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Finance Update

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CUMBERLAND LODGE 2019

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FINANCE UPDATE - CUMBERLAND LODGE 2019

Case name/ citation	Issues	Court / Judge
Ipecki v McConnell [2019] EWFC 19	Pre-nuptial agreement rejected due to substantive unfairness and lack of independent legal advice	High Court (Mostyn J)
Wodehouse v Wodehouse [2018] EWCA Civ 3009	Appeal against ultra vires lump sum order against a third party	Court of Appeal (leading Judgment of King LJ)
Cowan v Foreman & Ors [2019] EWHC 349 (Fam)	Inheritance Act 1975 claims, applications out of time	High Court (Mostyn J)
Lemmens v Brouwers [2018] EWCA Civ 2963	Costs orders, late service of costs schedule, summary assessment.	Court of Appeal (leading Judgment of Moylan LJ)
BC v BG [2019] EWFC 7	Challenges to / enforcement of arbitration awards, applications for financial orders under MCA after arbitration has concluded	High Court (Clare Ambrose sitting as a Deputy High Court Judge)
Re H [2018] 4 WLR 18, [2018] EWHC 3761 (Fam)	Committal for contempt, non-compliance with procedure	High Court (Mostyn J)
AR v JR [2018] 1 FCR 601, [2018] EWHC 3626 (Fam)	FR orders when an existing order in judicial separation proceedings	High Court (Cohen J)
Martin v Martin [2018] EWCA Civ 2866	Valuation of a private company, including pre-marital share	Court of Appeal (leading Judgment of Moylan LJ)
NN v AS & Ors [2018] 1 FCR 504, [2018] EWHC 2973 (Fam)	Issues of true beneficial ownership in a Part III claim	High Court (Roberts J)
Hart v Hart [2019] 1 FCR 445, [2018] EWHC 2966 (Fam)	Sentencing of third parties following committal for breach of disclosure orders	High Court (HHJ Wildblood QC sitting as a Deputy High Court Judge)
De Gafforj v De Gafforj [2019] 1 FCR 73, [2018] EWCA Civ 2070	*Hadkinson/ Mubarak* orders. Contempt of court, breach LSPO.	Court of Appeal (leading Judgment of Jackson LJ)
LKH v TQA AL Z (Interim maintenance pound for pound costs funding) [2018] 4 WLR 135, [2018] EWHC 2436 (Fam)	*Mubarak* orders in the face of arrears of MPS and breach of LSPO.	High Court (Holman J)
Tattersall v Tattersall [2018] 1 FLR 470, [2018] EWCA Civ 1978	Enforcement, variation, periodical payments and capitalisation	Court of Appeal (leading Judgment of Moylan LJ)
Versteegh v Versteegh [2019] 2 WLR 399, [2018] 2 FLR 1417	Pre-nuptial agreement, inability to value company and "*Well*s" sharing.	Court of Appeal (leading Judgment of King LJ)

***Ipekci v McConnell* [2019] EWFC 19 – High Court – Mostyn J**

Summary

Court refused to give effect to a prenuptial agreement that was "heavily slanted in favour of W" in circumstances where it failed to meet H's needs and there had been no independent legal advice in the relevant jurisdiction which was said to govern it (New York State). The judgment also contains fact-specific analysis of the extent of W's entitlement under various family trusts.

Facts

This was an 11 year marriage, with two children. This was a second marriage for W, who was an independently wealthy heiress to the Avon cosmetics dynasty, with beneficial interests in trusts in USA with an overall value of c.$65 million. H was from a more modest background: when the parties met he was working as a concierge for a New York hotel and had previously been made bankrupt. By the time the parties separated he worked as Head Concierge for a London hotel, with an income of c £35,000 gross. H had a 50% interest in his mother's home in Turkey, <£50,000, but no other capital and debts of >£100,000.

Both parties were 45 at the time of the proceedings. Their children were aged 11 and 17. The family home in Barnes was in W's name, with equity after deduction of the mortgage of £1.074 million.

The parties had signed a pre-nuptial agreement, drafted by W's private client lawyer. The terms provided that other than 50% of the passive growth over the course of the marriage in three properties (two of which had been sold and one of which had not increased in value – so nil overall), H would receive nothing. He would not be entitled to any maintenance or capital claims. The pre-nuptial agreement also stated that the parties wished any proceedings relating to the marriage to be determined in accordance with the laws of the State of New York and that they submitted to the exclusive jurisdiction of the courts of that State. Prior to signing the pre-nuptial agreement, H was given legal advice by an English solicitor, who had acted for W in her first divorce and was not qualified to advise in respect of the law in the State of New York. H met this solicitor for the first time 8 days before the agreement was signed, which was 15 days before the wedding.

Key Issues

- The court conducted a detailed analysis of W's entitlement under the various family trusts to which she had some connection or in which she had an interest. She was one of several family members (including her four siblings and their various descendants) in a class of beneficiaries, and the trustees had purported to communicate to the court that they would not follow W's direction if she sought payment from the trust. The court rejected this evidence and made various findings, including that W was beneficially entitled to substantial trust assets, and that sufficient capital could be drawn from those funds held in trust at W's request to pay an appropriate award to H.

- The prenuptial agreement was held to have been made under the laws of the State of New York and its validity, effect and construction therefore fell to be determined in accordance with those laws, irrespective of where either party resided or was domiciled at the time of death or divorce or separation.

- The Judgment considered in depth the decision in *Radmacher and Granatino* [2010] UKSC 42. Ultimately the court held that it would be unfair to hold the parties to the terms of prenuptial agreement for the following reasons:

    - UNFAIRNESS

      The court found that the pre-nuptial agreement did not meet H's needs. The court referred to the dicta of Lord Phillips at paragraph 81 of *Radmacher*:

      "…The parties are unlikely to have intended that their ante-nuptial agreement should result, in the event of the marriage breaking up, in one partner being left in a predicament of real need, while the other enjoys a sufficiency or more, and such a result is likely to render it unfair to hold the parties to their agreement."

- Of interest for the future Mostyn J said at paragraph 27 (v)

  "The agreement does not meet any needs of the husband. I do not take the language used by the Supreme Court, namely "predicament of real need" as signifying that needs when assessed in circumstances where there is a valid prenuptial agreement in play should be markedly less

than needs assessed in ordinary circumstances. If you have reasonable needs which you cannot meet from your own resources, then you are in a predicament. Those needs are real needs."

- LACK OF LEGAL ADVICE/ LACK OF APPRECIATION OF CONSEQUENCE

  The advice H had received was limited to one jurisdiction (England), which was significant in circumstances where the agreement was said to be solely governed by another jurisdiction. Further, the solicitor who gave the advice had acted previously for W, suggesting a conflict. The court concluded that H did not have a full appreciation of the implications of the agreement under New York law.

- EFFECT OF NEW YORK LAW:

  It was a curious feature of this case that the operation of New York State law itself emasculated the agreement: the evidence of the single joint expert was that a fatal defect to the agreement under New York law (a lack of a duly authenticated certificate that the agreement conformed with local law) had the consequence that the agreement would, in New York, have "*minimal weight, if any*". The parties had contracted that the agreement would be governed by New York law. The English court was loathe to attribute weight to the agreement when under the law that the parties elected it would be afforded minimal weight.

- Since all the assets were non-matrimonial, the court determined the case on the basis of H's reasonable needs. H was awarded a global lump sum of £1,333,500, which included a Duxbury fund of £445,500, to reflect his income needs of £50,000 pa falling to £35,000 pa on retirement, less his own income. H's reasonable housing need was found to be a 3 bedroom property within 1 mile of the FMH, for which a fund of £750,000 plus SDLT and moving costs was made available (£375,000 of which would be subject to a charge-back).

- The court concluded by expressing dismay at "the wholesale non-compliance by both legal teams with FPR PD27A and the Efficiency Statement of 1 February 2016." The

court had been provided with two bundles, which omitted several key documents and duplicated others. The parties had not managed to agree an asset schedule nor schedule of issues, and other documents were submitted late. The court asked practitioners to observe these rules in future cases.

***Wodehouse -v- Wodehouse* [2018] EWCA Civ 3009 – Court of Appeal – King LJ**

Summary

Court of Appeal confirms that there is no power under s.23(1) of the Matrimonial Causes Act 1973 to order a third party to pay a lump sum to a party to the marriage. The importance of eliciting direct evidence of the availability of Thomas resources when relevant trusts are intervening is also emphasised.

Facts

This was a long relationship of >20 years (including 19 years of marriage). The parties did not have children. H was the beneficiary under two family trusts. He was the son of a late Earl, whose widow, the Dowager Countess, survived and retained a life interest in both of those trusts.

H had a history of 'disastrous management' of his finances. He had twice been made bankrupt. By the time of the financial remedy proceedings, the parties' only money was held in the FMH, which had been funded in full by H's family trust and was held in the parties' joint names. Neither party was found to be able to work.

The two trusts were: (1) the Will Trust, in which the Dowager Countess had an absolute 50% share and a life interest in the remaining 50%, to be distributed at the discretion of the trustees on her death; and (2) the Falmouth trust, in which the Dowager Countess had a life interest until, on her death, H and his three siblings were to have a 25% share each. Using conventional actuarial tables the court concluded the Dowager Countess had a life expectancy of c.21 years remaining.

