Financial Remedies Update

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There are significant updates from both new authorities and amended procedural rules in this quarter. Of highest importance are the changes to the Family Procedural Rules which came into force on 29 April 2024. These amendments affect both Part 3, Part 28 and the Pre-Action Protocol under PD9A. The previous limitation as set out under the last formulation of FPR r.3.4(1)(b) has been removed. The court no longer requires the parties agreement to adjourn proceedings for NCDR. Pursuant to the new FPR r.3.4(1A), where the timetable in proceedings allows, the court should encourage NCDR between the parties. The court may make such directions on an application by either party, or on its own initiative. Whilst the changes stop short of mandatory NCDR, the court has a duty to consider whether NCDR is appropriate throughout proceedings (PD3A, Para 10A). The court will seek the parties' views on NCDR as a mechanism to resolving the outstanding dispute between them, and indeed a new Form FM5 is now required so that the parties views on such alternatives are clearly set out on an open basis (PD3A, Para 10B and 10C). In tandem, FPR r.28.3(7) has been amended so that any failure without good reason to engage in NCDR is justification for the court to consider departing from the '*no order as to costs*' starting point.

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The seriousness of intent behind these changes was underlined when, less than one month later in ***NA v LA* [2024] EWFC 113**, proceedings were stayed for NCDR to be explored. This was ordered despite the opposition of one party. Nicholas Allen KC sat as a Deputy High Court Judge on a return date hearing when this determination was made. The substantive applications before the court at the return date hearing were: (i) ex parte orders pursuant to FLA 1996; and (ii) an interim order under FPR r.20.2(1)(c). At the hearing the parties undertook significant negotiations. The court being presented with agreed draft orders to: (i) dismiss the occupation order; replace the non-molestation order with undertakings; (ii) compromise W's (unissued) MPS and LSPO applications; and (iii) the FMH to be transferred into W's sole name and thereafter present security to be discharged. Upon approving the three draft orders, the court raised staying proceedings of its own initiative for NCDR to be attempted. H endorsed the suggestion. W opposed. W argued that such a stay would be premature, arguing that sworn financial disclosure from H was necessary in the first instance. The court observed that there was nothing in the circumstances of this case that rendered it particularly unusual, and that despite it being a '*big money*' case, it did not appear to be legally complex. The court observed that: it has a duty to consider NCDR (FPR r.3.3(1)); there is no need for financial disclosure to be given prior to the parties engaging in NCDR, and in any event most NCDR will almost invariably provide for such

disclosure as an inherent part of the exercise, and; whilst it may be the case that some matters have an urgent element that warrants a MIAM exemption or '*rules out*' NCDR at the outset, once that urgent component has been addressed NCDR should still be considered. The court ordered that the financial remedy proceedings be stayed with immediate effect, and therefore no First Appointment was to be listed. Under FPR r.3.4(3) the parties were to write to the court after 6 weeks to detail what engagement (if any) there had been with NCDR, whether any issues had been resolved, and proposals for how to progress matters forward.

***X v Y (Financial Remedy: Non-Court Dispute Resolution)* [2024] EWHC 358 (Fam)** was a judgment of Knowles J handed down on 8th March 2024 and therefore before the new rules came into force. In this case the parties had agreed to try NCDR (for the first time) prior to a final hearing listed in June 2024. There were also contested Children Act proceedings due to be heard in late March 2024. The court noted that the asset base available for distribution between the parties was in the region of £27-29m. The total legal costs to the end of final hearing in the financial remedy proceedings would be £1.1m. On a conservative estimate the legal costs in the Children Act dispute would total £300,000. Knowles J observed that globally the combined disputes would cost the parties c.5% of the available assets. She described the parties failure to attempt NCDR up to this point as utterly unfathomable. She observed that had the new rules been in place at the time of this judgment, then the facts of this case would have justified an adjournment to encourage the parties to engage in NCDR. She warned that to assume the civil decision of Churchill v. Merthyr Tydfil County Borough Council & Ors [2023] EWCA Civ 1416 is of limited relevant to family proceedings would be unwise, particularly as the active case management powers under the CPR mirror those under the FPR almost word for word.

In ***TY v XA* [2024] EWFC 96** Moor J considered a second application by H to set aside leave pursuant to Part III, MFPA 1984. In the first application,

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which was heard prior to the UKSC determination in *Potanin v Potanina* [2024] UKSC 3, Moor J had refused to set aside leave on the basis that there was no '*knock out blow*'. That test having been removed, a second application now fell to be considered.

H had been born in Austria. He had been living in London for the past three years. W was born in France. She moved to live in London with the two children of the marriage a little under a year previously. Two days before marrying, the parties executed an Austrian PNA. Throughout the marriage the parties spent time in Austria, Germany and Cyprus. W argued they spent a lot of time in London from 2013-2014. This was disputed by H. From 2016 onwards the parties lived in Germany. They separated in October 2018 before either party relocated to London. When W first brought her application without notice she estimated H's worth to be in the region of £60-100m. At the time of this hearing after Form E disclosure, H's net assets were in fact estimated at £29.49m.

