Financial remedy update (June 2016 to October 2016)

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The article continues Christopher's regular reviews of the more important recent financial remedy cases, this one covering the period from June 2016 to October 2016.

Given the substantial tranche of cases this edition's selection may be more selective than usual. There has been a number of cases under Pt III of the Matrimonial and Family Proceedings Act 1984 which may have limited application in the real world of the county court but are hard to ignore.

Part III cases

Z v Z and Others [2016] EWHC 1720 (Fam) was part 2 of the Part III application decided by Roberts J in the Spring following an order in a Russian court purporting to be a final world-wide order but which did not address W's housing needs or the sufficiency of the award for her long term needs. The outcome is largely dictated by the facts and despite the resources the matter was addressed as a needs case. It was held that W was not entitled to remain in the property (owned by a trust established by H's father) indefinitely, but would have to leave when the youngest child finished tertiary education in 2022. It would not be appropriate to transfer that property to W as it would exceed the provision she would have received from an English Court. W was accordingly awarded £2.5m as a housing budget. A *Duxbury* award, assessed after setting off the rental yield from the property, and taking into account as relevant W's delay in bringing the claim, was made to meet the shortfall on her income needs and separate support was awarded for the children.

Estrada Juffali v Jaffali [2016] EWHC 1684 (Fam) raised issues which are probably not the run of the mill fare in the county court. In a Part III case in which H's resources were very substantial, W's aspirational budget was £544,430 per month, she sought capitalized maintenance of £127m and a housing budget of £62.8m. While the standard of living during the marriage was a factor, W was not entitled to replicate it. Roberts J awarded a total of £53m premised on housing of £18m, an annual budget of £2.5m and steps down of 33% when the daughter (for whom H, who had terminal cancer had made generous separate provision) had finished her first degree (when W would be 64) and a further 25% when W was 75.

***De Renee v Galbraith-Marten* [2016] EWCA Civ 537** the CA refused W permission to appeal an order dismissing her application for permission to apply for financial relief pursuant to Part III. W was Australian but with a permanent right of residence in this country. H was a British citizen. The parties had married in Australia in 2006, lived for 2 years in England and separated in 2008 when W returned to Australia alleging H's intimidating and violent behaviour They had an 8 year old daughter. In 2009 they entered into binding financial agreements in Australia which W alleged had not been fair and had not made proper provision for either her or the daughter. She had already applied unsuccessfully to set aside the agreements in Australia on the grounds of non-disclosure and duress, but instead of appealing, she had commenced proceedings here under Part III. Parker J dismissed the application and Black LJ refused permission to appeal. W had had legal advice before entering into the Australian agreements. If her lawyer, who could be assumed to have looked after her interests, had not then that was an issue between W and her lawyer. The difference between the systems in Australia and England was insufficient to "undermine" the decision of Parker J who had concluded the systems were similar, that W had and had had access to the Australian court, which had not been persuaded of her challenge to the agreements, that W should not be entitled to a rehearing here and that any new material W produced could be placed before the Australian court. Black LJ opined that the capital provision and limited term maintenance under the agreements would not be an unexpected outcome under an English order.

Al-Baker v Al-Baker [2016] EWHC 2510 (Fam) the background to the case involved an initial dispute on jurisdiction between Portugal and England resolved when H disclosed he had divorced W by talaq in the UAE. Mostyn J invited W to apply under Part III, made a series of interlocutory orders, including freezing orders, which H subsequently sought to challenge or with which he failed to comply, and gave inadequate disclosure. At trial Nicholas Cusworth QC (sitting as a deputy High Court judge) reminded himself of the inferences to be drawn from non-disclosure, assessed the assets as best he could, reminded himself that there should generally be no appreciable difference between the outcome in Part III claims and applications under MCA 1973, and concluded that after a 46 year marriage W had established a right to share equally in H's wealth and made orders accordingly.