First hearing – DDJ Austin

- The trustees intervened in the financial remedy proceedings in respect of a charge

they had registered against the FMH, following a loan made to H to purchase a previous property. One of the trustees gave evidence, but was not specifically asked questions about whether the trust would advance monies to H in order to fund an award to W. The DDJ proceeded on the basis that no funds would be made available to the husband by the Trust. The CA later found there was no evidence at first instance capable of founding a conclusion that the Trust would advance monies to H on a *Thomas v Thomas* basis to fund an award to W.

- The court ordered H to pay to W (inter alia) a lump sum of £138,500 by the completion date of the FMH. The DDJ accepted that there was unlikely to be sufficient equity in the family home to satisfy the full amount of the lump sum order, even if it sold for the highest conceivable figure. But he directed (when the order came to be drafted, at W's counsel's request) that in default of payment, the balance of the lump sum was to be paid by Trust upon the death of the Dowager Countess plus interest. The court found:

> '*The respondent's interests are known and foreseeable and a quantum can be calculated from the Trust's own disclosure. It is a foreseeable asset. It is foreseeable that it could cover the balance of the sums the judgment says are due to the applicant at some foreseeable future date*.

First appeal – HHJ Farquhar

- H appealed. The Circuit Judge hearing the appeal expressed doubt in the course of argument as to whether the court had a power to order the Trust to pay a lump sum under s.23(1)(c) of the MCA 1973, but in his Judgment did not overturn the order. Instead the lump sum was reduced after another part of H's appeal was allowed (namely the allocation of an unpaid mortgage debt between the parties).

Second appeal – Court of Appeal: Key Issues

- The Court of Appeal allowed H's appeal, confirming (had there been any doubt) that the court did not have jurisdiction to make an order against a third party, the Trust, to pay a lump sum. The wording of s.23(1)(c) refers to a 'party to the marriage'. By the time of the hearing, W's counsel had conceded this point, which the CA observed was 'the inevitable'.

- Further, the order could not be preserved simply by re-drafting it so the liability to pay fell purely on H. The CA concluded that it would not be possible to find on a *Thomas v Thomas* basis that the Trust would make the funds available to H to discharge the order himself, as the court at first instance had not heard evidence that the Trust would act in that way.

- The lump sum order would be discharged. W would receive her share of the net equity in the family home (which had recently sold) and no additional funds.

- The Court considered whether to remit the case for a retrial, observing there might be some merit in adjourning the lump sum application during the balance of the Dowager Countess's life. However, after waiting three years for the Court of Appeal hearing, the parties were said to be suffering from 'litigation exhaustion' and, after hearing from W's counsel about her wish for finality, the CA concluded that the better route was held to be making a final order and bringing the proceedings to an end. King LJ made clear that the CA would have remitted the case but for this representation by W.

- McFarlane LJ, agreeing with King LJ, observed this case served as evidence of the 'value in creating a Financial Remedies Court'. The stress and delay in proceedings ultimately could be traced back to an ultra vires order at first instance.

- Another ground of H's appeal (against a 50:50 pension sharing order) was refused, the decision having been within the proper discretion of the trial judge.

***Cowan v Foreman & Ors* [2019] EWHC 349 (Fam) – High Court – Mostyn J**

Summary

Permission refused to bring a claim for financial relief under the Inheritance (Provision for Family and Dependants) Act 1975 five months after the expiry of the six-month deadline.

Facts

The Claimant ('C') was in a relationship with the deceased for 25 years, and married him shortly before his death in June 2016. The deceased was described as being "*plainly devoted to the claimant*" and the terms of his will were expressly designed to meet her needs for the remainder of her life. However, the will did not make any outright provision for C, but instead made her the principal beneficiary of two trusts, with a life interest in one of them. The letter of wishes accompanying the will was clear that C was to be the principal beneficiary and all of her reasonable needs were to be met, with requests by her for capital being considered generously. Probate of the deceased's will was granted on 16 December 2016.

C brought a claim under section 2 of the Inheritance (Provision for Family and Dependants) Act 1975 ('the 1975 Act') for financial provision from the deceased's estate on 8 November 2018. The essence of her claim was that: (i) the structure of the will might expose her to US taxes which she did not understand; and (ii) that the trust structure left her "*at the mercy of the trustees*" who could not be trusted to deal with her fairly.

Key Issues

- C's application for financial provision under section 2 of the 1975 Act was made 5 months after the expiry of the statutory window (6 months), so she required leave of the court to proceed out of time.

- Mostyn J considered the circumstances in which permission should be granted under section 4 of the 1975 Act. He concluded that the court must be satisfied of both of the following before permission could be granted:
  1. C must show good reasons justifying the delay;
  2. C must have a claim of sufficient merit to be allowed to proceed to trial. This imported the test for summary judgment in CPR 24.2, namely whether the application had 'a real prospect of success'.

- Lord Clarke in *Abela & Ors v Baadarani* [2013] UKSC 44 had differentiated between a qualitative decision or value judgment on the one hand, and an exercise of unfettered discretion on the other. Mostyn J considered this requirement of

permission as being the former kind of exercise. Looking to the two limbs of the test, Mostyn J held that C's application failed on both.

- First, C was unable to demonstrate any good reasons for the substantial delay in making her claim. The judge warned that:

  "…. in no future case should any privately agreed moratorium ever count as stopping the clock in terms of the accrual of delay."

- The judge suggested that absent highly exceptional factors, the limit of excusable delay should be measured in weeks, or, at most, a few months.

- Secondly, the C's application did not have a real prospect of success; the structure of the will was not a failure to make reasonable financial provision for C (section 2 of the 1975 Act). If it was, this would be tantamount to saying that every widow had an entitlement to outright testamentary provision. This was plainly not the case. Having considered the evidence, there was nothing to support the assertion that the trustees would defy the deceased's wishes, and in any event to do so would likely be an actionable breach of trust by them.

Lemmens v Brouwers **[2018] EWCA Civ 2963 – Court of Appeal – Moylan LJ**

Summary

Costs order made by the trial judge at the conclusion of hearing, based on a summary assessment using a costs statement served during the course of the trial. Costs order upheld on appeal.

Facts

H had applied to vary an order for periodical payments on the basis of a change of circumstances. Following a two-day trial, the court varied the order in terms close to those proposed by W. H was acting in person during the trial; W was represented by counsel. At the hearing, W's counsel presented H with a costs schedule and sought her costs of the hearing. She sought her costs of £127,000 but the judge rejected that figure as 'not properly proportionate to the issues being investigated'. He made a costs order of £30,000,

after stating that H had failed to explain adequately his finances until the final hearing and that his Form E was 'deliberately misleading'.

Key Issues

- H appealed to the Court of Appeal on the following grounds:
  1) The costs schedule was not provided until the day of the hearing, in breach of W's obligation to serve her costs schedule 14 days before the hearing (FPR 2010, rule 9.27), which was prejudicial;
  2) The costs should not have been summarily assessed at the end of the hearing;
  3) The judge exercised his discretion wrongly.

- The CA rejected H's appeal on all grounds:
  1) Timing of schedule: While the CA agreed that W should have provided her costs schedule 14 days before the hearing in accordance with the rules, it also noted that a party's failure to do so will be taken account by the court when deciding what order to make. It could reasonably assume the trial judge did so. Further, there was no real prejudice caused to H; the issues were simple.

  2) Summary assessment: The CPR provides in PD44 para.9.1 that whenever a court makes an order for costs the court "should" consider whether to make a summary assessment. In para.9.2 as applied to family proceedings, the general rule is that a court should summarily assess costs at the conclusion of hearings that last less than one day. The preference for summary assessment was supported by the overriding objective. There was also authority in the form of *Q v Q* [2002] 2 FLR 668 that even after a ten-day hearing a summary assessment had its advantages para.33 of Wilson J's judgment in *Q*).

  3) Judicial discretion: It was well-established that appeals from the exercise by a judge of his costs discretion would only succeed where the judge had 'exceeded the generous ambit within which reasonable disagreement is possible.' The judge's discretion on costs in financial remedy proceedings was 'particularly wide' as per Thorpe LJ in *Malialis v Malialis* [2013] 2 FLR 1216 at para.13. The judge's exercise of his discretion in this case was well within his discretion and

reflected his assessment of W's reasonable costs.

***BC v BG* [2019] EWFC 7 – High Court – Clare Ambrose sitting as a Deputy High Court Judge**

Summary

Court refuses W's application for an award made at the end of a two-day arbitration not to be made into an order of the court. The arbitral award was upheld.

Facts

This was a marriage lasting 18 years including cohabitation. The parties had two children, both of whom lived with W.

The assets were quite limited: the FMH with net capital of c.£670k and pensions worth c.£500k. H's net income was c.£64k pa and W's were c.£7k pa.

H issued Form A in November 2016, after which the case was beset by terrible delay. The case did not settle at first appointment or FDR. The first final hearing in February 2018 was abandoned when the court could not accommodate it. The second, in July 2018, was adjourned at short notice when the judge became unwell. Unsurprisingly, a few days after the second aborted trial the parties signed a Form ARB1 FS agreeing to arbitrate under the Family Law Arbitration Scheme. They appeared before an arbitrator of their choice for a two-day arbitration the same week. Both parties were represented and gave oral evidence. The final arbitral award was dated 2 August 2018 and ran to 26 pages. The arbitral award provided (inter alia):

- £315k of net capital after liabilities paid to W (c.60%), resulting in a 55:45 split of the FMH. The departure from equality was due to differing mortgage capacities and to enable rehousing at c.£375,000.
- Global maintenance of £1,600pm reducing to £1,050 (23 July 2019) then to £650 (25 March 2022) when W could draw from the civil service pension, terminating on H's retirement.
- 76% pension sharing of H's civil service pension (this was agreed).