H argued two specific grounds to demonstrate that W's Part III Application had no reasonable prospect of success: (i) that the English court is not permitted to top up the provision made in Germany by virtue of the Maintenance Regulation; and (ii) that W's factual allegations were fanciful.

When considering the legal landscape Post-Potanin,

Moor J observed that:

i. To put the guidance of Lord Leggatt another way would be to say that an application for leave should only fail if it is of insufficient merit to avoid summary dismissal. i.e. the court should perform a reverse summary judgment. The correct threshold test is whether an application can demonstrate a real prospect of success. However, the court must be wary to prevent any leave or set-aside hearing from becoming a proxy final hearing.

ii. A refusal of leave to apply will only happen where the court concludes that even if an applicant successfully proved all the disputed facts, the claim would be bound to fail.

The court considered the s.16(2) factors at length. As the statute does not restrict consideration of the parties connection to the jurisdiction '*during the marriage*', the connection of the parties can legitimately be considered up to the present day post-Potanin. However, the connection to the jurisdiction during the marriage was very limited indeed. W's case regarding the connection during the marriage alone would not have come close to satisfying the test for leave. However the current position of the parties was very different. H had been habitually resident for three years, W and the children almost one. It seemed likely they would all remain for the foreseeable future. Moor J concluded that this was both relevant and important. Whilst the parties had a far greater connection to Germany during the marriage, any German association now was non-existent. Neither party lived in Germany nor was a German national. It was not even clear at the time of the hearing whether Germany would have jurisdiction any longer. It was undeniable that W's award was minimal. She received her rent until 2028 and modest maintenance until 2024. She received no capital award at all save for retaining her own inheritance. In contrast, H did now own property in England. Whilst Moor J was clearly wary of promoting '*divorce tourism*', he was clear that the criteria set down in s.16(2) did fall in favour of granting W leave to bring her application. This did not however mean that an award would definitely be made, and H could advance the same arguments at the substantive final hearing.

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As to the two specific arguments raised by H in opposition to W's leave, the court concluded that: (i) the dispute regarding the Maintenance Regulation was clearly a matter for final hearing, (rather than an issue concerning the granting of leave itself); and (ii) such factual matters as W's allegations regarding the PNA were not suitable for determination at this hearing, Moor J could not therefore say at this stage that W's case was fanciful.

In ***Standish v Standish* [2024] EWCA Civ 567** the Court of Appeal considered the vexed topic of '*mingling*': i.e. the circumstances in which a non-matrimonial asset might be '*matrimonialised*', and the consequences that might flow from this in a case where the sharing principle applies. This was an appeal from Moor J's decision in *ARQ v YAQ* [2022] EWFC 128. H was 71. He was born in the UK but moved to live in Australia in 1976. W was 56 and born in Australia. Both parties had been married previously, H divorcing in 2003 and W in 2004. The parties married in 2005 and had two further children together. In the same year H's employment required a move to Switzerland. H retired in 2007. They relocated to the UK from Switzerland in 2010. The parties separated in 2020. H's assets at the time of the parties' marriage were said to be in the region of £57m. W had far less resources. She sold a property in Melbourne in 2011 for AUS$5.6m (although it had been H that had previously cleared the mortgage on that property). She had received an

inheritance of AUS$626,340. In 2017 two significant financial events took place. First, H transferred investment funds of £77m (now £80m with interest) from his sole name into W's sole name (the "*2017 assets*"). This was intended to avoid UK IHT before H become domiciled. On advice he intended to make use of W's non-dom status and, after a period of time, for W to settle the funds into a Trust in Jersey. No settlement ever took place and the funds remained held by W in her own name. Second, to avoid accrued profits causing tax difficulties for the Ardenside farming business in Australia, the profits were used to acquire non-voting A shares in W's name, whilst H retained 12 ordinary shares with the entire voting rights. The judge at first instance concluded that the assets in question had become matrimonial by nature of the transactions above, however that the sharing principle did not require those funds to then be divided equally. The court had been mindful of the source of the assets, and as a result divided those assets 60%:40% in the favour of H. This brought about an overall division of the total assets of £132m of 34% to W and 66% to H.

W advanced two grounds of appeal before the Court of Appeal. Her first ground was that the judge had been wrong to decide that the 2017 Assets and Ardenside Angus had become matrimonial property. Given how they were held in W's sole name, they should have been treated as W's '*separate property*'. The autonomy of the parties as to how they had chosen to hold their assets should have been respected. Although W argued that these assets were hers rather than marital property, she voluntarily conceded that they should be treated as marital property and divided equally. Alternatively, if they were matrimonial property, then there was no justification for anything other than a 50%:50% division, and the judge had been wrong to afford W just 40%. Her second ground was that the judge should have found that the property Ardenside was a matrimonial asset because although it was owned by H prior to the marriage, the parties had holidayed there, maintained and improved it, and the value had increased considerably.

H cross-appealed arguing that the sharing principle should not have been applied to either the 2017 Assets or Ardenside Angus. This was on the basis that neither asset was matrimonial property but brought in by H as pre-marital wealth. In the alternative, W had been awarded an excessive share of the family assets when considering the scale of H's unmatched contribution to pre-marital wealth.

