

W then found paperwork about two loans H had taken out, which were secured against the property a number of years before the FMH was purchased. Those loans were not disclosed at the time of the agreement. £6,000 from one of the loans had been paid into H's account. W said this was for his personal benefit and indicated he owned the property fully. W also asserted that H had not disclosed or referenced the loans because they undermined the case he was putting in the proceedings as to why the legal title was transferred to him. W said she was prevented from probing further which would have likely caused her to take a different approach.

The judge did not consider that the documents now disclosed proved a case of material non-disclosure – rather they provided an evidential base of uncertain value for W to further promote the argument she was making in the proceedings. The case was distinguished from *Kingdon* and *Goddard-Watts*.

The court did not consider there was a duty on H to provide disclosure of a historic loan taken out 20 years ago, and more than a decade before the proceedings began. The judge was not satisfied that the evidence was the 'smoking gun' W thought it was and even taken at its highest, it would not have had a material impact on the outcome. The set aside application was dismissed.

G v. G (Confiscation Order: Conduct) **[2023] EWFC 16** concerned a final hearing in financial remedy proceedings. The CPS were intervenors. There were enforcement proceedings in respect of a confiscation order made pursuant to the Proceeds of Crime Act 2002.

The court did not consider there was a duty on H to provide disclosure of a historic loan taken out 20 years ago, and more than a decade before the proceedings began. The judge was not satisfied that the evidence was the 'smoking gun' W thought it was

H was a doctor. He was suspended from work and later convicted of fraud in relation to representations he made to obtain a post in a hospital. He was sentenced to 6 years imprisonment. The parties separated after his release.

Crucial to the case were three properties: BR (net equity £416,070), QG (net equity £1.23m) and a Scottish property worth £521,375. The CPS accepted that W had the majority share in the FMH (68%) as her parents had made a significant contribution to the purchase price. H's NHS pension had a CTV of £521,374.

There were factual issues to be determined in respect of QG and the Scottish property. QG was owned by H and his mother in shares which were disputed – either 50/50 or 33.33% to H and 66.66% to his mother. H said that it had originally been owned by his parents and himself as tenants in common and when his father died, his share passed to his mother on intestacy. It had, in any event, been agreed that the property could be sold and the proceeds held against the decision in the confiscation enforcement proceedings. The Crown Court had found that H had a 50% legal and beneficial interest in the property.

H had transferred his share of the Scottish property to his mother after the parties' separation, but before the petition was issued. W contended that H had a half share in the property, having been the sole legal owner until August 2021.

W sought the transfer of the former matrimonial home to her, a lump sum of £266,890 and for H to pay the mortgage, £328,060 in all, and the costs orders made so far of £2,557.5 in all. She sought 50% of H's pension and nominal spousal maintenance until the youngest child ceased tertiary education.

The CPS wanted the Confiscation Order to be paid. The total due was £411,983.60. The judge held that because of this, there was no scope for a lump sum order and if he were to make an order which transferred QG

or had the effect of preventing it being applied to the confiscation order, there was a risk of H being ordered to return to prison.

When considering the ownership of QG, the judge decided that neither POCA nor the MCA took priority, that the court must consider the s.25 factors and was not bound by the decisions of the Crown Court. The judge found that H's interest in QG was 33.33% (£336,982) which was subsumed by the confiscation debt.

H did have a share in the Scottish property before he transferred it to his mother, but an application had not been made to set aside the transfer and H's mother was not before the court, so the judge could not make orders binding on her. He did not find that H was the beneficial owner.

The matrimonial pot was therefore limited to the FMH and H's pension. The judge held that this wasis clearly a case in which H's conduct would be inequitable to disregard. He transferred the FMH to W and divided H's pension unequally so that W could benefit from a lump sum payment to pay off a substantial part of the mortgage when she was 55, without giving up the benefits of the pension.

In ***NO v. PQ*** **[2023] EWFC 36**, Recorder R Taylor endorsed the recent approach and helpful summary of Peel J in ***HD v. WB*** **[2023] EWFC 2** as to how the court should treat nuptial agreements. In this case the parties separated in or around 2018 after a long marriage. H had worked in the restaurant industry throughout the marriage. This business had been conducted successfully through a limited company ('TLF Ltd') for 25 years during the marriage. The restaurant 'TL' had been successful and TLF Ltd also took a lease on a second set of premises, which operated a bakery. H had given a personal guarantee on the lease for these premises. In 2017, H sold TL, achieving £1.3m net. By the time of the parties' separation the remaining funds from the sale were c.£600,000. It was agreed that the bakery would close, and a new high-end restaurant would be developed at those premises. From the point of separation, W was clear that she did not wish to be in business with H anymore. The litigation in this case arose from the parties' dispute as to what was, or was not, agreed between them at this point in time.