W was dissatisfied with the outcome of the arbitration. She raised her objections first with the arbitrator (on 3 September), then with H (on 1 October). On 5 October 2018 W wrote to the court, expressing her application as an 'appeal out of time'. Mostyn J gave directions in accordance with *DB v DLJ* [2016] EWHC 324 (Fam) determining that her application would be treated as one not to make the arbitral award an order of the court. A one day hearing was listed before Clare Ambrose, sitting as a Deputy High Court Judge, with directions for statements and limited evidence. The parties were litigants in person represented by direct access counsel.

Key Issues

Ultimately W's complaints were rejected on the facts of the case.

However there is also a detailed discussion in the judgment of the IFLA Scheme and its introduction in 2012 from para [31]. The judge considered the nature and scope of the court's jurisdiction to uphold or reject an arbitral award. She considered the judgment of Munby P in *S v S (Arbitral Award: Approval) (Practice Note)* [2014] EWHC 7 (Fam) and his firm guidance at para [19]:

> *'Where the parties have bound themselves, as by signing a form ARB1, to accept an arbitral award of the kind provided for by the IFLA Scheme, this generates, as it seems to me, a single magnetic factor of determinative importance…'*

At para [37] the judge said as follows in respect of *S v S*:

> *'…[it] is significant in that it makes clear that disputes about distributing finances after a divorce are arbitrable and there is nothing contrary to public policy about an agreement to arbitrate such disputes. Sir James Munby's comment that there was no conceptual difference between an arbitration agreement and a pre-nuptial agreement (or a settlement agreement as was in issue in L v L) perhaps requires further consideration. To equate the legal effect of an arbitration agreement with that of a pre-nuptial agreement probably fails sufficiently to recognise that the 1996 Act has given very specific consequences to an arbitration agreement, the commencement of arbitration pursuant to an arbitration agreement and the arbitration award made in the arbitration. The parties are not merely concluding an agreement between themselves, they are agreeing that a neutral third party (who is subject to specific court*

supervision) will adopt a fair procedure and apply the law in order to reach an independent and final decision.'

The judge then went on to consider Mostyn J's decision in *DB v DLJ* (paras [44-48]). At para [53] the judge summarised her views and the applicable principles as follows:

a. Finality is an agreed priority for parties using the IFLA Financial Scheme and this agreement will be respected.

b. It is clear from *S v S* and *DB v DLJ* that financial disputes are arbitrable and the 1996 Act applies to arbitration under the IFLA Financial Scheme and awards produced under that scheme.

c. In principle, an IFLA Financial Scheme arbitration award is effective and binding as between the parties without further court order. An order of the court is not a pre-condition for the binding effect of an award on the parties.

d. However, in the context of financial disputes it will usually be appropriate for the parties to ask the original family court in which the proceedings were started to incorporate the award into a consent order. This will ordinarily be more convenient than enforcing an award under s66 of the 1996 Act but that procedure is also available. Obtaining an order is necessary for the award to be relied upon against third parties (such as pension providers) and for achieving a clean break.

e. The making of an arbitration agreement (or an award) does not oust the court's jurisdiction under Part II of the MCA 1973 to make an order, and does not exclude its duty to investigate the parties' circumstances. However, the exercise of the court's discretion must take account of the award, the agreement to arbitrate, and the scope of the court's grounds for setting aside, varying or declaring an award to be of no effect under the 1996 Act.

f. For the reasons set out in *DB v DLJ* it would be exceptional for a court to

refuse to approve a consent order containing an award.

g. As laid down in *DB v DLJ*, the court can refuse to make an order giving effect to an award where there are supervening circumstances within the principles laid down in *Barder v Barder* [1988] AC 20. These have always been regarded as exceptional cases and the bar is set high. The emergence of fundamental new circumstances justifies re-opening the case because it gives rise to a new dispute upon which there are no findings, and which is not covered by the arbitration agreement, and accordingly the parties are not precluded from asking the court to deal with it.

h. The ground of mistake justifying a re-opening of facts in *DB v DLJ* is narrowly defined in that case. It will only exceptionally justify an award not being upheld. Again, the emergence of new evidence only triggers relief if it gives rise to a new and materially different dispute.

i. To allow an application that the award is not made an order under *DB v DLJ* (or an application to show cause) to confer a broader jurisdiction to re-open findings in an award, for example because the arbitrator has made an error of law falling outside s69 or a mistaken evaluation of the facts, or a party has a new argument or some useful new evidence has emerged would run directly counter to the 1996 Act and the parties' intentions in agreeing to arbitrate. I am not satisfied that the wording of ARB1FS supports such wide powers to vary the effect of an award.

At para [56] she went on to conclude that,

> *'it is doubtful that an agreement would be effective to enlarge the court's jurisdiction where there are mandatory statutory provisions limiting the court's jurisdiction (for example section 68 of the 1996 Act.'*

A concluding note of caution is the doubt cast by the judge over the wisdom of pursuing an application to the court for an order that the arbitral award should not be made an order of the court (i.e. pursuant to *DB v DLJ*) as opposed to pursuing a

challenge to the award within the confines of the 1996 Act within 28 days. At paras [62] and [63] the judge said this:

> *'[62]… [q]uite apart from the mandatory statutory application of the 1996 Act there are good practical reasons why powers under the 1996 Act should be the primary means for challenging an arbitration award. The procedure adopted here for an application under DB v DLJ has entailed a directions hearing plus a full day's hearing in the High Court. Even though W had the benefit of very experienced counsel (and solicitors' assisting her in part) there was confusion as to what regime applied and what rules she needed to comply with. She had to obtain an allocation within the Family Court to High Court Judge level and tailored directions were required. The process cannot be regarded as an easier or more efficient alternative to an arbitration claim. The procedures applicable to arbitration claims under the 1996 Act were not drawn up solely for dealing with civil and commercial claims. Arbitration is used in much wider fields including employment, partnership and consumer claims. The rules are not designed solely for high value commercial claims since many arbitration claims concern relatively small amounts and the procedures are aimed at resolving applications efficiently, often without need for an oral hearing.*
>
> *...A further point is that the 1996 Act enables the court to order that the matter be immediately remitted back to the arbitrator. The "notice to show cause" procedure means that if W's case had merit the parties would be faced with going back to an unknown judge in the Family Court and losing much of the benefit of having their chosen arbitrator who had investigated their case fully and acted promptly throughout. In addition, the "notice to show cause" procedure does not entail the variation of an award or it being set aside (since such orders are governed by the 1996 Act) so it leaves uncertainty as to the status of an award.'*

In re H **[2018] EWHC 3761 (Fam) – High Court – Mostyn J**

Summary

Court dismisses an application for committal in light of 'fatal' procedural errors in the application. This guidance on the procedure for committal was given in the context of a child abduction case, but the Judgment is of universal application to all types of proceedings in the family courts.

Facts

This case involved an application for committal made within child abduction proceedings, but the principles stated in relation to the procedure for committal are equally applicable to all family, including financial remedy, proceedings. The father of three children was arrested by the Tipstaff executing a Passport Order on the suspicion that he (the father) was failing to comply with his obligation to reveal the whereabouts of the children. The father was remanded in custody over two subsequent hearings (respectively, two days and eight days after the initial arrest) in preparation for a full committal hearing. When the committal application came to be tried, Mostyn J dismissed it on the basis of fatal procedural errors.

Key Issues

The judgment reinforces the importance of compliance with procedure in respect of a committal application. Key principles stated are:

- The application must be made using the Part 18 procedure (rule 37.10(1))
- The application notice must set out in full the grounds on which the committal application is made and must identify, separately and numerically, each alleged act of contempt including, if known, the date of each of the alleged acts and be supported by one or more affidavits containing all the evidence relied on. (rule 37.10(3))
- Rule 18.8(b)(ii) provides for the application notice to be served at least seven days before the court is to deal with the application (which does not include days which are not business days, per rule 2.9(4).

While Mostyn J accepted that PD37A, para.13.2 grants the court's powers to 'waive procedural defects' in the application 'if satisfied that no injustice has been caused to the respondent by the defect,' he concluded it was difficult to envisage circumstances that would justify the waiving of the requirements in r.37.10(1) or (3) given that committal interfered with the liberty of the subject.