The court dismissed W's appeal and upheld H's cross-appeal. When it comes to the application of the sharing principle, the court confirmed that it is the source of an asset rather than how its title is held that is the critical factor. Ownership is not a good guide to fair outcome, the approach proposed by W would run counter to the principles established post-White. Despite submissions made to the contrary by both parties, the court determined that the concept of matrimonialisation should continue to be applied. In every case there is a balance to be struck between flexibility and certainty. It would be wrong to state that an asset with a non-matrimonial source could never be subject to the sharing principle. On some occasions fairness may require that. However, it is a concept which should be applied narrowly, and not in such a way as would undermine the certainty of the sharing principle, i.e. that it is the sharing of assets generated by the parties endeavours during their marriage. As a result, Moylan LJ proposed a minor reformulation of the situations envisaged in *K v L*

In Standish v Standish [2024] EWCA Civ 567 the Court of Appeal considered the vexed topic of 'mingling': i.e. the circumstances in which a non-matrimonial asset might be 'matrimonialised', and the consequences that might flow from this in a case where the sharing principle applies.

by Wilson LJ where the importance of the non-marital source of an asset may diminish over time as follows:

> *"[163] … (a) the percentage of the parties assets (or of an asset), which were or which might be said to comprise or reflect the product of non-marital endeavour, is not sufficiently significant to justify an evidential investigation and/or an other than equal division of the wealth; (b) the extent to which and the manner in which non-matrimonial property has been mixed with matrimonial property mean that, in fairness, it should be included within the sharing principle; and (c) non-marital property has been used in the purchase of the former matrimonial home, an asset which typically stands in a category of its own."*

This does not mean however that once the asset has become matrimonial it must be shared equally. Moylan LJ said it would be perverse if the court was prevented upon deciding something other than an equal division of an asset which had a non-matrimonial source but was now treated as matrimonial property.

The Court of Appeal disagreed with the court at first instance that the only conclusion from the 2017 transfer was that the 2017 Assets therefore became matrimonial property. Particularly where the reason behind the transfer was an intended tax scheme. The Court of Appeal concluded that the findings made by the judge at first instance did not justify the percentage division of the 2017 assets ultimately arrived at. The judge had found that the funds were to a significant extent generated prior to the marriage, and that most of this sum was pre-marital (although it had been impossible to quantify a precise proportion). This finding did not justify the high percentage of the funds that W was ultimately awarded. The source of the funds was not changed as a result of the transfer into W's sole name. Moylan LJ concluded that the judge at first instance could not have decided anything other than that at least 75% was non-matrimonial. The result is that W's proposed award of £45m would be reduced to £25m. Regrettably, this appellate court was not able to undertake the needs assessment necessary, and so the matter required remitting for determination of the application of the needs principle.

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***D v D* [2024] EWFC 76** considered, in a similar vein, the correct quantum to be awarded to a second wife where there were no children of the marriage and all of the assets related to H's post-marital endeavour. There were total assets of £15-16m (although the court considered the total pot to be £12m due to an outstanding obligation under the court order from H's first divorce that he may be called upon to pay £3m into a fund for his disabled son). W suffered from mental ill-health, which culminated in a suicide attempt in 2014 and further attempts in 2023, the second of which led W to spending a period of time in a psychiatric unit and her being assessed by her treating psychiatrist as being without litigation capacity for a period. Neither party had sought to adduce SJE evidence regarding W's health or future prognosis. The headlines of W's position were that she sought £1.25m to meet her housing need together with £2.26m capitalised maintenance (representing £100,000 per annum for someone aged 48 years old), and £267,000 towards legal fees. H proposed to pay W £2.5m in total, representing a housing fund of £750,000 and the balance as capitalised maintenance of £75,000 per annum. The court concluded that a sum of £1m was appropriate for rehousing. It agreed to an assessment of maintenance at £100,000 per annum, but took the appropriate Duxbury sum of £2.1m (this being the figure for a woman of 51 years). The extent of W's legal costs had been a point of criticism throughout the proceedings. The court had previously restricted W so that she was

to spend the same sum as H on future legal costs, however despite this she had incurred considerably higher costs. It was argued this was due to W's ill-health. The court had to balance W's health needs against the fact that the costs could only be paid out of funds that were created pre-maritally by H's endeavours. After considering the decision in Azarmi-Movafagh v. Bassiri-Dezfouli [2021] EWCA Civ 1184, the court allowed an additional sum of £177,300 towards W's outstanding legal costs.

The litigation conduct of H in the long-running case of *Xanthopoulos v Rakshina* was also described as '*egregious*'. Readers will remember costs orders totalling £1.04m had been made against him. H also had an overspend owed to lawyers of c.£900k.

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The most recent judgment reported as ***Xanthopoulos v Rakshina* [2024] EWCA Civ 84**, is H's appeal against Sir Jonathan Cohen's order under section 17 of Part III MFPA 1984 that: H have a life interest in a property in Greece to be purchased by W for no more than €600,000 with €60,000 for furnishings, and PPs for £60k for 4 years. H contended that the order was unfair as it was too low and left him in debt and in a position of real need.