Non-matrimonial property and mingling

MCJ v MAJ [2016] EWHC 1672 (Fam) was a case of assets worth between £10.5 and £11.6m in which a number of factual issues arose but H contended it was a needs case while W pursued an outcome based on sharing. Roberts J categorized it as a needs case. H was 17 years the senior of W and the marriage lasted between 13 and 17 years. Properties within the portfolio which H brought to the marriage had been sold during the marriage and replaced and income from the portfolio sustained the domestic economy, but this was insufficient to "change the fundamental nature of [the] capital asset [which] was non-matrimonial from the outset". Non-matrimonial property invested and preserved throughout the marriage without any inroads being made into the underlying capital value, remains non-matrimonial property notwithstanding the use of interest or income therefrom to support the parties. In relation to non-matrimonial property and mingling the judge adopted Mostyn J's structured approach in *JL v SL (No 2) (Appeal: Non-Matrimonial Property)* [2015] EWHC 360 (Fam), but observed that this was one of those cases where there was insufficient reliable evidence to establish a reliable and historical benchmark in terms of crystallised value at a particular point in time and noted Holman J's observation in *Robertson* that the approach in *Jones v Jones* was a tool not a rule. The judge rejected W's claims that H promised her a half share of his wealth: "whilst he was willing to share with W the benefits which flowed from his wealth as a consequence of marriage, there was never – on his part at least – an expectation, far less legal commitment or agreement, to endow her independently with a 50% share of that wealth". However, H had not adequately acknowledged the extent of W's contribution to his nursing home businesses but the judge nevertheless cut W's budget from £140K to £90K and awarded a *Duxbury* sum accordingly. The wife retained £2.3m which significantly exceeded 50% of the matrimonial acquest but met her needs and left H with around 75% of the assets.

Judgments Summons and committal

Morris v Morris [2016] EWCA Civ 812 was an appeal from a variation of periodical payments by which H's liability was reduced from £2,000 to £1,750 pm, a suspended committal order made by way of judgment summons for arrears due under the earlier periodical payments order and a consequential costs order. The appeal against the committal order was conceded because of fundamental procedural errors but Moylan J (giving the leading judgment) deals with the errors in detail "because it is clearly of considerable importance that proper process is followed whenever an application is made by judgment summons". The errors included the fact that in breach of the rules and his right to remain silent H was required to file and serve evidence and gave evidence at the hearing without being informed of his right to remain silent, and he was not informed of his right to legal aid. The judgment summons was heard in tandem with the variation application (at which he had to give evidence) – a further error. The costs order was equally set aside and the judgment summons dismissed.

The variation application against an order made in August 2014 was decided in May 2015. H relied on a (modest) increase in W's income (reflected in the variation ordered) and what the CA found to be insufficiently significant changes in his circumstances. More generally Moylan J rejected the suggestion that on such an application the judge is required to consider the matter *de novo*. The court must conduct a s.25 exercise which, consistent with the overriding objective, is proportionate to the requirements of the case. This might warrant a complete review but can also justify focusing only on relevant matters and conducting a light touch review. S.31(7)(a) requiring the court to consider the termination of maintenance did not, so soon after the original order and in the absence of sufficiently significant events, require the judge to reduce the term. Overall H failed to show the judge's exercise of discretion was outside the bracket of fair awards.

Migliaccio v Migliaccio [2016] EWHC 1055 (Fam) concerned W's application for a judgment summons for arrears of child periodical payments and unpaid costs which had been agreed as part of a consent order compromising earlier enforcement proceedings in which he also agreed to pay a lump sum in respect of arrears of spousal maintenance. H, who was in Dubai, did not attend although W had tendered £500 conduct money. Mostyn J rejected McFarlane LJ's recent (*obiter dicta*) comments as to the standard to which proof of a respondent's means and his default must be proved in proceedings under s.5 Debtors Act 1869 as unnecessarily requiring an applicant to prove the means issue *de novo* despite a finding in previous (albeit civil and thus to a civil standard) proceedings. He stressed that the principles he outlined in *Bhura v Bhura* [2013] 2 FLR 44 derived from Richards LJ in *Karoonian v CMEC* [2012] EWCA Civ 1379 and suggested that judgment should be regarded as definitive. He further held that while a discrete order for costs following a contested periodical payments application would not be an order to be treated "as if made" under Part 2 MCA 1973 and therefore not enforceable under s.5 Debtors Act, the consent order included the costs as part of a lump sum to be paid by H and thus was to be treated as if so made. In any event the court found the arrears of child maintenance proved and could (and did) make the payment within 28 days of the unpaid costs, as well as the repayment of the unused conduct money, and the further arrears of maintenance built up since the judgment summons was issued (and the costs of this application), all terms of the suspended order of 14 days imprisonment which he imposed.