W argued her case on two alternative bases: firstly that the parties had agreed H would take the remaining funds from the TL sale in addition to his pension (£600,000 and £50,000 respectively), while W kept the FMH with equity of c.£800,000; secondly and in the alternative, that the parties agreed H's investment in his new restaurant business would come 'out of his side' of the parties' financial separation settlement. H argued that there was no agreement, or that if there was it was only that H would establish a new restaurant, make it successful and then consider what would be fair financially between the parties in 2026 when the current mortgage on the FMH was due to end. The court ultimately accepted W's case as set out in the alternative. Contrary to intentions, H's new business venture was ultimately unsuccessful (although this was not found to be due to lack of care or diligence by H as W sought to argue). Furthermore, when the new restaurant failed in 2021, there were years remaining on the lease term. H was being pursued by the landlord through the County Court for his personal guarantee in respect of the same. The sum being claimed was £223,876. The court found that whilst that lease may have been marital in nature when it started, any matrimonial character was lost at the start of 2019 when H began to pursue his new restaurant project alone post-separation. H invested heavily and the lease was a personal liability to him and not secured against the FMH.

At the time that the new restaurant business failed, H had invested c.£776,000 in the venture. Were W to leave the marriage with all the remaining assets (c.£625,500), these would amount to less than this sum already received and used by H. It was clear that the parties' had made an informal agreement, with clear intentions, then acting on the same. H traded with and risked the money from his share of that settlement agreement. The approach of Munby J (as he then was) LH in ***H v H (Financial Relief)*** **[2010] EWHC 158 (Fam)** was held to have force: in that case it was held that if a unilateral division of the assets was objectively fair, there was no reason to go behind it, and provided that the original division was fair, the parties should each bear the consequences of any subsequent changes in their respective shares, good or bad. Indeed, the judge felt that there was perhaps more magnetic force in this case, given that the division was by agreement

rather than a unilateral division of the assets. Having made this determination regarding the parties' nuptial agreement, the court went on to consider whether any order should be made to alleviate H's predicament of real need. The Recorder concluded against making such an order. This was because: (i) any sum awarded to H would in any event be absorbed by H's litigation with the landlord regarding unpaid rent, meaning it was not possible to assist H in a practical sense; and (ii) the court felt on balance H's evidence suggested a preference for capital to start another business, rather than to put a roof over his head. H had a partner, who was earning an income and was mother to his two young children. It was found that despite H's age, he would be able to obtain some work.

In ***MN v. AN* [2023] EWHC 613 Fam**, Moor J heard cross applications: W applied for the full range of financial remedies and H issued a Notice to Show Cause why the application for financial remedies should not be dealt with in the terms of the Pre-Nuptial Agreement.

The parties took legal advice and made proposals before agreeing between them that W would get £500k for every year married (to a maximum of £12.5m on the 25th anniversary) and half the value of the London Property after eight years or following the birth of children. In the alternative, W would get 50% of the increase in H's assets, if that was greater, but with a cap of 42% of H's overall wealth. On arrival of children, there would be maintenance of £60k p.a. per child, plus school fees and medical expenses. The agreement would cease to operate after 25 years.

The agreement was executed by each party. It was recited that each was to retain their separate property accumulated before they met. Each had given full and frank disclosure of their resources: H had £32.5m and W had £62k. They each had independent legal advice and it said that they intended it to be legally binding.

When they separated, W argued that the PNA was unfair – she had been under undue pressure and it did not meet her needs. H said it provided her, now, with £11,750,000 (£7m as a *Duxbury* fund and £4.75m for housing).

The agreement had been reached before *Radmacher* but Moor J did not consider this a vitiating factor. Further, he held that W was under pressure but that was not enough – it needed to be undue pressure. He found no vitiating factor and said: "*Litigants must realise that it is a significant step to instruct top lawyers to prepare a pre-nuptial agreement prior to marriage. It is highly likely they will be held to these agreements in the absence of something pretty fundamental that vitiates the agreement*"

Moor J concluded that the PNA provided a reasonable level of provision for W's housing and income needs.

A further, final, judgment is out in the long running case of ***Xanthopoulos v. Rakshina (citation*** [2023] EWFC 50), described by Sir Jonathan Cohen as "*…some of the most costly and destructive litigation imaginable*". Total costs of £9m had been incurred in litigation about jurisdiction, children and money, all paid for by W. H had been represented by 7 firms of solicitors, 12 KCs and an array of juniors. There had been well in excess of 60 hearings in Russia and England, and Sir Jonathan had himself seen the parties in court on 40-50 different days.

