Family Affairs: February 2018

Financial Remedy update (Nov' 17 – Feb '18)

Christopher Sharp QC, Barrister,
St John's Chambers

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It has been a slender few months for conventional FR cases, enabling the net to be cast a little wider than normal, and thus catching some slightly unusual fish.

Advice from the President

In his *Practice Guidance: Standard Financial and Enforcement Orders*, issued initially on 30 November 2017, [2018] Fam Law 89, the President strongly encouraged the use of Mostyn J's standardised orders to avoid time wasted in manual drafting and to achieve national consistency. The orders do not have the strict status of forms within Part 5 of the FPR 2010 and their use, although strongly to be encouraged, is not mandatory. A standard order may be varied by the court or a party if the variation is required by the circumstances of a particular case, and such variation, if required, will not, of course, prevent an order being valid and binding. The President recognises that the project is critically dependent upon the availability of modern, up-to-date, IT in the courts which is currently inadequate ("has long been obsolescent and is now obsolete"). Nevertheless, the standard orders should represent the starting point, and usually the finishing point, of the drafting exercise. The Guidance was corrected on 22nd January 2018 and can be found here: https://www.judiciary.gov.uk/publications/practice-guidance-standard-financial-and-enforcement-orders/

The *President's Circular: Financial Remedies Courts,* of 1st December 2017, [2018] Fam Law 91, and the 18th *View from the President's Chambers* (23rd January 2018) announced the pilot of the specialised Financial Remedies Court intended to start In February or March 2018 in W Midlands, London and SE Wales and to be rolled out thereafter under the leadership of Mostyn J and HHJ Hess. The pilots will be conducted in accordance with Practice Directions issued from time to time in accordance with FPR

36.2. The aim is to have a specialist cadre of financial remedy judges, with improved judicial training, and with hearings conducted (a) at Regional Hubs and also (b) at a number of Financial Remedies Hearing Centres (FRHCs) within the hub area. Early allocation to the right judge at the right level at the right place is a key element of the process. The aim is to work towards digitisation in the near future. There will be a new Form A and Form E.

Segal Orders

In ***AB v CD*** **[2017] EWHC 3164 (Fam)** Roberts J upheld an order substantially in the form of Mostyn J's standardised orders. The judge at first instance had ordered H to pay W maintenance of £39,000 pa (index-linked) "for the benefit of herself and the children of the family" with a corresponding reduction in that level of provision in the event of a future CMS calculation (there having been no application made for such an assessment at the time of the first instance hearing). By the time of the appeal a maintenance assessment had been carried out by CMS in the sum of £413.14 pw in circumstances where H's income was always likely to result in a maximum assessment by the CMS. Having reviewed the case law reviewing the background to and jurisdiction for such orders, and (importantly) accepting that W was in this case entitled to a substantive spousal order, Roberts J rejected an appeal that there was no jurisdiction to make a final periodical payments order which was expressed to be a "global order" and which included an element of financial support for the children of the family. While the judge below had accepted that he had no jurisdiction to make an order in respect of periodical payments which were directly for the benefit of the children, and had further accepted that, in the absence of a CMS maintenance assessment, there was no 'gateway' jurisdiction under s 8(6) Child Support Act 1991 to make a 'top up' order, nevertheless he was entitled to make an order to meet W's needs to run her domestic economy which, by allowing a reduction in the event of a CMS assessment, allowed H's liabilities to be adjusted accordingly. In addition she rejected H's appeal against the quantum of the maintenance (on the basis of W's need and the fact that H's obligations would reduce as the children's school fees reduced and stopped), and against the modest departure from equality in the division of capital in W's favour (on the basis of W's housing need and the fact that H's pension was not the subject of sharing).

Publicity

R v R & Anor [2017] EWCA Civ 1588 arose out of Pt III proceedings and a claim under Sched 1 of the 1989 Act. H failed in his challenge to the English court's jurisdiction, but the Court of Appeal granted a reporting restriction in respect of its judgment which Moor J, after the conclusion of the financial proceedings, refused to continue. H appealed. The Court of Appeal dismissed the appeal, holding H's Art 2 rights were not engaged, that s.97 of the 1989 Act, which only applies during the currency of proceedings, did not apply as Moor J had made a final order, and that Moor J had adequately carried out the balancing exercise in a way which, although preceding it, was consistent with the approach of the Court of Appeal in *Norman v Norman* [2017]

EWCA Civ 49 to appellate judgments. McFarlane LJ also stresses the need for counsel to raise with a judge any need for clarification of the reasons for a judgment, and the need on appeal from *ex tempore* judgments to have regard to the transcript of prejudgment exchanges (as to which see eg *Re F (Children)* [2016] EWCA Civ 546 [22 – 24] and *Piglowska v Piglowski* [1999] 1 WLR 1360 at 1372).