The court referred to the decision of the Court of Appeal in *Re L* [2016] EWCA Civ 173 stating that an application for committal was a technical process for a good reason (Vos LJ at para 75):

> *"The process of committal for contempt is a highly technical one, as this case shows, but it is highly technical for a very good reason: namely the importance of protecting the rights of those charged with a contempt of court. In cases of an alleged breach of a previous court order, persons should not be at risk of being sent to prison for contempt of court unless:*
>
> *(i) they have been served or otherwise made fully and properly aware, in accordance with the rules, of the order they are said to have breached before the alleged breach occurs;*
>
> *(ii) the fact that they have been served or so made aware is established before the committing court;*
>
> *(iii) they have been informed before the hearing of the precise details of the breach they are alleged to have committed;*
>
> *(iv) they have been informed of their right to remain silent before they give evidence if they choose to do so; and*
>
> *(v) the allegation of contempt is proved to the criminal standard. The principles as to the need for service have always been axiomatic in civil proceedings where injunctions are frequently made against defendants in their absence. It can be no different in family proceedings."*

Later in *Re L*, Theis J said at para.78:

> *"Before any court embarks on hearing a committal application whether for a contempt in the face of a court or for a breach of an order, it should ensure that the following matters are at the forefront of its mind: …*
>
> *(ii) prior to the hearing, the alleged contempt should be set out clearly in a document or application that complies with FPR r.37, and which the person accused of contempt has been served."*

Not only did Mostyn J endorse this paragraph but he went further and said at para.9:

> *"…given that the liberty of the subject is at stake, I find it hard to envisage any circumstances where the terms of r.37.10(1) and (3) are waived. For my part I cannot envisage the sort of circumstances where the court would waive the requirement of spelling out in detail in the application notice the grounds on which the committal application is made, and in affording the alleged contemnor the full period of notice provided for in the rules,*

which have been of course approved by Parliament."

***AR v JR* [2018] EWHC 3626 (Fam) – High Court – Cohen J**

Summary

Cohen J dismisses H's application under r.4.4(1)(b) of the FPR 2010 for W's application for financial remedies to be struck out on the basis that it was (a), vexatious, and/or duplicative and/or (b), on the basis there had already been compromise of her claims within previous judicial separation proceedings.

Facts

The parties were married for more than 40 years, and had two (now adult) children. In 2010 the parties had a formal judicial separation and agreed a consent order under which W would receive a sum of just over $16 million.

In 2015 H petitioned for divorce, and FR proceedings followed. H issued an application to strike out W's claim for financial remedies ancillary to the divorce suit under the rule in *Henderson*, i.e. that it was 'vexatious and/ or duplicitous and/ or that there had been a prior compromise.' This application came before Cohen J. Further detail of the stages of proceedings are set out below:

2010 Judicial Separation Proceedings

- When the marriage foundered in 2010, W issued judicial separation proceedings and served Form A. At that time her assets amounted to around £6.8m. H asserted his wealth at "plus or minus £9m" but gave no disclosure. Despite having formed another relationship, H did not press the issue of divorce and there was no mention in the correspondence between solicitors with respect to divorce proceedings. A decree of judicial separation was pronounced on 10th August 2010. On 14 October 2011, a consent financial order was made by District Judge Bowman, who dealt with the matter on paper.

- The judicial separation financial agreement was reached without H having provided any financial disclosure by way of Form E or otherwise. The wording of the order

approved by District Judge Bowman reflected that fact. This was not for want of trying on the part of W's solicitors who pursued the lack of financial disclosure vigorously in correspondence. In addition, they made it very clear that W was seeking 'a fair share' of H's assets and income under English law, a share which could not begin to be quantified until he had provided at least basic details of his net worth, including world-wide assets owned by him and income from all sources.

- The first appointment in the JS proceedings was postponed at least twice due to the husband's non-compliance with respect to disclosure. Notwithstanding these difficulties, parallel negotiations were successful and the agreement reached.

- W's lawyers ensured that the consent order clearly recorded that the financial settlement was final with respect to dismissal of both parties' claims 'in these proceedings', that phrase being repeated on a number of occasions throughout the order. The terms of the 2011 order were complied with in full by H.

2015 Divorce and Financial Remedy Proceedings

- H issued divorce proceedings on 7 August 2015 on the basis of five years' separation and Decree Nisi was subsequently pronounced. W issued financial remedy proceedings. After several hearings (the delay being later referred to in the Judgment of Cohen J as a relevant factor) H issued a strike out application on 7 November 2018, arguing that W's application for financial relief was either (a), vexatious, and/or duplicative and/or (b), there had been prior compromise by reason of the agreed terms of the 2011 financial order. Specifically, H sought to argue that even if it was not spelt out in the 2011 order that this was a final order encompassing future divorce proceedings.

Key Issues

- Cohen J acknowledged that there was power to strike out W's FR claims. However he held that the 2011 order was intended to cover the 2011 proceedings only, and not future divorce proceedings.

- It was common ground that the parties' substantial fortune had been built up wholly during the 40-year marriage, which had been spent largely in West Africa, where H established a successful business supplying support vessels to the offshore oil industry. At the time of the divorce proceedings in 2015, the net equity in his principal business appeared in the accounts at just under 1 billion US dollars, the husband being either the sole owner or holding the vast majority of the shares.

- The argument that W should have made her full claims in the judicial separation proceedings was unsustainable as there was no obligation for her to do so and W did not have the material by way of full financial disclosure to determine her sharing claims.

- Judicial separation did not end the marriage and divorce gave rise to a separate cause of action. There was no evidence that W had misled H, and both parties were aware that W's entitlement had not fully been dealt with.

Martin v Martin **[2018] EWCA Civ 2866 – Court of Appeal**

Summary

The Court of Appeal gives guidance on the correct approach for valuation of shares in a private company, including the calculation of the percentage said to be 'matrimonial' when the bulk of the company's value had grown during the marriage. Also issue of "Wells" sharing and differences between categories of asset.

Facts

The parties separated after a 29 year marriage, including 3 years of cohabitation. They had two, now adult children. In 1978, eight years before the parties began living together (in 1986) H started a business with a friend that he would later become the business, Dextra, found by Mostyn J at the time of the proceedings to be worth £221 million (gross). In 1989, the year of the marriage, H bought his partner's shares and thereafter H held 99% of the shares and W held 1%. It was accepted by both parties that the court should strive to

share the matrimonial assets equally as part of the final settlement. A single joint expert was instructed to provide opinion evidence to the court on the issue of valuation of the company, including its pre- and post-matrimonial states.

The Court of Appeal summarised Mostyn J's decision at paragraphs 6-13:

- He found the net capital assets held by the parties to be worth £182 million, comprising: (i) properties (substantially residential) and pension funds valued at approximately £21 million; and (ii) 100% of Dextra. This was based on his determination that the "present value" of Dextra was £221 million before tax and costs of sale. He used this as a hard figure in the sense that he did not differentiate between its value and the value of the other assets including, in particular, cash (comprising, largely, a net dividend of £49.5 million to be paid by the company). He adopted this approach because he considered that "the only difference between it (i.e. the company) and its cash proceeds is … the sound of the auctioneer's hammer". Accordingly, he calculated his award on the basis that the wife should receive half of the net value of the marital assets including the value of the company.

- He decided that only 80% of the value of Dextra was marital property. He arrived at this percentage by applying a **straight-line** apportionment to the value of £221 million from the date when the business was first incorporated, in its initial form (July 1978), to the date of the hearing. He did not, therefore, seek in any way to base this determination on the value given by the single joint expert for the company at the start of the parties' relationship (July 1986) or his attempt to value by reference to an earnings based methodology. The judge's approach led him to conclude that £177 million of the present value of Dextra represented marital property (see para.51-53)

- Mostyn J concluded that the marital wealth totalled, net of taxes and costs of realisation, £146 million. He awarded W half of this. The court's assessment of the total wealth was in part based on Dextra declaring a dividend of £80 million gross (£49.5 million net) of which £50 million could be paid "immediately" with

the balance being "deferred". Based on these assumptions, Mostyn J awarded W assets of £53.7 million, being a lump sum of £40 million (£20 million being payable by June 2017 and £20 million by June 2019) and 17.5% of the shares in Dextra (being equal to £19.2 million). Together these totalled £72.8 million or 40% of the total wealth of £182 million. W's shares in Dextra would represent 26% of her assets with her non-business assets totalling £53.7 million. H was awarded total wealth of £109 million (60% of the total), of which his shares in Dextra would represent £90.6 million, or 83% of his wealth, with other assets of £18.4 million.

Key Issues

W appealed and H cross-appealed the order. The main issues raised by the appeals were:

- Whether the court had correctly valued H's interest in Dextra;
- Whether the method for calculating the marital part of Dextra was correct;
- Whether the court had been entitled to treat the value of Dextra as equivalent to cash/ whether issues of liquidity had been adequately explored in the evidence.

In essence, H complained that the order unfairly distributed the 'copper-bottomed' assets in favour of W. He also argued that the court had heard insufficient evidence to conclude that he could meet the obligation to pay a second sum of £20 million by June 2019 from a dividend by Dextra paid before that date. He argued:

- The judge wrongly treated the value he ascribed to the company as equivalent to cash and, as a result, awarded W an unfair proportion of the non-risk assets; and
- The judge was wrong to order £20 million of the lump sum to be paid to W within 2 years.

W complained that the valuation method deployed by the court had been inexact and inadequate. She argued:

- When determining what part of the current value of the company was marital wealth, the judge wrongly applied a straight line apportionment from the date of its incorporation; and
- The judge wrongly disregarded the fact that, when the parties started living together, H only owned half of the company; and

- The judge was wrong not to provide a mechanism for the realisation of the shares in the company which formed part of W's award.

The Court of Appeal concluded:

- W's ground of appeal against the application of a straight line apportionment to determine the non-matrimonial part Dextra was rejected. While the SJE had stated a value for the company as at 1986, the CA found that Mostyn J was entitled to conclude that that figure did not fully reflect the true potential of the company, which was borne out by its later growth. The CA used the words of Holman J in *Robertson*, that any specific methodology should be considered "a tool not a rule", and reminded the parties that "*the exercise on which the court is engaged is not restricted to a single route to determining how the wealth is to be characterised for the purposes of the application of the sharing principle*."