Thejudge had refused H's earlier application to adjourn but made adjustments to ensure he would have a fair trial.

On the first day of the final hearing in H's Part III claim, leading counsel said that whilst not completely without instructions, she and H's whole legal team were unable to discharge their professional obligations and had to withdraw. H knew that this request would be made, but did not attend the hearing. The application was determined in his absence.

The court considered evidence about a pre-nuptial agreement. It set out that each party would keep what was theirs at the time of the agreement and in the future. H did not take issue with its validity.

W's mother gave her £12.7m in 2012-2014 for her granddaughter's education and future. W had left this in an account, untouched until late 2021 when she had exhausted her other savings. The court accepted

that the funds should be treated as intended for the ultimate benefit of the children without there being any prescription that they must be so used.

W bought a property for £6.25m paid for using £3m from her brother, £2m from her mother and the rest paid for from savings. She later bought 2 flats in the neighbouring property. The money came from her brother and the court had previously determined that W held the property on trust for her brother.

W's assets exclusive of her company interest were £12.9m plus her jewellery. H had no assets of any significance. Regarding W's business assets, Cohen J had to consider the true beneficial ownership of the shares and the extent of any matrimonial element. He concluded that W held her shares on behalf of her father and brother and any matrimonial element was minimal. On the face of it, the 25% interest was worth, on a net asset basis, some £400m but it was not regarded as an asset available for W to realise.

H had not earned anything since 2008. Cohen J had to consider his earning capacity. He agreed with W that the most obvious and/or likely course for H to follow was some form of property venture. It would however take H some time before he could properly exercise his earning potential. Medical evidence suggested that H needed to engage in psychiatric and psychological treatment.

As for H's housing need, H sought a £5m property, £3m to purchase a second home in Greece and £500k for furnishing, i.e. £8.5m. Cohen J however found it was highly unlikely that H would make his future in England. W had produced particulars for properties in H's chosen Athens suburb. The properties had 3-bedrooms at a price of between €500-560k.

Cohen J found that €600k with €60k for furnishing was appropriate. H was entitled to have occupation of the property until he no longer needed it. Maintenance orders were made for c.4 years with £75k p.a. in the first year to include costs of medical treatment and relocation, reducing to £60k thereafter.

A further, final, judgment is out in the long running case of Xanthopoulos v. Rakshina (citation [2023] EWFC 50), described by Cohen J as "*…some of the most costly and destructive litigation imaginable*".

After three previous reported judgments, the final substantive decision in the Schedule 1 case ***X v Y, (Re Z (No. 4)) (Schedule 1 award)*** **[2023] EWFC 25** has been handed down by Cobb J. By the time of the final hearing, F had ceased to instruct a legal team and declined to attend the final hearing in person. In light of this, Cobb J gave a full and detailed judgment, setting out the authorities and all his considerations clearly and in full. (This was primarily for F's benefit in light of his absence and lack of representation at the hearing). The most pertinent conclusions to note are as follows:

i. Despite M mother having misled the court on previous two prior occasions, a Schedule 1 award is for the benefit of the child. Cobb J was therefore conscious not to express his disapproval of M's conduct by any reduction in award that would compromise the child.

ii. M sought a sum of £174,372pa for HECSA. This was reduced by the court, who awarded her £148,250 per annum on an index linked basis. The approach taken was to apply a broad 15% discount across the board to M's claim, this being in keeping with the broad-brush approach recently advocated by Mostyn J in ***Collardeau-Fuchs*** **[2022] EWFC 135.**

iii. While the court did consider the question of award capitalisation to circumvent any potential enforcement issues, it ultimately decided against building capitalisation into the order at this stage. Mostyn J's view of such capitalised maintenance being a "rare bird" as in ***AZ v FM*** **[2021] EWFC 2** was reinforced.

iv. Cobb J awarded a sum to settle M's debts, save for a sum of c.£72,000 sought to pay to M's former solicitors. This was refused on the basis that the court had criticised the manner in which the firm had ignored the specific terms of his previous legal

services order, and incurred costs beyond those allowed. In ***Re Z (No. 2)*** **[2021] EWFC 72**, Cobb J had concluded that the firm was not entitled to assume the overspend would be retrospectively authorised. Accordingly, he was unwilling to lay this cost on F at this later stage in the proceedings.