Prince of Luxembourg v Princess of Luxembourg and Telegraph Media Group [2017] EWHC 3095 (Fam). W's application to make public the terms of her open offer in FR proceedings in light of false adverse media comment was refused and the court made a reporting restrictions order. Even the bare figure(s) or arrangements offered in settlement of financial remedy proceedings, held in private between a husband and a wife upon the breakdown of their marriage, engaged both parties' right to respect for private life under Art 8, notwithstanding the public interest in a person, about whom falsehoods had been published, being able to correct the record. Accordingly, such information was amenable to restrictions on publication depending on the outcome of a balancing exercise involving any competing rights (pursuant to articles 6, 8 and 10). The same analysis applied to the information concerning the family home, which, in so far as that information did not engage the implied undertaking (that financial information disclosed under the duty to give full and frank disclosure would not be reported when referred to at a hearing) and/or was already in the public domain, it nonetheless engaged the parties' rights under Art 8. Where that home was the children's home, it would also engage their Art 8 rights to respect for private life. There was no sufficient public interest for the material to be published where, although members of a royal family, the parties held no public role in this jurisdiction, or indeed in Luxembourg. There was a need to protect the administration of justice and safeguard the integrity and efficacy of financial remedy proceedings, by ensuring the parties might negotiate confidently, an exception to the principle of open justice evidenced by FPR 27(11)(1)(a).

Barring the other party's solicitor from acting

S v S (Application to Prevent Solicitor Acting) [2017] EWHC 2660 (Fam) was an application by H to bar W's solicitor from further acting for her in circumstances where his agent had had a preliminary meeting in November 2015 with the solicitor, RT, some 15 months earlier (although H would have known of RT acting for W 5 months earlier than his application). Williams J refused the application, rejecting H's agent's evidence as to the what was discussed, and finding the exercise in 2015 to have been at least in part designed to conflict out potential solicitors who W might subsequently instruct. He summarises the law at para [10] stressing (inter alia) the need for the applicant to establish that confidential and/or privileged information has been imparted which is relevant or may be relevant to the matter on which the solicitor is now instructed by the person with an adverse interest to that of the former client, and that there is a real risk of disclosure (including inadvertent disclosure or unconscious/subconscious influence), in respect of which the burden falls on the solicitor to disprove such risk, which is likely to be difficult in the context of family litigation. The relief is however discretionary and although there is a strong public policy to protect confidentiality, the motive of and

delay by the applicant, the availability to the respondent of alternative lawyers, and the cost and delay suffered by the respondent will be relevant factors.

Evidence

Richardson-Ruhan v Ruhan [2017] EWHC 2739 (Fam) was a preliminary (if lengthy) fact finding and computation of assets by Mostyn J prior to his subsequent decision as to "how to exercise my dispositive powers (i.e. distribution)". In brief, he rejected H's claim that his £200m fortune had been entirely lost to a fraudster, Dr Smith, concluded that H had lied to conceal the truth, that significant wealth was held by H's nominee (Mr Stevens) and that a number of transactions satisfied the test for a sham (as summarised by the same judge in *Bhura v Bhura* [2014] EWHC 727 (Fam)). In respect of assets said to be the subject of dispute with others, the judge concluded no-one but W had any valid claim over them. Mostyn J considers the weight to be given to hearsay material and witness statements and judgments from other proceedings (paras 12-14). At para 15-19 he considers the inferences that might be drawn from the failure of H to call Mr Stevens or of W to call Dr Smith, referring to *Prest v Petrodel* (per Ld Sumption).

Akande v Akande [2017] EWCA Civ 2159 provides a reminder of the limitations on the Court of Appeal's interference with findings of fact (only if "compelled to do so") and the entitlement of a judge to draw conclusions and inferences adverse to a party who fails in his duty of disclosure. The Court upheld the judge's refusal to accept W's unsatisfactory valuation of Nigerian property, produced on the day of the hearing and without permission, while attributing a value based on insurance documents to the property which she found H to own.