The Court of Appeal agreed that a '*needs light*' approach was right. H was not left in a predicament of real need. The judge was wrong to have required H to live in Greece, rather than enabling him to purchase in London, or choosing where he was to live. The Court substituted an order providing H with £1m to purchase a property in Greece or London, to be owned by W but in which H will have a life interest. Regarding maintenance, the Judge had fallen into error. He found that W had received significant dividends and the family's lifestyle could not have been maintained without that dividend income. W intended to continue with the same standard of living. The fairer figure to meet H's needs, even on a '*needs light*' basis, to adjust to financial independence, was £115k pa for four years.

It was recognised that H's needs had to be met on some level, but to give him a debt free start W would have to clear the overspend and forgive the costs orders, when she had already funded the entirety of the litigation in all the proceedings, costing £9.5m. It was held that W did not have to clear the overspend. It would amount to an order for costs against her. The costs orders were not to be enforced without leave of the court.

There are three interesting intervenor cases. ***AW v RH (Preliminary Issue: Third Party Rights)* [2024] EWFC 54** was a decision of HHJ Willans about whether two properties (No 22 and No 11) should be treated as matrimonial property. In respect of No 22 the central question was whether it was matrimonial property or jointly and beneficially owned by H and PT, and so should be included in the matrimonial assets as 50% (or such other % as determined by the court). The issue in respect of No 11 was whether H had a beneficial interest in it, or whether it was owned by SB in its entirety.

H was held to be solely beneficially entitled to No 22 and it was concluded that PT did not intend to have any beneficial interest in the property when she was added to the legal title. However, it was held H had no interest in No 11 and SB was solely beneficially entitled to it.

The judgment provides a short and straightforward example of how third-party rights are determined as a preliminary issue.

The Incorporated Trustees of Great Calling

***Ministries Worldwide v (1) A Irabor (2) F Irabor* [2024] EWHC 803 (Fam)** was an appeal by the intervener against a decision of Recorder Willetts.

The intervenor was a church in Nigeria founded by H. H had received money from the church which had been found to be loans. H used the first loan to buy the FMH. H then needed another loan from the church to complete the purchase as he had been the victim of fraud.

The first loan was due for repayment in 2017 and the church sued H in the Nigerian courts. H and the church settled, and judgment was entered for the sum lent.

W was granted leave to issue proceedings under Part III MFPA 1984 and the church was given leave to intervene. It was recorded that the court needed to determine whether the church had a beneficial interest in either of H's properties.

HHJ Mitchell determined that legal and beneficial ownership of both properties remained with H, not the church, with each loan being described as "*the softest of loan with in reality there being no expectation that H could manage repayments of the scale needed*" and the church would not require repayment of either loan for the foreseeable future, so both properties were available within the MFPA proceedings.

After the decision, the church applied to register the Nigerian judgment in the High Court. An interim charging order was made and the application for a final charging order was transferred to be considered alongside the financial remedy proceedings. Recorder Willetts ordered H to pay W a lump sum of £750k, pay W's costs for the preliminary issue hearing and 50% of her other costs. An interim charging order made in favour of the intervener in respect of the former family home was discharged.

The church appealed making submissions in 3 categories: 1) res judicata / estoppel in respect of HHJ Mitchell's finding about the loan being soft, when the church had now applied for a charging order 2) whether W's needs had been overcalculated and 3) the balancing exercise between the rights of the creditor and the needs of W had not been carried out.

The res judicata / estoppel argument failed. Recorder Willetts reached his conclusion on the facts and matters as they appeared to him. Regarding W's needs, the Judge's assessment was not wrong, save in making orders for costs as well as the lump sum, he had double counted. The Judge was right to conclude it was an exceptional case, the facts of which set it aside from the usual charging order application and the legitimate needs of W and the children required access to the equity in the property. He found that the intervenor could not be considered a "*bona fide judgment creditor*" and that the interests of W and the children must take precedence. The appeal was dismissed (save as to the adjustment to the costs element of the order).

***Julie Annette Merryman v Alex Raymond Merryman & Ors* [2024] EWFC 58 (B)** was a decision of HHJ Baddeley concerning the intervenors' case that they were each entitled to a 1/6 share of each of the properties being considered in the financial remedy proceedings between their parents by virtue of them being partnership property or alternatively by reason of the doctrine of proprietary estoppel. H supported their claim. W accepted they were 1/6 partners in the farming business but not the properties (in her pleaded case). In evidence, she accepted they each had an interest in land at one of the properties as it was an integral part of the farm business. W said that the properties could not be assets of the partnership business because there were express provisions in the partnership agreement to contrary effect.

The Judge considered the partnership agreement (which did not assist) and extraneous evidence to illuminate the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably

have been available to the parties in the situation in which they were in at the time of the contract. He considered all the factors that pointed '*for*' and '*against*' and held that two of the properties were partnership property.

In respect of proprietary estoppel, W conceded that the intervenors had acted to their detriment but the contentious issues were assurance and reasonable reliance. The judge held that the elements of proprietary estoppel was made out in respect of the same two properties and the intervenors relied on these promises.

The proportionate outcome was that the intervenors who had been working long hours on the farm for many years should get what they were promised, namely equal shares in two of the properties.