Elliott v Butler [2016] EWCA Civ 953: the CA upheld a 6 month prison sentence on a husband who had persistently failed to vacate the FMH following the outcome of a financial remedies claim which required its sale. His mental health difficulties had been adequately taken into account and did not prevent him understanding the order

Non-disclosure and costs

AB v CD [2016] EWHC 2482 (Fam) following her decision (*AB v CD* [2016] EWHC 10 (Fam)) to set aside a consent order on the basis of W's material (but initially non-fraudulent) non-disclosure of heavy third party investment in her company Roberts J ruled on H's application for indemnity costs. H had pursued his enquiries tenaciously and leaked material to the press and as he pursued her so W's replies became more misleading and in breach of her duty to provide full disclosure, and lacking integrity. H's conduct to an extent explained W's reluctance to make full disclosure but could not excuse her early lack of transparency from which most of the current costs could be traced. H had been unreasonable in continuing to pursue particular issues of fraud and non-disclosure in relation to other companies. After analysing the admissible offers to settle made by each party, Roberts J concluded that both parties could and should have used each other's offer and counter offer as a platform for further negotiations but had lost a valuable opportunity to settle the proceedings, although W had made a serious offer to settle and she had successfully resisted several allegations of fraud. However, H had succeeded in the set aside application which was a critical factor regardless of his own misconduct. The question was the extent to which H's litigation misconduct should discount his recovery of costs. The order made had to be fair and proportionate. The factors contained in CPR 1998 r 44.2(4) and (5) informed the Court's analysis. W should pay 50% of H's costs on a indemnity basis, stayed until after the rehearing of the FR application.

Strike Outs

T v R [Maintenance after remarriage – agreement) [2016] EWFC 26 Parker J refused to strike out H's application to vary (pursuant to ss.34 and 35 MCA 1973) an agreement in a 1999 consent order, expressed as a recital, that he would continue to pay maintenance to W after her remarriage at the rate (payable pursuant to a conventional order until remarriage) in force at that date and index linked. W remarried in 2001. After H stopped paying in 2015 W was about to issue proceedings in the Queens Bench to enforce the agreement as a civil debt (relying on *H v H* [2014] EWCA Civ 1523, and contending the consideration included her forgoing a claim for a *Duxbury* capitalized sum) when H issued proceedings under s.31, which Parker J thought probably misconceived since the order itself had come to an end with remarriage and there was no power to vary it. He also applied to vary what he contended (but W denied) was a "maintenance agreement" under s.35. W sought to strike out both applications under FPR r.4.4. Parker J refused, finding that (whatever the merits of H's application which it was not permissible to consider) the s.35 application was not an abuse of the court's process (H's alleged litigation conduct might be relevant in subsequently considering the merits) nor did it disclose no cause of action. She rejected the suggestions (i) that the agreement having initially been reached orally it was not a written agreement (it had been reduced to writing),(ii) that the agreement was not a maintenance agreement because such an agreement must be made outside the court process and without reference to divorce (the judge noted that s.34 merely required an agreement in writing and did not require or exclude reference to divorce). Her conclusion was that this was a maintenance agreement standing alongside the court order and which was suspended and did not take effect until W's remarriage. She did however hint that the fact of the agreement reached with legal advice would be a relevant factor in the outcome of H's application to vary.