In ***EL v. ML*** **[2023] EWFC 43**, the proceedings had finished in January 2019 at a final hearing before DDJ Todd. The judgment carefully analysed the sums, in terms of income and capital, which H was likely to receive in the future from SS Company. DDJ Todd took the view H may well in due course receive significant capital payments on his future departure and would also probably receive ongoing sums from various 'Carried Interests'. The Judge noted that H's basic salary of £250k p.a. gross was likely to continue plus an ongoing annual bonus (which had recently been £200k). The order was made on the basis of these assumptions. It distributed fairly limited amounts of the then existing capital and then made provision for future payments from H.

H undertook to pay:

i. 25% of the net sums received from capital payments received by him (within certain parameters) on his leaving SS company;

ii. 25% of the net sums received from certain defined 'Carried Interests';

iii. substantive global periodical payments until the death of either party, W's remarriage, further order or until their child ceased full-time education up to first degree; and

iv. further substantive periodical payments calculated by reference to his annual bonus payments and child PPs calculated by reference to the whole of the school fees until they left school.

Unfortunately, H did not get the expected bonuses in the period that followed the judgment and in May 2020 he was "asked to leave" the SS company. He had been unemployed since and stopped paying the PPs. W applied to enforce the arrears. H then applied to vary the income provisions of the 2019 order.

In 2021, as the trial approached, the parties' solicitors had discussions which led to W withdrawing her enforcement application. The spousal PPs order was varied to a nominal rate of payment and the child PPs were discharged. The capital parts of the order remained. W's solicitor was plainly concerned that W was unlikely to succeed and might be at risk on costs. The consent order was filed, but without the Forms D81. The court approved the order.

In 2022 W made an application for variation/capitalisation of the PPs order. In conference, counsel advised her to withdraw her application, considering that it was the wrong time. W followed this advice.

W then took advice from a new solicitor. He expended considerable energy trying to overturn the 2021 consent order and contemplated a potential negligence claim against W's previous legal team. HHJ Hess stated that the applications/submissions/actions pursued by W's solicitor since August 2022 "*involved an extraordinarily high degree of ill judgment*". The application started as a set aside and ended up being an appeal out of time. H had incurred further legal costs in response to those steps of c.£59,935.

Though HHJ Hess agreed with W's contention that a D81 should really have been filed, he dismissed the appeal as being totally without merit.

DR v. UG **2023 EWFC 68** was a decision of Moor J, applying the case law on special contributions and post-separation endeavour.

H had been a board member and the "driving force" behind a company which was a world leading manufacturer of a medical product. H had been able to participate in a management buyout (MBO) in 2017. H got nearly 70% of the shares in the company and had virtually complete control over the direction of the business.

The SJE valued H's shareholding in early 2021. There were then some difficulties with the product but ultimately the company overcame them and the value increased. H said it was "new strategies" since

separation that had led to the value of his interest rising so much from the SJE valuation to the sale in August 2022.

Moor J held that none of the three tests set out in *Work v Gray* were satisfied in respect of special contribution and in respect of post-separation endeavour, some of the situations where post-separation endeavour might be a good reason to depart from equality did not apply. He said: "*There is no more to do to "harvest" the asset, as it has already been sold. There is no element of earn-out or lock in as, unlike some of the trading company executives, the Husband is no longer employed there. Third, there is no question that the Wife has already been bought out*'.. There were 2 potential reasons remaining: undue delay or development of a truly new venture. The issue of delay was not really pressed. Moor J did not consider there was a truly new venture H had developed since the breakdown of the marriage and the other three areas in which significant changes were made to the trading company were all conceived during the marriage.

Moor J considered that the argument that H was trading W's undivided share was relevant. At the time of the MBO, their FMH had been charged to assist with the finance for the share purchase. W thought everything they had was at stake. They were sharing the risk then and this became very real in 2021 when the company was in difficulties. There had been no ring-fencing of W's half-share at the date of separation (£16.5m) and the fact that H brought in consultants to avert disaster should not enhance his share. The business as sold was not a new venture. It remained first and foremost a producer of the product and so, the assets of the parties were divided equally.

In ***Bogolyubova v. Bogolyubov & Ors* [2023] EWCA Civ 547** the estimation of H's assets had varied significantly, with an approximation of £3.8bn at the time of completing the D81. The majority of H's wealth was held in Ukraine and therefore impossible to value accurately due to the current conflict, but he also owned properties in London totalling £121m.

Following their separation, the parties had terminated their pre-nuptial agreement and replaced the same with a settlement agreement. This made provision for W to receive a minimum of £95m. The parties applied for their settlement agreement to be approved as a consent order settling their financial remedy claims. At the time of the application, proceedings by PrivatBank were pending against H in the Chancery Division for alleged fraud (a 13-week trial date was set for June 2023). If PrivatBank succeeded substantially in its action, the consequential damages order would essentially reduce H's assets to nil, 'wiping him out'. A worldwide freezing order had already been obtained by PrivatBank against H. There was a 'conditionality clause' within the parties' agreement, which stated that the consent order could not be implemented unless and until the worldwide freezing order was varied or discharged.