Further to his final determination in ***ES v SS* [2023] EWFC 177**, it felt to Cohen J in *ES v SS (No 2)* [2024] EWFC 59 to determine what should become of the '*M Trust*'. At the time of the final hearing both parties agreed that the Trust was entirely matrimonial in nature and that they had an equal entitlement to it. There had however been significant challenges in valuing the net assets contained within the Trust. This was because: (i) it was unclear what value should be attributed to L Co (a NFI held within the Trust); and (ii) difficulty in assessing the tax liabilities which the Trust attracted. H had initially been keen to keep the trust in existence. A letter of wishes that accompanied the establishment of the Trust in 2015 provided for each party to receive one-third and the children to receive one-third in the event of divorce. By the time of this hearing before the court, H's position had changed. He sought for the Trust to be wound up and all the proceeds to be held for the benefit of the children. W sought for the Trust to be wound up with the proceeds to be divided equally between H and W. W was clear that the NFIs should be attributed to H, her not wishing to have any involvement in H's future ventures. H argued that this would be unfair to him and that the NFIs should be shared equally.

Cohen J noted with regret that the parties had spent c.£300k arguing over this one outstanding asset, which in net terms was worth c.£2.4m. Ultimately his determination was driven by a desire for simplicity and to end tax arguments which might take years to resolve. He concluded that the Trust should be wound up with the net proceeds to be divided equally. He was clear that such a division should not be overcomplicated: the NFIs should be attributed to H's side, and the only asset with a disputed value was L Co. Regarding the latter the court accepted the argument of W's expert accountant and concluded that no minority discount to reflect the small size of the shareholding should be applied.

***AH v BH* [2024] EWFC 125** was a financial remedies decision of Peel J. Assets were £50m but only c.£291,000 in W's name. The length of the marriage with cohabitation was 5 ½ years. W was the primary carer of the parties' two children (aged 4 and 2). The principal issue was the interplay between (i) the terms of a pre-marital agreement ("*PMA*"), which purported to limit severely W's financial claims in her own right and (ii) the financial needs of W and the children.

H realised €13m from his business which sustained the family through the marriage, along with his salary. H bought the FMH and paid for refurbishments, with W contributing £100k. W oversaw the work. After separation, H bought a property for c.£2m. W and the children remained in the FMH.

H issued a Notice to Show Cause. W confirmed she did not assert a vitiating factor such that the PMA should be disregarded and that her claim was based on needs.

The PMA set out that joint property would be divided equally, neither would make a claim against the other's separate property and W would not make a claim against H's business interests. Neither party believed that there should be a PPs claim against the other. The deed was to be reviewed

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upon, inter alia, the birth of the first child (there was no such review). If the parties had children and the marriage lasted less than 7 years, H was to pay W £600,000 and £200,000 for each completed year thereafter up to a maximum of £4m. A Schedule 1 claim would remain open. When setting out the law on PMAs Peel J set out what he said in *HD v WB* [2023] EWFC 2 at para 44 onwards, with some adaptations. In his analysis he said the PMA was a constant influence on the case but on the other hand a factor of considerable (indeed magnetic) significance and powerful counterweight to the PMA was that W would be the primary carer for the children for the rest of their minority. The fact of marrying and having children had a significant impact on W. She was vulnerable and dependant. There were material changes since the PMA was entered into. It expressly recorded that the PMA "*shall be reviewed*" in the event of the birth of children, indicating they contemplated it might not be a fair document upon children being born.

Peel J conducted a useful review of the spectrum of housing provision awarded in the case law in cases featuring unvitiated marital agreements, before determining that it would be unfair in this case to restrict W to Schedule 1 type housing. He awarded her 56.7% of the FMH (£2.75m) ourtight and £300,000 for stamp duty, purchase costs, refurbishment and furniture. He refused to make W's housing sum subject to a charge in H's favour. Using an analysis of expenditure during the marriage as a guide to the standard of living, he awarded W £110,000 pa for herself and £40,000 pa for the children over a 10 year term factoring in an earning capacity of £21,000 pa after 5 years. W's PPs were capitalised: totalled £910,000 and £200,000 of her own capital was set against it, leaving H to pay £710,000. W's total award was £4,051.944, representing about 8% of the net assets. Her sharing claim could have been c.£7.5m.

***Hersman v De Verchere* [2024] EWHC 905 (Fam)** concerned cross-applications for the enforcement of a financial remedies order made by Mostyn J in 2019. The order said H was the sole beneficial owner of two rental properties. H was to pay W a lump sum of £709,707 and W was to transfer both properties to him, with H releasing her from any liability under the mortgages. H was to pay the mortgages using the rental income.

H applied for enforcement and an account of monies due to him by W (rent), and an injunction. W applied for enforcement of an unpaid lump sum and appointment of an expert in CGT.

In 2023 the court ordered W to transfer the properties to H upon being released from the mortgages and to give vacant possession. W appealed and permission was refused. W did not comply with the order. Committal proceedings followed (reported as [2023] EWHC 3481 (Fam)) and W was sentenced to three months imprisonment, of which she would serve half.