Roocroft v Ball [2016] EWCA Civ 1009 On the dissolution of their civil partnership, R, who had been notionally employed by A, a successful businesswoman, instituted FR proceedings which were compromised in 2010 when she had no legal advisors, and although she had challenged A's disclosure as understating her wealth. The parties later resumed a relationship, A died intestate in 2013 and R took out letters of administration, and in 2014 instituted proceedings to set aside the 2010 order for non-disclosure. R's application was dismissed by a judge purporting to conduct an "abbreviated hearing" but in practice exercising a summary judgment jurisdiction which does not exist under the FPR (*Wyatt v Vince*). King LJ said "An abbreviated hearing is however precisely that, and does not avoid the need for the court to be satisfied on an application to set aside a consent order, that there has (or has not) been non-disclosure and, if so, whether it was material in the sense that it had led to the making of a substantially different order from that which would have been made following full disclosure." It was necessary for the judge to find whether the non-disclosure was inadvertent or intentional as that would determine on whom the burden in proving materiality fell (*Gohil* and *Sharland*) and could have a significant effect on the outcome of the case. The judge wrongly regarded the fact that R had agreed to the making of the order, notwithstanding her reservations about the honesty of the deceased's disclosure, as fatal to her application to set aside. *Gohil* established R could not exonerate A from her duty to disclose. By failing to investigate the evidence as it was presented by the deceased at the time of the consent order the judge deprived R of an opportunity of satisfying the court that there had been material non-disclosure justifying the setting aside of the order. King LJ rejected the contention, made by the personal representatives of the deceased, that R's delay defeated the application. The application was not an appeal subject to time limits and as such mere delay could not justify the striking out of an application pursuant to FPR r 4.4(1)(c) (failure to comply with a rule, practice direction or court order). Further, if the deceased deliberately misled R that conduct could not be saved by a delay on the part of R to have discovered the fraud. The appeal was therefore allowed and the application remitted to be heard at first instance by a high court judge.

<u>Delay</u>

Waudby v Aldhouse (Financial Remedies: Delay in Application) [2016] EWFC B63 was a decision on appeal from a deputy district judge. HHJ Mark Rogers makes some helpful distinctions between a challenge on appeal from findings of primary fact and the deductions, inferences and value judgments drawn by the judge of first instance in the exercise of discretion. The case itself involved long delay between divorce and financial proceedings, considered in the light of *Wyatt v Vince*. After a 12 year childless marriage the parties divorced in 1995. H remarried and had two children. Both parties were bankrupted (post divorce) by ruinous litigation arising out of a joint barn redevelopment during the marriage. As a result there were no assets to share and H's assets were all accumulated post divorce and after he requalified as a commercial pilot. W delayed issuing financial proceedings until 2014 believing H's false assurance that he would "see her right" financially. The wife had in the intervening years supported herself through employment and self employment, bought a house and car and lived with another man for 4 or 5 years but suffered psychological ill health after the bankruptcy proceedings and was in receipt of an ill health pension which left her with a budget shortfall of £798 pm. The District Judge's award of £10,000 lump sum and joint lives periodical payments at £9,576 pa (£798 pm) was predicated on need alone. On appeal the absence of a causative link between the needs and the mental health problems, on the one hand, and the relationship, on the other, were held fatal to the claim and the husband's appeal was allowed.

<u>Legal costs funding orders</u>

MG v FG (Schedule 1: application to strike out: estoppel: legal costs funding) [2016] EWHC 1964 (Fam) notwithstanding the mother had entered into a binding agreement in Australia in relation to spousal maintenance, child support and capital provision, and W's unsuccessful attempts in Australia and England to vary the agreement, set it aside and apply for Pt III relief, her Sched 1 application was not struck out under FPR 2010 4.4 as the previous hearings did not consider the merits of the Sched 1 claim which was therefore not estopped, and in any event estoppel should be employed sparingly in children cases without a consideration of the merits. However M's application for a legal costs funding order was refused after consideration of the principles derived from *Rubin v Rubin* [2014] 1 W.L.R. 3289.