After W and H applied for the agreement to be made into a consent order, PrivatBank applied for a stay of the financial relief proceedings pending outcome of their fraud claim against H. They further applied for specific disclosure. Peel J joined PrivatBank for the purpose of hearing submissions before discharging them as a party. The application for disclosure was refused. In response to H and W's application Peel J refused to approve their proposed consent order, and he instead adjourned the financial remedy proceedings.

Whilst the Grounds on Appeal were discursive and cited under several heads, the key question was whether the judge fell into error in declining to make an order by consent where all parties acknowledged that, had the financial remedy proceedings been contested, they would have been inevitably adjourned in the circumstances facing H.

S33A MCA 1973 gives the court a statutory power to refuse to make an order solely on the D81 where they have reason to think that there are other circumstances into which they ought to inquire. In this case, the judge was right to conclude that there were such circumstances into which he should inquire: i.e. the extent of net assets available upon conclusion of the PrivatBank Litigation.

The Court of Appeal did not accept that by taking this course of action PrivatBank had been given priority claim status. It was simply that only after the fraud trial would the court know if there would be any assets left.

Only at that point could the court decide, in analogy to the principles in ***CPS v Richards and Richards* [2006] EWCA Civ 849** and ***Stodgell v Stodgell* [2009] EWCA Civ 243**, whether to exercise its discretion and approve the parties' settlement agreement as a consent order or not.

Unger and another v Ul-Hasan (deceased) and another [2023] UKSC 22

Nafisa Hasan ("the wife") and Mahmud Ul-Hasan ("the husband") married in 1981. In 2012 in Pakistan the husband obtained a divorce. The wife applied to the courts in England and Wales for financial relief under section 12(1) of the Matrimonial and Family Proceedings Act 1984 ("the 1984 Act") on the basis that the divorce was an overseas divorce recognised as valid in England and Wales. On her application under the 1984 Act, the court in England and Wales was empowered to make any of the orders which it could make under the Matrimonial Causes Act 1973 ("the 1973 Act") if a decree of divorce had been granted in England and Wales.

The husband died before the final determination of the wife's application. Nonetheless, the wife wished to pursue her claim for financial relief against the husband's estate. In the High Court, Mostyn J considered that he was bound by the prior decision of the Court of Appeal in *Sugden v Sugden* [1957] P 120, but would otherwise have held that the wife could continue her claim against the estate of the deceased husband on the basis that the wife's unadjudicated claim for financial relief was a cause of action vested in her and subsisting against the husband's estate under section 1(1) of the Law Reform (Miscellaneous Provisions) Act 1934 ("the 1934 Act"). He considered that the Court of Appeal authority was incorrect but was binding on him so that he was compelled to and did dismiss the wife's claim against the estate of the husband.

Mostyn J granted a "leapfrog" certificate enabling an application to be made for leave to appeal directly from the High Court to the Supreme Court and this court granted that application.

Before this appeal was heard, the wife also died. The appellants before the Supreme Court were the personal representatives of the wife's estate and the second respondent was the executor of the husband's estate.

At the time of the application, proceedings by PrivatBank were pending against H in the Chancery Division for alleged fraud (a 13-week trial date was set for June 2023). If PrivatBank succeeded substantially in its action, the consequential damages order would essentially reduce H's assets to nil, '*wiping him out*'.

There were two issues before the Supreme Court.

The first was whether the rights under the 1984 Act read with the 1973 Act were personal rights which could only be adjudicated between living parties so that, on the death of the husband, the wife could not pursue her claim for financial relief against the husband's estate.

The second was whether a claim for financial relief under the 1984 Act is a cause of action which survives against the estate of a deceased spouse under section 1(1) of the 1934 Act.

The Supreme Court unanimously dismissed the appeal.

Lord Stephens gave the lead judgment, with which Lord Hodge, Lord Hamblen and Lord Burrows agreed. Lord Stephens concluded that the true construction of the 1984 Act read with the 1973 Act is that, when a party to an application under Part III of the 1984 Act dies, further proceedings cannot be taken. To allow proceedings to continue after the death of a party to the marriage would require a major reform to the law, which was for Parliament and not the court.

Lord Leggatt gave a concurring judgment, with which Lord Hodge, Lord Hamblen and Lord Burrows agree. Lord Leggatt added observations about the defect in the law which Mostyn J's judgment had exposed.