Needs

HC v FW [2017] EWHC 3162 (Fam) concerned a W, without capacity and with significant care needs, against a background of a very high standard of living ("opulent") during the relationship and a H who, after the FDR, disappeared and did not further engage in the proceedings. Cobb J addresses the test for incapacity and the power of the Court to proceed in the absence of a party, before addressing the merits. The judge sought to establish a value for the assets, basing his factual findings on inferences drawn from contemporaneous documentary evidence, and known or probable facts, rather than assertions or recollections, and giving W the benefit of the doubt in light of H's failure of disclosure and engagement. The judge estimated the value of the assets at £40m. H was 68, W 64, their relationship commencing in the early 2000s. They married in 2006, separating in 2014. The marriage was (Cobb J observed) of "less than median length", but H's wealth was pre-marital and the case was addressed on a needs basis. These the judge divided into (i) general reasonable needs (based principally on W's age, the standard of living, her modest resources, H's wealth and, against that, the length of the marriage and the source of the assets) and (ii) specific needs arising from her medical condition. The latter was approached on a "quasi-personal injury" basis and an issue arose as to whether the capitalisation should be assessed on a *Duxbury* or an *Ogden* basis. Unfortunately (in light of the current

debate within the profession as to the continued validity of the *Duxbury* model, in at least some contexts) this issue was not pursued by W and the default *Duxbury* approach was adopted, but, despite a reference to a gloomy prognosis, no discount appears to have been allowed for a reduced life expectancy. Having regard to the fact specific evidence her total needs were assessed at £15.25m (including the purchase and adaptation of properties).

Joint Ownership (bank accounts)

In ***Whitlock v Moree*** [2017] UKPC 44 the Privy Council considered the law applicable to the beneficial ownership of a joint bank account following the death of one account holder. Two friends, L and M, opened a joint bank account, and signed a form of which cl 20 read:

> "JOINT TENANCY: Unless otherwise agreed in writing, all money which is now or may later be credited to the Account (including all interest) is our joint property with the right of survivorship. That means that if one of us dies, all money in the Account automatically becomes the property of the other account holder(s). In order to make this legally effective, we each assign such money to the other account holder (or the others jointly if there is more than one other account holder)."

L, who was in his mid-90s, died and an issue arose whether the account, holding $190,000, entirely contributed by L (the new account in effect replacing an account previously in L's sole name), devolved beneficially upon M by right of survivorship, or reverted to L's estate under a resulting trust. The Bahamian Court of Appeal held that M had satisfied the burden of overturning a presumption in favour of a resulting trust. The Privy Council by a majority (3-2) dismissed the estate's appeal but approached the matter differently. Ld Briggs summarised the issues as:

(1) Does clause 20 deal with the beneficial ownership of the joint account, or merely with the bare legal title to the chose in action against the bank represented by the account?

(2) Is the fact that L and M opened the joint account by means of a signed written application containing clause 20 determinative of its beneficial ownership, as at the date of L's death?

In light of inconsistent dicta in common law jurisdictions (which Ld Briggs reviews) the Board started from first principles contrasting the legal and beneficial ownership of property, including bank accounts, in co-ownership. The property in question here consisted not of money, but of a contractual chose in action enjoyed by the account holder (or holders in the case of a joint account) as against the bank, the rights by which that chose in action is constituted deriving entirely from the contract between the account holders and the bank, whereby the account is set up and operated. The contract will not necessarily be a document of transfer (like a conveyance in relation to land) but, since it creates the relevant property, if the account opening document contains an express assignment by each account holder to the two of them jointly of

any money separately owned by that account holder, it does indeed constitute a document of transfer, even in the strict sense, and may contain a binding declaration of beneficial interests. The Board concluded that where two or more holders of a joint account all sign an account opening document (or separately sign identical documents) which, on their true construction, declare or set out their respective beneficial interests in the property constituted by the account, then those are the beneficial interests of the account holders, determined by construction of the document as a matter of law (and not as the subject of a fact finding), pending any subsequent variation of them by agreement or otherwise, and an examination of the subjective intentions of the account holders, or of those of them who place money in the joint account, is neither relevant nor permissible. Still less is recourse to the doctrine of presumed resulting trusts permissible, because the potential beneficial owners have declared what are their beneficial interests by signed writing. This was *a fortiori* where the wording was as in cl.20. The effect of the document could only be challenged by a claim for mistake, *non est factum*, fraud, duress, undue influence, misrepresentation and the like, or if it is sought to be rectified, where in all such cases the burden lies on the person challenging the document. Here the majority interpreted the account opening documents as clearly dispositive of the beneficial interest in the property represented by the account. Lords Carnwarth and Wilson delivered dissenting opinions, disagreeing with the application to bank accounts (being temporary arrangements) of principles applicable to real property