In **BC v DE [2016] EWHC 1806 (Fam)** however the same judge (Cobb J) awarded a legal costs funding order, distinguishing *Rubin* on the basis that here proceedings were already under way (and in *Rubin* they had been concluded and the application was to enable recovery of costs in the concluded claims). Here F was extremely wealthy and M had no resources. There was a danger that M would be inclined to accept a settlement, due to vulnerability in respect of a litigation debt, which would not be in the child's interests. There was a solid reason for lawyers not to have a financial interest in the outcome of family law litigation. Cobb J reviewed the authorities and concluded that M having a proper case to advance, and with a view to promoting fairness between the parties, while exercising a judicious mix of "caution and realism" the court could exercise its discretion in M's favour in respect of past and projected costs (less 15% to allow for a reduction on assessment)

<u>Publicity</u>

Wyatt v Vince [2016] EWHC 1368 itself was the subject of a further decision when the issue of publicity arose. Following the Supreme Court allowing W's FR claim to proceed (after a significant delay of 19 years) and Lord Wilson's reference to the wife's "real prospect of comparatively modest success" in her claim, the parties reached a compromise whereby H was to pay W a lump sum of £300,000 and permit her to retain the £200,000 paid by him on account of her costs of the appeal to the Supreme Court and the £125,000 paid earlier, but she would have to meet the as yet unquantified costs of her solicitors. Only when the order was being drafted did H introduce his requirement for mutual confidentiality undertakings. W did not agree and threatened a *Dean v Dean* application for an order in the agreed terms. H subsequently backed down so the application was not made. By the time the matter came before Cobb J the issue on publicity was reduced to whether H could publish the "net effect" of W's recovery by reference to an estimate of her costs. The judge rejected this on the basis that the sum was unknown and it was not in the public interest for potentially misleading information to be published. More generally, and after referring to *W v M (TOLATA proceedings: Anonymity)* [2012] EWHC 1679 (Fam); *Luckwell v Limata* [2014] EWHC 502 (Fam); *Fields v Fields* [2015] EWHC 1670 (Fam); *Cooper-Hohn v Hohn* [2014] EWHC 2314; *DL v SL* [2015] EWHC 2621 (Fam); and *Appleton v Gallagher* [2015] EWHC 2689 (Fam), he held the parties should be at liberty to publish the final order agreed between them, on the basis that (i) The starting point of privacy for these parties in respect of the proceedings was readily displaced here, given that the lives and financial circumstances of the parties had already been trailed extensively in the public domain. (ii) This was not a case in which H had disclosed any, or any material, financial evidence under compulsion which might attract protection; he had run the 'rich man's defence'. There was, further, no commercially sensitive (or other similar) financial information to protect in this case – none had been vouchsafed; it was W who sought the right to publish, and her financial circumstances were reasonably apparent from the publicly reported documents in existence; (iii) It was in the public interest that the outcome of the case should be revealed; W's application had generated considerable attention and speculation in legal circles, and in the national media. There was a legitimate interest in the publication of its conclusion, and specifically the figure which – whether a conscientious appraisal of the merits, or a figure computed by reference to strictly commercial considerations – the parties agreed would be the right one to reflect an appropriate award to W; (iv) Further, and of importance, there was a public interest in disseminating the fact that these parties had, in the end, been able to reach a negotiated settlement without a trial. Given the ambitious objectives of each party along the way (their open positions, widely publicised, pitched them £2m apart), and the heavily contested litigation to the Supreme Court and back to the High Court, the public should know that compromise is achievable and (he added) highly desirable, even at a late stage of such a hard-fought case. H was ordered to pay £1,000 towards the *Dean* application but otherwise there would be no order for costs on the publicity issue where both parties had retreated from their initial positions.

Drafting orders

Ali v Ansar-Ali [2016] EWCA Civ 781 An appeal on its facts, relevant to the drafting of orders, in which the CA substituted transfers of various assets and accounts *in specie* (so W received the actual net sum realized) in place of the guaranteed sum drafted by counsel for one party, the other being unrepresented. Otherwise the appeal failed.