H sought lost rental income less expenses and mortgage interest and penalties for both properties. The total he sought was £14,666,216 plus legal fees and website fees and less the lump sum owed to W. He also complained that W had been denigrating him, which had a negative impact on the rental bookings, and sought an injunction prohibiting her from denigrating him or the properties.

Moor J held H was entitled to £2,353,000 after reduction of the lump sum H owed W, made the injunction and awarded H costs of £80,000. W's cross-application was dismissed as the lump sum was declared satisfied.

Re Z (No. 5) [2024] EWFC 44 was unfortunately required after F's failure to comply with the substantive final order made in Re Z (No. 4) (Schedule 1 award) [2023] EWFC 25. M applied for: (i) continuation of the worldwide freezing order initially made in November 2023; (ii) capitalization of the award made in Re Z (No. 4); and (iii) a Hadkinson Order. The court concluded that:

i. Continuation of the freezing order was necessary. F had shown that he was determined not to comply with the court's order (of which he was well aware) and had allegedly made threats that M will not see a penny of the award. It was therefore necessary to continue the order to prevent F from seeking to evade justice by disposing of or otherwise concealing assets.

ii. At the time of the final hearing, Cobb J had refused M's submission to make the final order automatically capitalised on default by F. However, in light of subsequent events that F's continued failure to comply, this case was now the '*very rare bird*' envisaged by Mostyn J in *AZ v FM* [2021] EWFC 2 where capitalisation was appropriate. F had shown himself unwilling to comply or engage over a protracted period, he was residing abroad, enforcement procedures in the US were challenging but advice suggested would be easier if a single application could be made for a single sum. M proposed that the capitalised fund should be managed by a professional fund manager, meaning that the total sum would be held securely and the recipients be paid periodically as envisaged by the final order. When considering the mechanism for calculating the capitalised award, Cobb J considered: The Ogden tables; the Duxbury Formula, and; a '*true*' multiplier. The court accepted M's submission that the true multiplier approach should be taken.

iii. When considering if the criteria for a Hadkinson Order were met, the court deliberated greatly over whether such an order was a proportionate response, particularly when unusually this Hadkinson Order was sought after the Final Hearing and consequential Order had already occurred. However, the court ultimately concluded that it was proportionate and that F had provoked this application by his non-compliance with ongoing orders, his contempt being both deliberate and flagrant.

The decision in *LT v ZU* [2023] EWFC 179 was considered in ***SP v QR* [2024] EWFC 57 (B)** and appealed in ***Re A v B (Schedule 1: Arbitral Award: Appeal)* [2024] EWHC 778 (Fam)** during this quarter.

SP v QR was a Schedule 1 decision of HHJ Hess concerning C (6yo) in a modest asset case. C had additional needs. M sought an order: settling a flat (owned by F) on her until C completed tertiary education, F to pay monthly interest only mortgage and household outgoings, C's other costs including top up maintenance, medical insurance and a lump sum for certain expenses including a car and iPad. F said he would pay a £24,000 lump sum to cover M's rent for a year, CMS at CMS rates and C's other expenses on a voluntary basis.

Relying on *LT v ZU*, F argued the court could

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not settle the flat on M because the existence of the mortgage meant he was not entitled to the entirety of the property. HHJ Hess disagreed, holding F was still entitled to the property, subject to the mortgagee's rights, so he could settle what entitlements F had on M for the benefit of C, but this must be subject to the mortgagee's rights. He said the arrangement would only work, though, if he was satisfied that the monthly mortgage interest payments were met by someone, but that was a question related to the merits of the proposed solution, rather than the jurisdiction.

HHJ Hess held that ordering H to pay ongoing monthly mortgage interest payments would be disguised '*top-up*' maintenance but if there were capital repayments that might point to a different conclusion.

F also argued that there was no power to order him to pay top-up maintenance as there was no maximum CMS assessment and the exemption provided by s8(6) CSA 1991 does not assist. HHJ Hess agreed that F was obliged to pay what the CMS assesses, but no more, and all top-up items M sought fell foul of that.

HHJ Hess settled the flat on M on the basis of cross-undertakings (M to pay the interest-only payments on the mortgage and F to use his best endeavours to execute a new fixed rate interest-only mortgage at the most advantageous rate for the period of any settlement) until C ceases secondary education.

Re A v B was M's application against HHJ Evans-Gordon's decision in *LT v ZU* not to convert an arbitral award into an order.

M and the children were living in a property called "*Thames House*". The parties agreed it should be sold and F agreed the sale proceeds should go towards a new property for them, and he would raise a mortgage. M also agreed to use her mortgage capacity. The award provided for the parties to purchase a new property for M and the children and raise a joint mortgage of £870,000. Neither

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party argued that there was no power to make an award/order predicated on one or both parties borrowing money by way of mortgage in order to settle property under Schedule 1 for the purposes of housing the children in substitution for the Thames House apartment.

F's main challenge was that the Arbitrator had no power to require F to borrow monies for the purposes of making a settlement of property under paragraph 1(2)(d). HHJ Evans-Gordon held that an order requiring a parent to borrow money for the purposes of a settlement (or transfer) cannot be made, as a settlement (or transfer) may only be ordered in respect of property to which either parent is entitled in possession or reversion. There was no specified property, so no settlement. She was satisfied that the court did not have the power to order a parent to borrow monies or provide property they do not have for the purposes of a settlement.