Bankruptcy

In ***Pickard v Constable*** [2017] EWHC 2475 (Ch) the trustee in bankruptcy (T) applied for an order for sale of the family home more than a year (and less than 3 years) after W's bankruptcy, her interest in the property being her only significant asset. H filed evidence about his health and care needs which were accepted as rendering the circumstances "exceptional" within s.335A(3) Insolvency Act 1986 (which would otherwise prioritise the interests of the creditors). At first instance sale (and possession) was postponed until H's death or earlier vacation of the property. T's appeal was allowed and a postponement of 12 months substituted with permission for H to apply to vary the date and adduce further evidence. Warren J criticised the DJ's approach (which *inter alia* drew speculative conclusions from inadequate evidence and reversed the burden of proof, requiring T to prove a move to alternative accommodation could be managed), and observed that H would have to provide cogent medical evidence as to his condition and its effects on him, much more cogent evidence about the availability of private sector accommodation, full details of his and W's financial position and as to his engagement with the local authority. While each case is fact specific, Warren J reviewed the authorities to identify the principles affecting the exercise of the court's discretion and referred to *Grant v Baker* [2016] EWHC 1782 for the need, in considering all the circumstances, to have regard to the scheme and purpose of the bankruptcy legislation (to realise and distribute the bankrupt's property – which in respect of the home must be done within 3 years).

In ***Hayes v Hayes*** [2017] EWHC 2806 (Ch) H had been made bankrupt in 2005 and discharged in 2006. During his bankruptcy he (or his trustee (T)) made claims for damages against W for harassment in the (long) course of which several orders for costs were made against W after H's discharge, but remained unpaid. H issued a statutory demand which W applied to set aside, relying on her purchase for £34,000 from T (holding the cause of action as after acquired property) of H's claim for damages. Morgan J rejected the argument that this had included the post discharge costs orders which, he held, remained vested in H.

Agreements

While not strictly a Family financial remedies case, ***Yedina v Yedin (and others)*** [2017] EWHC 3319 (Ch) provides interesting (if very lengthy) reading. The Ukrainian H and W entered into a 'financial provision deed' in 2009 having married in Ukraine in 1986 where H made a lot of money in the post-communist era. W had become resident in England in 1998. They may (or may not) have divorced in Ukraine in 1997, or 2006 (or both). By the deed H agreed (*inter alia*) to pay outgoings on English properties and pay maintenance but then refused to do so, and W alleged repudiation of the agreement (which H admitted, if his actions were breaches of a valid deed: para [297]) which she had accepted and consequently sought damages. Mann J, who was presented with evidence from both sides which he found at best unreliable, rejected a plethora of what he called "test book defences" by H, from *non est factum*, and unconscionable bargain to undue influence, rectification and uncertainty (see para [263] *et seq* with some light touch references to relevant authorities). Ultimately Mann J upheld the validity of the deed, and dismissed H's counterclaim, but there were other issues concerning the ownership of properties here and abroad, trusts and overseas entities, and the effective ownership by H of a BVI company (D2) which had sold a flat of which W claimed the proceeds of sale. W was awarded damages of over £2m (and other relief) with further issues to be resolved later.

In the Press

Scottish Widows' annual Women and Retirement report (2018) revealed the disadvantage for women in making pension provision, and that women are less likely to have considered their savings options or their pension rights during a divorce. Worryingly 71% of couples were reported as not discussing pensions during the divorce. More concern was reported about pets than pensions! Aviva's Family Finance 2018 report, noting the average overall cost of divorce or separation in a process taking typically 14.5 months, recorded that 19% of divorcing/separating couples (22% of women) made no claim on their partner's pension and 9% of women had no pension as they were relying on their partner's scheme.

A ComRes poll revealed that a disturbing 27% of Britons (still) wrongly believe that, after living together for more than two years, unmarried couples have similar rights to married couples if they break up, while 37 per cent think unmarried couples benefit from a 'common law marriage' after 2 years together.

All of which suggests a strong need for general education, and for specialist advice and encouragement to take it, as well as a need for reform to address and reflect the shift towards non-marital cohabitation.

On 2nd February 2018 the Civil Partnerships, Marriages and Deaths (Registration Etc.) Bill, which seeks to expand civil partnerships to heterosexual couples, (as well as allowing mothers' names to appear on marriage certificates, allow coroners' to investigate stillbirths and review how stillbirths are registered) passed its Second Reading in the House of Commons

Christopher Sharp QC
St John's Chambers

christopher.sharpqc@stjohnschambers.co.uk
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