Pensions

Goyal v Goyal [2016] EWCA Civ 792 is another example of the unwisdom of not having specialist advice in pension cases (cf *WS v WS* [2015] EWHC 3941). The trial judge worked on the erroneous basis that he could not make a PSO in respect of a foreign pension. The CA accepted such an order could be made (paras 29-31) subject to the essential procedural prerequisites being satisfied (para 33), although the decision is actually about the limits of the court's power under s.37 Senior Courts Act 1981 and whether the Family Court has any power to make an order transferring or assigning one spouse's interest in a pension annuity policy to the other spouse outside the statutory scheme established by the 1973 Act. Assuming he could not make a PSO against the Indian annuity policy, the judge (apparently) sought to use s.37 to make a substantive order that H transfer or assign the policy to W. The CA held he could not do this and that the use of s 37 is confined, in all circumstances, to orders which are ancillary to, or supportive of, a separate substantive legal or equitable right. The application for a PSO (which had not been decided on its merits) was remitted to the first instance court.

Bankruptcy

The Court of Appeal in **Horton v Henry [2016] EWCA Civ** has resolved the recent debate as to whether a bankrupt aged 55 or over, is or can be obliged to access his uncrystallised pension to satisfy his creditors by way of an IPO. Conflicting answers were given by deputy judges in *Raithatha v Williamson* [2012] EWCH 909 and at first instance in *Horton* with the latter being followed in *Hinton v Wotherspoon* [2016] EWHC 623 (Ch). The Court (Gloster LJ giving the lead judgment) held that a trustee in bankruptcy could not compel a bankrupt to elect to draw down payments from his personal pensions where he was eligible to make such an election but had not yet done so. A bankrupt could not be required to obtain property that was excluded from the bankrupt estate and convert it into income receivable by the trustee, and his contractual right to crystallize his pension was not a payment in the nature of income within the meaning of the Insolvency Act 1986 s.310(7)._This decision should preserve the pension as an asset available to the other spouse in financial remedy proceedings but nonetheless care needs to be taken in assessing the availability of the pension in such circumstances.

Grant & Anor v Baker [2016] EWHC 1782 (Ch) was an appeal by Trustees in Bankruptcy against an order that a property, jointly owned in equal shares by the bankrupt and his wife and which was the only asset of value in the bankruptcy, should not be sold until the parents' 30 year old vulnerable child, who resided at the property, no longer lived there. Unless the property was sold, the Trustees would have no funds with which to discharge their own costs or make a distribution to the only known creditor, HMRC. Where an application is made to realise a sale of the bankrupt's house s.335A(2) IA 1986 sets out the factors for the court to consider and s.335A(3) provides that one year after the property vests in the trustee 'the court shall assume, unless the circumstances of the case are exceptional, that the interests of the bankrupt's creditors outweigh all other considerations.' On appeal the decision that the circumstances were exceptional was upheld but, on the facts, the district judge was held wrongly to have exercised her discretion and failed to meet the underlying purpose of the bankruptcy legislation which was to enable a bankrupt's interest in a property to be realised and made available for distribution among his creditors. The child's interests, on the facts, did not require a postponement beyond 12 months.

Bataillon & Anr v Shone & Anr [2016] EWHC 1174 (QB) was an application under s.423 of the IA 1986 by creditors of H to set aside transfers of property, cash and chattels by H to W after a separation contemporaneous with the creditors' claims and purportedly in pursuance of an informal separation agreement by which W agreed not to initiate divorce or financial remedy proceedings. The judge did not find W's evidence reliable and held that the Claimants' claims under s.423 were made out and that the various transfers from H to W had either been made with no consideration or at an undervalue, and were intended to defeat the claims of the Claimants. The subsequent order did reflect W's 50% interest in the properties and the lump sum she was ordered to pay to the Claimants was reduced by £100,000 to make provision for the school fees of the parties' daughter who was found to be "an innocent victim"

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