- Moylan LJ noted that he had concluded in *Hart v Hart* that there was no single route to determining which assets are marital and which are not. Put simply,

> 'a judge has an obligation to ensure that the method he or she selects to determine this issue leads to an award which, to quote Lord Nicholls in Miller; McFarlane, at [27], the judge considers gives "to the contribution made by one party's non-matrimonial property the weight he considers just … with such generality or particularity as he considers appropriate in the circumstances of the case". This provides the same perspective as Wilson LJ's observation in *Jones v Jones* about "fair overall allowance", at [34]. This was why Holman J was entitled in *Robertson v Robertson* to reject the "accountancy" approach, not only because it seemed unfair to the husband, but because he did not consider that this fairly reflected the relevant considerations in the "overall exercise of (his) discretion", at [59]. Both of the latter cases concerned the development of trading companies and, in my view, these observations apply with particular force in such circumstances.' (para.113)

- He sanctioned Mostyn J's straight line approach to calculating the marital, or pre-marital element of Dextra (paragraph 126-127) whilst refusing to elevate this approach above all others:

- He agreed with Mostyn J's observation about, "the beneficial side effect of eliminating arid, abstruse and expensive black-letter accountancy valuations of a company many years earlier at the start of the marriage."
- He agreed that it "resonates with fairness" because it takes an overarching view of the weight to be attributed to the husband's contributions to the business throughout its existence; and
- He noted that the approach was consistent with the overriding objective.

- W's ground of appeal concerning the overall value ascribed to the company of £221 million was also rejected. The CA accepted that the Judgment had been a bit brief in setting out its methodology and a "*more balanced, explicit assessment would have made clear that the judge had taken all the relevant factors into account*," but it could not be persuaded on that basis alone that any of the grounds on which a factual determination could be set aside had been demonstrated.

- However, the CA considered that Mostyn J's comment that the *'only difference between (Dextra) and its cash proceeds is… the sound of the auctioneer's hammer*', was inapt to the circumstances of this case. There was a difference of substance between the value ascribed to Dextra and the other assets, including the cash to be extracted from the company by way of a dividend. The CA was satisfied that Mostyn J failed to consider whether his proposed award achieved a fair division of both the copper-bottomed assets and the illiquid and risk laden assets.

- Moylan LJ considered the court's approach to valuation generally from paragraphs 80 to 98. He cited in detail the Court of Appeal's decision in *Versteegh v Versteegh* (at [136]-[138] and [185]) and the citations from *H v H* [2008] 2 FLR 2092 which were explicitly referenced and not departed from (see paragraph 91-92). He made the following points:

    - Assets self-evidently have different levels of risk and it is important to compare like with like. This was clear from in *Wells v Wells*, *P v P*, *Chai v Peng*, *Myerson v Myerson* etc. [80-85]

- More recently *Versteegh v Versteegh* [2018] 2 FLR 1417 Lewison LJ at [185]: '…the difference in quality between a value attributed to a private company on the basis of opinion evidence and a sum in hard cash is obvious.' [84]

- The difference between private shares and cash is not confined to the issue of risk, but extends to the quality of the asset (e.g. liquidity and illiquidity) [86]

- The judge's reference to the 'auctioneer's hammer' was misplaced; Thorpe LJ in *White v White* (from whose judgment in the CA the reference was taken) had been referring to prime agricultural land, not <u>all assets</u> [88]

- Valuations are always a term of art. There is a spectrum between [89-90]:

    - An active market with a lot of comparable, which make it easy for an expert to provide a valuation (e.g. residential property); and

    - An inherently speculative business valuation (see *Fields v Fields* or *Versteegh*)

- Private companies can sit within that spectrum. In *Versteegh* the trial judge was unable to reach a safe valuation (see paras.107-138, 184-185 and 195-199). Caution was urged in respect of valuations of private trading companies in particular [91-93].

- If the court <u>can</u> "fix" a value 'this does not mean that that value has the same weight as the value of other assets such as, say, the matrimonial home. The court has to assess the weight which can be placed on the value' [93], which affects the amount and structure of an award with reference to liquidity, risk etc. This assessment of weight is a 'broad evaluative exercise'.

- Moylan LJ said this at paragraph 93:

> 'How is this to be applied in practice? As referred to by both King LJ and Lewison LJ, the broad choices are (i) "fix" a value; (ii) order the asset to be sold; and (iii) divide the asset in specie: at [134] and [195]. However, to repeat, even when the court is able to fix a value this does not mean that that value has the same weight as the value of other assets such as, say, the matrimonial home. The court has to assess the weight which can be placed on the value even when using a fixed value for the purposes of determining what award to make. This applies both to the amount and to the structure of the award, issues which are interconnected, so that the overall allocation of the

parties' assets by application of the sharing principle also effects a fair balance of risk and illiquidity between the parties. Again, I emphasise, this is not to mandate a particular structure but to draw attention to the need to address this issue when the court is deciding how to exercise its discretionary powers so as to achieve an outcome that is fair to both parties. I would also add that the assessment of the weight which can be placed on a valuation is not a mathematical exercise but a broad evaluative exercise to be undertaken by the judge.'

- The CA allowed H's appeal in relation to the order to pay W £20 million by June 2019. There had been inadequate exploration in evidence on the issue of liquidity, which was necessary when considering the extraction from Dextra of a sum as large as £20 million.

The Court of Appeal substituted the order for payment of a lump sum of £20 million by June 2019, with an order for four annual instalments of £5 million.

2 final points from first instance decision.

- The first instance decision also contains an interesting point in relation to **'add backs'**. H had, during the course of the proceedings, purchased a shooting estate for c.£1.5 million which he did not need to purchase and which was not his primary home. Mostyn J considered it unfair and unreasonable to deduct from the total matrimonial assets the costs and taxes of purchase and the notional costs of sale even though there was no express finding that the purchase was "wanton and reckless".

- **Requests for corrections / amplification**.

  "39. Finally, I would observe that the demands by [counsel] for correction and amplification of the draft judgment went far beyond what is permissible, and amounted to blatant attempts to reargue points which I had already rejected. This practice is becoming commonplace and should be stopped in its tracks in the interests of efficiency and the conservation of the resources of the court. Suggested corrections should be confined to typographical or plain numerical

errors, or to obvious mistakes of fact. Requests for amplification should be strictly confined to claimed "material omissions" within the terms of FPR PD 30A para 4.6."

For detailed guidance on the issue of valuing private companies, in particular trading companies see *Versteegh v Versteegh* [2018] EWCA Civ 1050 and *Hart v Hart [2017] EWCA Civ 1306*.

***NN v AS & Ors* [2018] EWHC 2973 (Fam) – High Court – Roberts J**

Summary

Roberts J declines to make additional financial award to W under Part III MFPA 1984 (other than to formalise the agreed financial support for a child), following extensive fact finding concerning H's interests in various London properties and a yacht. Three of his family members intervened in the proceedings.

Facts

The parties married in Egypt in 2007. Both parties were Egyptian nationals, and H additionally held British nationality (W later also acquired British nationality in 2015). In the same year as the marriage H reconciled with his father after a long period in which he had struggled with debt. H's father paid off the debt and the parties returned to Egypt for married life, where H took up work for his father (who was to become the second respondent in these proceedings). In 2012, W moved to London with the parties' son, A. W alleged that this relocation was consensual and permanent. H maintained that it was W's initiative and for a maximum of 3-4 years.

In 2015 the parties divorced in Egypt. They entered into a financial agreement, under which H agreed to pay W a lump sum of EGP 5 million (c.£215,000) and to maintain the financial status quo. W and A would remain in the London property where they had lived since 2012. H agreed to keep paying the mortgage on the property and to maintain the voluntary pps of £5,000 pcm to cover her and A's expenses.

W issued an application in England for financial relief following a foreign divorce under Part III of the MFPA 1984 in March 2017. In those proceedings W alleged that H was the legal and beneficial owner of three properties in central London and a yacht, with a combined value of c.£100 million. W sought an award of £3.8 million, including the outright transfer to her (mortgage-free) of the London property in which she and A lived, plus an additional lump sum. W alleged she had been 'set up' by H in relation to the Egyptian divorce and financial agreement and that she had been put under pressure to sign it. She also made a series of allegations of sham and forgery against H and his family members.

H denied W's allegations. He accepted he had a one-third interest in two of the London properties (with his two sisters holding the other two-thirds in each, who became the third and fourth respondents), and he denied having any interest in the third property or yacht, although his name appeared on the legal title to both. In the first instance he invited the court not to exercise any powers under Part III. However he informed the court that his family members had consented to W remaining in occupancy of the London flat until A completed his secondary education. He offered to maintain the mortgage payments on the flat on a secured basis. And he would make additional testamentary provision in the event of his death during A's minority.

H's wider family members were joined as parties to the proceedings. The court embarked on a lengthy fact-finding exercise over 10 days, with a bundle running to eight lever arch files.