Hearing the appeal, Cobb J disagreed. Whilst there was no express power within Schedule 1(1) to order a sale of property (to assemble the sum to settle) nor an express power to direct that a new property be purchased on trust, but that was usually how Schedule 1 housing provision wa interpreted and carried into effect. A two-step process to achieve the settlement of property (payment of the lump sum, then identification of the property and settlement of the trust) is permitted. Where financial resources are more limited, parties of young children are likely to need to borrow funds by way of mortgage to help them acquire and/or settle domestic property and it is likely the parties will be expected to use their

own funds and/or use their own mortgage capacity/ies in supplementing the housing fund. The fact there is no specific statutory power in Schedule 1 for a party to raise funds by way of mortgage in order to make one of the defined forms of financial provision does not exclude this approach.

***TK v LK* [2024] EWFC 71** was F's Schedule 1 application. M was in prison at the time, acting in person. A final financial remedy order had been made by consent in 2015. There had been a previous public law judgment that found M's conduct to be the most sustained "*improper parental influence and manipulation*" the judge had seen in some time and "*an extreme example*". After those proceedings, supervised contact between F and Child A started. M carried out a criminal offence against Child A, who was subsequently diagnosed with PTSD. M received a long custodial sentence and a lifetime restraining order. Child A remained in foster care until reunified with F.

Given M's imprisonment, the responsibility, financial and otherwise, of raising Child A would fall on F. F made his application after learning of M's father's death as he understood M and her brother were the sole beneficiaries of his estate.

A Schedule 1 application for a further lump sum can be made after a divorce clean break in "*exceptional*" circumstances. Mr Nicholas Allen KC had no doubt that the circumstances since the order was made in 2015 had been exceptional. Though not a specific factor in the para 4 checklist, conduct can be taken into account when egregious. He considered the recent case law, which may call into question the "*accepted view*" that conduct must be identifiable or quantifiable in monetary terms in order to be relevant, but did not have to consider the question further as he was satisfied there was a causative link between the conduct and a financial impact. F's income and earning capacity had been directly impacted by the trauma caused by the criminal offence and M had lost her income as a result of her criminal conviction.

A Schedule 1 application for a further lump sum can be made after a divorce clean break in "exceptional" circumstances.

F's capital need was £348,000-£420,500. F could get a mortgage but because of M's conduct the Judge considered it permissible to try to strive to ensure Child A's housing needs were met by ordering long term capital provision. It was a rare case where capital should not revert to M on Child A's majority.

In a further instalment to their litigation, ***Collardeau v Fuchs & Harrison* [2024] EWHC 256 (Fam)** saw Knowles J refuse W permission to bring contempt proceedings against H and his Head of Staff, Mr Harrison. W's application was made in response to H's application to debar Sears Tooth from acting on behalf of W. W subsequently sought to withdraw his application. However, W would only agree to the withdrawal on certain conditions, including that H accepts that he should never have made the application in the first place. H refused to accept this condition. In light of H's refusal W applied for permission to bring committal proceedings. W argued that H and Mr Harrison had fabricated a telephone call between themselves and Mr Tooth on or around 22 April 2022 which had in fact not taken place. The court reminded itself of the rules on contempt as set down in FPR r.17.6(1), PD 17A Paragraph 6, FPR r.37.15 and PD37A Paragraphs 41.4.4 in particular. It further considered the test for permission as enunciated by Whipple K in *Newson-Smith v Al Zawawi* [2017] EWHC 1876 (QB). In particular that: (i) the question at this stage was not whether there was contempt, but whether proceedings should be brought to establish that question; (ii) the court must have regard to the public interest alone, this involves key considerations of whether the public interest requires committal proceedings to be brought, and secondly whether the applicant is the proper person to bring them;

There were grave reservations as to whether W was the appropriate person to bring committal proceedings as the quasi-prosecutor, particularly as her key motivation was to gain benefit in future litigation.

(iii) a number of factors are relevant to assessing public interest, but the court should be wary of too freely allowing such proceedings to be pursued by private persons. The court should not grant permission unless there is a strong prima facie case that the allegations would be proved to the criminal standard at a substantive hearing. Where false statements are concerned the prima facie case must demonstrate not just the fact of falseness but the knowledge of that untruth; (iv) when considering the strength of the prima facie case, the court will have regard to all the circumstances of the case; (v) the court must guard against the risk of vindicative litigants with a grievance.

Knowles J concluded that W's prima facie case was weak and evidentially flawed. W's application was made in the context of bitterly contested financial remedy proceedings. Her allegations were of great gravity. There were grave reservations as to whether W was the appropriate person to bring committal proceedings as the quasi-prosecutor, particularly as her key motivation was to gain benefit in future litigation. Evidentially it was difficult to see how W could succeed in the inferences she invited the court to make from reliance on Mr Tooth's telephone records. It was overall not in the public interest for committal proceedings to be brought.