Key Issues

- The court made findings in relation to the three London properties and yacht in H's name, and other findings in relation to monies said to have been paid to H. Those findings were fact-specific and not of wider application, but in summary:
    - The court upheld H's case that he held two of the London properties on trust for himself and his sisters in three equal shares;
    - The court also found that H held the third property on trust for his father. The property had been a contingent gift to H from his father that was later recalled, after which H declared a voluntary trust of his entire interest in the

property to his father;

  - The court was satisfied that H held the yacht on a bare, resulting trust for his father, who had funded its purchase.

- Roberts J went through the relevant principles relating to constructive and resulting trusts in detail and also rejected W's case in relation to sham and her allegations concerning forged documents. The result of her analysis was that H's property interests amounted to some £340,000 in total.

- In deciding the Part III application, the court was satisfied that the Egyptian agreement was "*fair and likely to survive a Radmacher health check*". Roberts J rejected W's case that W had been placed under pressure to sign up to the Egyptian divorce agreement. Given that W had property of her own, and given her findings in relation to H's true resources, Roberts J made an order more or less in line with H's open position. She was persuaded to make an order under Part III insofar as was necessary to embody the agreement in relation to A's financial arrangements, to provide him with 'security'. She did not alter the quantum.

- The court observed that W had made a '*very significant financial investment into this litigation*'. W held liquid cash funds of £665,000 from which her legal fees of £400,000 (in both jurisdictions) were yet to be paid. Her only other asset was an investment property she co-owned with her brother (her net interest being valued at £416,000). The erosion of W's capital assets on legal fees was of particular concern as W derived part of her income from her investment funds. However, Roberts J was reminded that, "*As the Court of Appeal has made plain in Zimin v Zimina, the court cannot and should not exercise its discretion under Part III simply because the costs of an unmeritorious Part III application have depleted the applicant's resources and given rise to a potential situation of need.*" So this was not sufficient reason to grant further award.

***Hart v Hart* [2018] EWHC 2966 (Fam) – High Court (HHJ Wildblood QC sitting as a DCJ)**

Following ***Hart v Hart* [2018] EWHC 2894 (Fam) – High Court (HHJ Wildblood QC sitting as a DCJ)** and ***Hart v Hart* [2018] EWCA Civ 1053** and ***Hart v Hart* [2017]**

EWCA Civ 1306 – Court of Appeal and others…

Summary (of [2018] EWHC 2966 (Fam))

Sentencing hearing for Third and Fourth Respondents following successful committal application by the Wife in the course of enforcement proceedings.

Facts

The parties were married for 19 years. They have two adult children. They separated in 2006 and began divorce proceedings in 2011. Those proceedings have been up to the Court of Appeal twice: once in 2017 ([2017] EWCA Civ 1306) and again in 2018 ([2018] EWCA Civ 1053). Subsequent proceedings have also taken place in the Chancery Division. Much of the case, particularly the former judgment on appeal, has concerned the assessment and treatment of "non-matrimonial property" largely accrued by H prior to the marriage. The CA gave detailed guidance on that issue in its 2017 judgment. However, the proceedings have also been dominated by what has been found to be repeated non-disclosure by H and his non-cooperation with the implementation of orders.

The proceedings have now reached the stage where a final order has (notionally) been made (in June 2015) and the substantive appeal against it has been dismissed (in August 2017). The focus of the litigation has shifted to enforcement and implementation.

Pursuant to the final order, inter alia, H's sister, who was joined to the proceedings as the third respondent, was required to transfer to W shares in a subsidiary of the company that was then held on trust for the benefit of W and H. When that did not take place (for various alleged reasons) W issued enforcement proceedings, to which H's sister and the company were also joined. Within those enforcement proceedings, H, his sister and the company were ordered to provide to W various documents and pieces of information. They failed to do so, and W issued a committal application.

On 23 February 2018, H was found to be in contempt of the enforcement orders. He was committed for 14 months. His appeal of this order was mostly dismissed by the Court of Appeal ([2018] EWCA Civ 1053) (one limb in relation to committal from breach of an undertaking was allowed; the other grounds were refused).

W's application for committal against H's sister and the company were adjourned. They admitted the fact of the breach, but alleged that without H's cooperation were unable to comply with the orders in full. The court found them also to be in contempt in November 2018, and this hearing was listed to consider their sentencing only.

Key Issues (of [2018] EWHC 2966 (Fam))

- The Judge began his judgment by lamenting:
  "*this is a ridiculous situation which is brought about by a steadfast refusal to obey court orders. No judge, myself included, would ever wish to be in the position of having to sentence an otherwise highly respectable and respected 65 year old woman, a committed family member, for contempt arising out of the divorce proceedings between her brother and her former sister-in-law. However, that is the position in which I now find myself and there is no avoiding it.*"

- In performing this quasi-criminal jurisdiction, the judge considered the aggravating factors and mitigating factors.

- The judge noted that H's sister had only become involved latterly in the proceedings and considered that she was likely to be acting "*principally out of her sense of misplaced loyalty to the elder brother who has protected her and cared for her from a very early age*." He also noted that she was of good character and he considered the effect of her sentence on her health, welfare and her standing in the community. But he had to weigh those factors against her awareness of the effect of her contempt on W's position, her expressed lack of remorse, and her defiance of the court's orders in the face of the many warnings that had been issued to her, and the repeated opportunities to comply. The judge sentenced H's sister to three months' imprisonment in relation to each of the two orders of which she was in contempt (running concurrently). No separate penalty was imposed on the Company, since H's sister was its sole director.

- He concluded that a financial penalty would be insufficient because the contempt was serious. Likewise, to suspend the sentence would not do adequate justice to

the gravity of the breach.

- Six points were distilled from the judgment of Hale LJ (as she then was) in *Hale v Tanner* [2000] 1 WLR 2377 at pp. 2380H to 2381G:
  a. Imprisonment is not an automatic consequence of breach of an order.
  b. The full-range of criminal sentencing is not available but there is a range of things the court can consider, including taking no action, imposing a fine or sequestering assets, or suspending a sentence of committal.
  c. If imprisonment is appropriate the term should be decided and then the question of whether to suspend decided separately. The length of suspension again is separate but it is often appropriate to link it to future compliance.
  d. There are two essential objectives: to mark the court's disapproval and to secure (where possible) future compliance.
  e. The length of committal must bear a reasonable relationship to the maximum of 2 years.
  f. Reasons should be given.

- H and his sister were also ordered to share the costs of the committal proceedings, which had cost W a total of £100,000.

De Gafforj v de Gafforj **[2018] EWCA Civ 2070 – Court of Appeal – Jackson LJ**

Summary

The Court of Appeal made a Hadkinson order such that H (the appellant) would only be permitted to pursue his appeal if he purged his contempt of court by paying outstanding sums owing to W, including a LSPO for her historic and future costs.

Facts

W and H married in France in 2002. They had 2 children, who were educated in England. At the time of the hearing W had a home in England, H remained in France. W petitioned for divorce in England in April 2016. H petitioned for divorce in France six weeks later

and challenged the English divorce proceedings for want of jurisdiction under BIIa. The trial judge refused H's application. That judgment concerned the interpretation of "resident" within the meaning of article 3, indent 5, of BIIa. The judge (DJ Hudd) found that W had been resident in E&W for 12 months prior to the petition and rejected H's case that she needed to have been habitually resident for that time[1]. She refused to make a reference to the CJEU on the interpretation of the article. Baker J granted H permission to appeal from that decision not to make a CJEU referral. The appeal was listed to be heard in October 2018.

H was ordered to pay W maintenance pending suit and costs. He initially paid the MPS but none of the costs. Further, in June 2018 a legal services payment order (s.22ZA MCA 1973) was made in W's favour for £80,000 (her previous legal costs) and for ongoing payments. H made no payments under the order.

As the appeal hearing approached, in August 2018 W applied for a *Hadkinson* order seeking to dismiss H's appeal unless he purged his contempt of the previous orders and paid the sums due to her.

Key Issues

Jackson LJ gave the judgment of the Court of Appeal. It offers a very helpful summary of the law on granting a *Hadkinson* order, which is

> *"…draconian in its effect because it goes directly to a litigant's right of access to a court. It is not and should not be common place…. it is a case management order of last resort in substantive proceedings where a litigant is in wilful contempt rather than a species of penalty or remedy in committal proceedings for contempt." [§9, citing the CA in Assoun [2017] EWCA Civ 21]*

He reiterated that such an order can be made at any stage in proceedings: first

[1] This case was directly on the point of the legal uncertainty between the competing judicial perspectives of Munby J in *Marinos* [2007] EWHC 2047 (Fam), [2007] 2 FLR 1018 (supported inter alia by Ryder J in *Z v Z* [2009] EWHC 2626 Fam and Jackson J in *V v V* [2011] EWHC 1190 (Fam), [2011] 2 FLR 778) and Bennett J in *Munro* [2007] EWHC 3315 (Fam), [2008] 1 FLR 1613 (supported inter alia by Holman J in *Olafisoye v Olafisoye* [2010] EWHC 3539 (Fam), [2011] 2 FLR 553). But for H's default, it could have been the case to decide the point.

instance and on appeal. Further, the following conditions were necessary in order to make a *Hadkinson* order [§11]:

1. The respondent must be in contempt;

2. The contempt must be deliberate and continuing. Note that non-payment of a maintenance order is itself a continuing contempt of court and the question of ability to pay is connected to how to act on the contempt [§14]);

3. There is an impediment to the course of justice. The judge said this was likely to include, "making it more difficult for the court to ascertain the truth or to enforce the orders it makes." [§13]

4. There is no other realistic and effective remedy: if the court has other powers that can effectively be deployed then it will use those first [§14];

5. The order is proportionate to the problem and goes no further than necessary to remedy it: a *Hadkinson* order is flexible and can have a range of possible sanctions. The key is that the sanction imposed is proportionate to the contempt and designed to remove the impediment to justice [§15].

This case clearly met the criteria for a *Hadkinson* order. H was only permitted to pursue his appeal in the divorce proceedings on the condition that he paid the sums outstanding under the legal services payment order and W's costs by 8 October 2018. Failing that, his appeal would be dismissed and the temporary stay on W's petition would be lifted.

LKH v TQA AL Z (Interim maintenance and pound for pound costs funding)
[2018] EWHC 2436 (Fam) – High Court – Holman J

Summary

Holman J makes a Mubarak order against a husband in breach of MPS and LSPO orders, requiring

him to pay W's solicitors £1 for every £1 he pays to his own legal team. At the same time he refuses to make a debarring order.

Facts

The case came before Holman J in circumstances which the judge described as a "grave picture of non-compliance by H". In particular, H was in breach of orders:

- to file a Form E (the deadline for which had already been extended once),
- to pay MPS to W of c.£26,000 pcm, with a total arrears of >£100,000,
- to pay a LSPO to W of £40,000 pcm, with total arrears of £120,000,
- to pay certain costs payments to W of £10,000.

H filed a witness statement for the hearing in which he said his net wealth was $45 million, but his assets were illiquid and unrealisable. He claimed he was unable to make the payments owing to W under the order. However, he had paid his own solicitors, newly instructed in place of a previous firm one month prior to the hearing, £95,000.

W (unsurprisingly) made an application for a *Mubarak* order, though the terms she sought were that for every £1 paid to H's solicitors, H must pay £100 to W's solicitors. Holman J allowed the *Mubarak* application, though substituted the more conventional £1 for £1. W also sought a *Hadkinson* order, debarring H from entering an appearance while he remained in contempt. This was refused.

Key Issues

- Holman J was willing to make the £1 for £1 order in addition to the interim maintenance order already in existence, commenting that it was "*frankly, intolerable and an affront to justice that in the last month this man paid £95,000 to his new solicitors at the very time when he was already in arrears and getting further into arrears with his wife*" [para 23].

- Holman J did not allow the £100 for every £1 sought by W. He expressed the view that since the "*rationale of such an order must be that of an equal or level playing field*," he did not think the Mubarak jurisdiction can "*properly be applied to require a payer (usually*

the husband) to pay substantially more to the other party than to his own solicitors" [para 17].

- Holman J also refused to accede to W's *Hadkinson* application for a debarring order. That "very extreme course" [para 20] may be more readily applied to prevent a party from pursuing a further application himself, but would be rare indeed to prevent a party from engaging in the substantive financial remedy proceedings, which required both parties to be fully engaged and heard in order for the court to be fully informed.

- Crucially, as with previous *Mubarak* authorities, Holman J was at pains to emphasise that nothing in the terms of this injunction released H from his obligation under the existing orders to pay the full amounts he had been ordered to pay. Even if he chose not to pay his solicitors another penny, he remained under an existing obligation to pay W the full sum [para 16].

Tattersall v Tattersall **[2018] EWCA Civ 1978 – Court of Appeal – Moylan LJ**

Summary

The Court of Appeal dismissed a husband's appeal against orders for enforcement of unpaid periodical payments arising from a financial remedy order.

Facts

The case had a long procedural history – the original financial remedy order having been made on 10 December 2012; H had previously sought to appeal the substantive order but that appeal was dismissed by the Court of Appeal on 9 July 2013 – and with various orders for enforcement having been made between 2013 and 2016. H also applied in 2014 to vary the original order, which was before the court hearing the enforcement claims but has (as yet) not been determined.

H and W married in 2000 and separated in 2010. They had one child. The final financial remedy order of 10 December 2012 ("the financial order") divided the capital unequally in

W's favour to enable her to buy a house for herself and the child. The financial order also provided, inter alia, for H to pay to W periodical payments at the rate of £1,070 pcm, less any child support payments, until the first of various trigger events, one of which was 1 September 2020. From September 2020 until September 2027, the rate of periodical payments was to become nominal, with a dismissal and section 28(1A) bar to be imposed at that stage.

H failed to pay the periodical payments owing under the financial order. It was recorded in the Judgment (§10) that "*for some time H paid what he calculated his CSA liability would be and he then stopped paying anything.*" By the time of this appeal, W informed the court that she had received c. £3,500 in CSA payments from H. W issued enforcement applications, first in July 2013 and secondly in September 2013. Those came to be heard (together) at trial on 3 June 2014, with judgment being given on 30 July 2014 and addendum judgment on 23 September 2014.

Meanwhile, H had lodged an application to vary the financial order on 9 October 2013. He did not pay the court fee until 27 January 2014, so it was not issued until then. Case management directions were made on 31 January 2014 that listed his variation application to be heard with W's enforcement claims.

Following the trial of the enforcement and variation applications in June 2014:

a. H provided no documents in support of his variation application to the court, not even the application itself. His variation application therefore could not be progressed and was put over to a future hearing.

b. W was given permission to enforce all of the arrears of periodical payments (determined to be c.£16,340);
    i. part of the arrears (£6,000) was ordered to be paid from H's share of the proceeds of a property sold pursuant to the financial order;
    ii. payment of the balance was to be stayed pending H providing a copy of his variation application and supporting evidence to the court by 24 November 2014, and held by the conveyancing solicitors in the meantime. In default of such evidence being provided by 24 November, the stay would lapse.

Subsequently, H produced his variation application and supporting evidence. That application came before the court for directions at various junctures in 2015, and at the time of the appeal was still yet to be determined finally.

At a further hearing (on 1 June 2015) on W's enforcement application, another judge made an order capitalising the order for periodical payments, in the sum of £74,500 for future liability, and £9,000 in respect of arrears.

At a further hearing (on 11 January 2016) on W's enforcement application, the court ordered the balance of arrears held by the conveyancing solicitors to be released to the wife.

Key Issues

H was given leave to appeal the enforcement orders on limited grounds by King LJ:

(1) Against the order on 23 September 2014 giving permission to W to enforce arrears after more than 12 months.
(2) Against the order on 1 June 2015 capitalising the maintenance.
(3) Against the order on 11 January 2016 releasing to W the balance of funds held by the conveyancing solicitors.

H's appeal was dismissed on all grounds, save for a deduction being made from the capitalised sum to give credit (as the original financial order had) for CSA payments. W consented to this approach, leading the Court to make a 'broad assessment' that she was likely to receive a total of c. £6,000 in CSA payments (including the £3,500 already paid) before 2027, and on that basis the Court made a proportionate deduction from the capitalised global figure.

Of the various issues raised in the appeal, the following points arising from the judgment are of particular interest:

- no formal application need be made for leave of the court in respect of arrears that are more than 12 months old to be enforced, if the court is prepared to proceed in

that way. Such applications are "frequently made informally" (§31).

- there is no need in general to adjourn enforcement proceedings for the determination of outstanding variation applications. If that were to become a general requirement, enforcement proceedings would be "too easily manipulated" (§32).

- when capitalisation is live in enforcement (or other) proceedings, there may be some merit in first determining any extant variation application, but the court is entitled to expect the party seeking variation to bear some responsibility for progressing his/ her application and, if failing to do so, will not delay the other party's application longer than is necessary (§39).

- while it is usual (following *Pearce v Pearce* [2003] 2 FLR 1144 and *Vaughan v Vaughan* [2010] 2 FLR 242) for a court capitalising a maintenance order to apply a Duxbury calculation rather than Ogden tables, it is not wrong for the judge to use an alternative method of calculation. There is no error of law in using, as this judge did, Ogden tables to quantify the capital fund.

Versteegh v Versteegh **[2018] EWCA Civ. 1050 – Court of Appeal – King LJ, Lewison LJ, Holroyde LJ**

Summary

The Court of Appeal considers Pre marital Agreements and legal advice and understanding implications in other jurisdictions, principles surrounding 'sharing' including Wells v Wells sharing, considers the various approaches to determining and dealing with "non matrimonial" assets and considers valuation principles.

Facts

This was a 21-year marriage. H and W were in their 50s. They were Swedish. They were married in Sweden in 1993. The day before the wedding W signed a pre-marital agreement (PMA) by which the parties committed to a separation of property regime subject to Swedish law. W received no legal advice.

W came from a middle-class background. H came from an affluent family and had inherited tranches of shares in family companies prior to the marriage. In 1983 H had moved to London and bought a flat there. He was an astute business man and had an interest in a company which he established pre-marriage and which was engaged in long-term land development projects worldwide

At trial, 4 experts had given evidence in relation to the value of H's business which ranged from £38.2 million to £103.7 million

After the marriage W moved to London to live with H. She lived there until their separation in June 2014 after a marriage of 21 years. She was the home-maker and carer of the children during their minority.