The costs relating to H's debarring application and W's contempt application were considered separately under ***Collardeau v Fuchs & Harrison* [2024] EWHC 642 (Fam)**. The general costs rule contained in CPR r.44.2(2)(a) applies to committal proceedings. Where such costs are ordered against the unsuccessful party, this will usually be on an indemnity basis. The partes' respective costs for bringing the committal proceedings were that: £69,750 was incurred by W; £174,244.50 incurred by H; and an astonishing £336,632.40 by Mr Harrison. Knowles J concluded it was appropriate for a costs order to be made against W on an indemnity basis. However, the costs of both respondents was excessive and unreasonable. The court ordered W to pay £101,471.50 to H, this sum to be offset against the c.£800,000 interest that had accrued on the outstanding £18m remaining of the lump sum that H owed W. W was ordered to pay £189,815.40 to Mr Harrison, which would not become payable until 30 April 2024, by which time a further enforcement relief hearing was due to have taken place between H and W.

***Tousi v Gaydukova* [2024] EWCA Civ 203** was a Court of Appeal decision in respect of the jurisdiction of the court to make an order to transfer a tenancy under s.53 and Schedule 7 of the FLA 1996 (which give the court power to transfer the tenancy of the family home between spouses or former spouses (and civil partners) and between cohabitants or former cohabitants). The specific question was whether '*cohabitants*' in para 3 of Schedule 7 includes parties to a void marriage or whether they are only within the scope of para 2 which gives the court power "*on making a divorce, nullity of marriage or judicial separation order or at any time after making such an order*". If the former, a transfer of tenancy order can be made when they cease to cohabit. If the latter, it can be made on making a divorce, nullity of marriage or judicial separation order or any time thereafter.

The Court held that parties to a void marriage have the same status as unmarried people who are living together and therefore are, in general terms, cohabitants. They can fall within the definition of cohabitants in s62(1) FLA 1996, but they have to be living together as a married couple. There was no reason why para 3 should not apply to parties to a void marriage, when they fit within that definition.

It is well established that the law of the place

where the marriage was celebrated (*the lex loci celebrationis*) determines the formal validity of the marriage only. The authorities did not support the Judge's view as to the relevance of the foreign law to the remedy or relief available under English law and his conclusion that the relief awarded should reflect the "*ramifications of invalidity*". It is for the English court to determine what remedy is available and this, inevitably, requires the English court to determine, if the marriage is invalid under the foreign law, whether, by reference to English law concepts, the marriage is void, voidable or a non-qualifying ceremony.

***C v D (No 2) (2007 Hauge Convention)* [2024] EWFC 36** was the rehearing of F's appeal against the registration of a maintenance order made in Colarado, limited to consideration of the grounds for refusing recognition set out in the 2007 Hague Convention, having regard to the terms of Art 23(7).

M lived with the child in the US and F had issued an application for financial remedies in the UK. At the final hearing in the UK a clean break was imposed. The judge made no order for child maintenance.

The US court then accepted jurisdiction in respect of child support, and made an order that F pay $841.49 pcm and arrears of $27,310.85. F's appeals against this were unsuccessful.

The order was registered in the UK. F appealed the registration. The appeal was refused by the magistrates. F appealed and HHJ Booth dismissed it on the basis that there was no right of appeal, but this was overturned by the Court of Appeal who determined that there was a right of appeal under s31K(1). The matter was then remitted to MacDonald J.

The grounds for refusing recognition and enforcement of existing maintenance decisions are set out in Art 22. Even where one or more of the conditions is met, the court addressed retains a discretion as to whether to recognise the maintenance decision.

F's arguments were that registration should have been refused as 1) pursuant to Art 22(e)(i), he did not have proper notice of proceedings and an opportunity to be heard 2) pursuant to Art 22(d), the child support order was incompatible with a decision rendered between the parties having the same purpose, 3) recognition of the child support order was manifestly incompatible with public policy in this jurisdiction and 4) the child support order was obtained by fraud.

The public policy exception is of very limited application and the question is whether recognition of the decision would lead to an intolerable result in the State addressed. Regarding the fraud ground, the concept of fraud presupposes the presence of a subjective element of wilful misrepresentation or fraudulent machinations, and not simply a mistake or negligence. Regarding the ground concerning '*proper notice*' it is sufficient that the defendant be notified in a way to provide an opportunity to react but that it is not necessary for the defendant to have been duly served. Art 22(d) concerns conflicting decisions. Art 28 prohibits the State addressed from undertaking its own investigation into the meris of the decision in the State of origin (without prejudice to the review necessary to determine whether the provisions of Chapter V concerning registration and enforcement apply in the given case).

The English court had not exercised any jurisdiction it had regarding child maintenance by making an order as between M and F having the same purpose as the US order and with which the US order was incompatible. F knew of the hearing and knew in sufficient time to prepare and file extensive and considered motions to be dealt with at the hearing. He had an opportunity to be heard and chose not to avail himself of that opportunity. There was no evidence of fraud by the US court, nor M. There was nothing in the case to justify the conclusion that the recognition of the child support order was manifestly incompatible with the public policy in this jurisdiction. The appeal was dismissed.