- At first instance Sir Peter found:
  - W had a full appreciation of the implications of the PMA when she signed it and it was therefore appropriate for weight to be attached to it
  - H's business was impossible to value and no findings about its liquidity could be made
- W was awarded ½ of the non-business assets (£51.4m) and a 23.41% interest in H's business

Key Issues - The appeal

W appealed the whole decision. Lady Justice King gave the single judgment of the Court of Appeal. She dealt with (broadly) 4 grounds of appeal: (i) the Swedish PMA; (ii) non-matrimonial property considerations and sharing; (iii) valuation principles and the need for valuation; and (iv) *Wells* sharing.

The Swedish PMA

King LJ noted that the judge found that "*throughout the marriage the wife has known and understood the impact of the PMA*" [§36]. Although W's counsel quibbled with the meaning of the finding, King LJ was not persuaded.

From paragraph 40 in the judgment, King LJ cites at length from *Radmacher v Granatino* [2011] AC 534 and the speech of Lord Philips and his well-known proposition that: "*The court should give effect to a nuptial agreement that is freely entered into by each party with a full*

appreciation of its implications unless in the circumstances prevailing it would not be fair to hold the parties to their agreement."

The main complaint by W centred on the lack of legal advice prior to signing the contract. King LJ considered the 2 first instance decisions of: (i) Moor J in *Z v Z (No 2) Financial Remedies: Marriage Contract)* [2011] EWHC 2878 (Fam) – in which a French PMA had been upheld; and (ii) Mostyn J in *B v S (Financial Remedy: Marital Property* [2012] FLR 502 – in which a Spanish PMA had been overturned [§47 to 55].

W argued that the PMA should carry no weight as she had received no legal advice in respect of the English discretionary regime of divorce at the time she signed the PMA. Although she was aware (when she signed the agreement) that she was going to be living in England, she was unaware that England had a discretionary approach to financial provision upon divorce.

King LJ rejected these arguments and – although not expressly rejecting the analysis of Mostyn J in *B v S* – quite evidently preferred the analysis of Moor J. She noted that legal advice was 'desirable' but not essential [§58] and was one factor in the consideration as to whether the party did or did not have a full appreciation of the implications of the PMA.

The judge had evidence from 3 Swedish experts who said that PMAs were commonplace and binding in Sweden and that the PMA in this case was absolutely standard in form [§60-61].

King LJ in dealing with the desirability of legal advice at paragraph 59 said:

> "The desirability of legal advice forms part of the miscellany of factors which a judge considers before concluding that a party did (or did not) have a full appreciation of the implications of the PMA. Doubtless in some cases its presence or absence will be critical. In the present case, the judge was fully aware that the wife had not received legal advice but, having seen her give evidence, made the clear finding that the wife knew "full well" the effect of the agreement…"

she concluded at paragraph 65:

> "In my judgment, when an English court is presented with a PMA such as the present one; signed in a country where they are commonplace, simply drafted and generally signed without legal advice or indeed disclosure, it cannot be right to add a gloss to Radmacher to the effect that such a spouse will be regarded as having lacked the necessary appreciation of the consequence absent legal advice to the effect that some of the countries, in which they may choose to live during their married life, may operate a discretionary system."

Sharing

- W argued that, where (as in this case) H chose to make an offer in excess of that to which W would strictly be entitled under the PMA, then the PMA should have been ignored completely and the case should be treated as an ordinary 50% 'sharing' case after a long marriage – with some reduction due to H's pre-marital contribution.

- King LJ could not "accept the logic of that argument" [§77] and it ran contrary to the fundamental tenet of *Radmacher*. The judge had not held W to the strict terms of the PMA or simply her needs, nor had he simply stuck to H's open proposal (he had used the same structure but awarded more) [§79-80]. This was therefore a sharing case of sorts, because W had received a sum in excess of her needs, but the existence of a valid PMA represented a "modification of the sharing principle" (Lady Hale in *Radmacher*) [§82].

Non-matrimonial assets

- King LJ considered the 2 differing schools of thought which have developed as to the treatment of non-matrimonial assets.

- First, the "arithmetical approach" of *Jones v Jones* [2011] EWCA Civ 41 (and see *JL v SL (No.2)* [2014] EWHC 360 whereby there is clear demarcation between matrimonial and non-matrimonial assets [§88]. Second, the "impressionistic approach" where the court considers the nature and quality of the non-matrimonial

assets and then, in the exercise of its discretion, gives the wife such reduced percentage of the total assets as in the judge's view, makes a fair allowance for the introduction into the marriage of the non-matrimonial assets in question (see Moylan J in *SK v WL* [2010] EWHC 3768 (Fam)).

- King LJ lent support to the analysis of Moylan LJ at [83-97] of *Hart v Hart* [2017] EWCA Civ 1306 that itself cemented the guidance of Lord Nicholls in *Miller;McFarlane*, which was in essence that some cases would demand one approach and some the other approach: "*the court does not have to apply any particular mathematical or other specific methodology. The court has a discretion as to how to arrive at a fair division and can simply apply a broad assessment of the division which would affect "overall fairness"*." [§95]

- In this case the judge was entitled, and really had no option, but to give weight to the non-matrimonial assets in a more general way as part of the totality of his discretionary exercise [§101].

Valuation?

- In relation to the valuation of the business, there is no absolute requirement on the court to settle on a valuation 'come what may'. Whilst it was preferable for the Court to settle on a figure which was, on the balance of probabilities, appropriate; considerable unfairness could be caused *'if the variables render such a valuation to be particularly friable.'* [134 and 135]

Wells Sharing

- Given the impossibility of valuing the shares or estimating their future liquidity, it was difficult to see what order other than a *Wells* sharing order the court could have made. Although *Wells* orders should be approached with caution, they were not to be regarded as exceptional. According to Eleanor King LJ:

  "[151] I fully accept that the making of a *Wells* order is something that should be approached with caution by the court and against the backdrop of a full

consideration by the court of its duty to consider whether it would be appropriate (per s25A MCA 1973), to make an order which would achieve a clean break between the parties. I do not accept however that *Wells* was a wholly singular case and should be regarded as such by the courts: see for example *GW v RW (Financial Provision: Departure from Equality)* [2003] 2 FLR 108 and *WM v HM* [2017] EWFC 25."

- In dealing with the difference between cash and other assets Lewison LJ at [185] said '…the difference in quality between a value attributed to a private company on the basis of opinion evidence and a sum in hard cash is obvious.'

PROCEDURAL UPDATES IN BRIEF…

- **Specialist financial courts**: The scheme, which provides ticketing and gatekeeping for finance cases, has been piloted (successfully, by all accounts) in Birmingham and the West Midlands in 2018. In October 2018, the new President announced that it would be extended to the nine courts named in Sir James Munby P's circular dated 27 July 2018, namely:
    - East Midlands (Nottingham)
    - West Midlands (all)
    - Cheshire and Merseyside (Liverpool)
    - North-east (1) (Sheffield)
    - North-east (2) (Leeds)
    - North-east (3) (Newcastle)
    - London (CFC)
    - South-East Wales (Newport)
    - South-East Wales (Swansea)

- **Standard-track/ fast-track applications for financial remedies**: The FPR (Amendment) Rules 2018 (SI 2018/440) came into effect on 4 June 2018, and have amended the FPR 2010. See in particular the new rules 9.9B and 9.18-9.21A, which provide an alternative, fast track procedure for applications for periodical payments/ variation of periodical payments only. The standard Forms A and A1

have been updated to take into account these changes so from now on Form A will be used for 'standard track' and Form A1 for 'fast-track' applications. If an applicant wants the 'standard track' to apply to a 'fast-track' issue, it should be stated on the face of the initial application. The court will be expected 'to determine' fast-track applications at the first hearing, unless there is good reason not to do so, or alternatively may conduct an FDR (rule 9.20). Parties will need to be prepared for multiple possibilities, and it may be worth agreeing the agenda for the hearing as much as possible with the other side.

- **Revised PD 27A** : came into force on 23 July 2018. It relates to our old chum "bundles". The amendments provide for
  - a composite bundle of authorities which shall not exceed 10 authorities without the permission of the court (para 4.3A1).

  - Page limits for various documents (Yay!)

"5.2A.1 Unless the court has specifically directed otherwise, being satisfied that such direction is necessary to enable the proceedings to be disposed of justly, and subject to paragraph 5.2A.2 below, any of the following documents included in the bundle shall be limited to no more than the number of sheets of A4 paper and sides of text specified below:

Case summary - 6
Statement of issues - 2
Position statement - 3
Chronology -10
Skeleton argument - 20
List of essential reading - 1
Witness statement or affidavit (exclusive of exhibits) - 25
Expert's or other report - 40 (including executive summary at the beginning of no more than 4 pages)
Care plan- 10

5.2A.2 The length and content of skeleton arguments in financial remedy cases

which have been allocated to a High Court Judge shall continue to be governed by paragraph 15 of the Statement on the Efficient Conduct of Financial Remedy Hearings dated 1 February 2016. [FDA Note 10 pages, FDR Note 15 pages and Skeleton for Final Hearing 20 pages]"

- **McKenzie Friends**: in February 2019 The Judicial Executive Board delivered a consultation response recommending that the Practice Guidance issued by the Master of the Rolls and the President of the Family Division in 2010 in relation to McKenzie Friends be updated due to concerns among solicitors, barristers and the judiciary about practices in the courts. That consultation response is at: https://www.judiciary.uk/wp-content/uploads/2016/02/MF-Consultation-LCJ-Response-Final-Feb-2019.pdf

James Roberts QC
and
Charlotte Hartley

1KBW **April 2019**