# Family Affairs (February 2021)

## Financial remedy update. November 2020 to February 2021

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The words of Lord Sumption in *Prest v Petrodel* [2013] UKSC 34 "….Courts exercising family jurisdiction do not occupy a desert island in which general legal concepts are suspended or mean something different." were referred to in a couple of the cases under review (*Derhalli v Derhalli* and *Crowther v Crowther*) and it is perhaps well for us to remember his comments despite the more inquisitorial nature of our cases

Although it was a second appeal from the Chancery Division ***Derhalli v Derhalli* [2021] EWCA Civ 112** is of some interest as H's argument that W should pay an occupation rent pending sale of the matrimonial home was rejected. A consent order had been made by Holman J in 2016 following acrimonious proceedings which very specifically established the agreement to be in full and final settlement and placed bars on any variation or review of its terms. The order provided for the immediate sale of the home which was in H's sole name. Some of the clean break capital to be paid to W was referrable to a sale of the home but despite the great detail of the order no specific provision was made in relation to the occupation of the property pending sale other than that W would pay the outgoings and agreed to the removal of notices (including occupation rights under the FLA 1996 s.30) registered in her favour. No application was made for those rights to be extended beyond decree absolute (s.33(5)). In the event, after the Brexit referendum, the property did not sell for over two years and then for £2m less than originally expected. H took possession proceedings in the county court, relying on his ownership of the home and alleging W's 'gratuitous licence' had been revoked, that she was a trespasser and claiming £5,000 pw 'rent'. H's argument was accepted by the county court but rejected on W's appeal by Fancourt J. In the CA King LJ held there was no factual foundation for saying that the wife was granted a licence and that the case turned not on this issue but on a conventional construction of the terms of the order. Although a consent order derives its authority from the court and not from a contract between the parties, nevertheless the principles applicable to the construction of a consent order are the same as those applying

to a commercial contract. The test was what a reasonable person, having all the background knowledge which would have been available to the parties would have understood them (at the time and not with the benefit of hindsight), using the language in the contract, to mean." While a conventional interpretation of the order does not import separate family law principles, nevertheless a consideration of the whole background includes the fact that this was an order made in financial remedy proceedings which had been approved by the judge having considered all the s.24 factors and relevant case law. Fancourt J's order did not imply a licence for the party in occupation to occupy until sale, irrespective of the legal ownership.

Although Asplin and Arnold LJJ reserved their opinions, King LJ found H's choice of possession proceedings to be inappropriate. H could have sought possession of the matrimonial home under s24A MCA 1973, which permits a court at any time after the making of an order for sale of a property to make such "consequential or supplementary provisions as the court thinks fit" which, by FPR r.9.2(2), include an order for possession to "any other person". Similarly, there is the power to vary a s24A MCA 1974 order for sale under s.31(2)(f) MCA1973. She suggested that any dispute as to the interpretation of such a financial remedy order made should be put before the specialist Financial Remedy Court or Family Division judge with the expertise that comes from exercising their specialist jurisdiction.

***Crowther v Crowther & Ors*** **[2020] EWHC 3555 (Fam)** The continuing saga of Mrs Crowther's allegations of fraud and conspiracy resulted in H securing an indemnity costs order in respect of the preliminary issues when she discontinued the allegations following a (modest) settlement against their business partner and related companies but to which H was not a party. The preliminary issue fell outside the 'no order' principle (FPR 2010 r.28.3(5)). Lieven J rejected arguments that a different approach should be adopted in financial remedy proceedings to other civil proceedings (on the basis of the court's inquisitorial role and its objective being a fair distribution of assets, so that the issue of costs should be deferred until the end of the case), holding that the approach to costs, particularly where there are allegations of fraud, should be a consistent across the different Divisions of the High Court. The financial remedies jurisdiction should not be allowed to develop into a discrete world where normal principles of disclosure, pleading and discontinuance no longer apply. Basic principles of proper litigation conduct should continue to apply, and to be enforced. There is

a presumption in the CPR that the party who has discontinued should pay the other party's costs (CPR 38.6). Lieven J reviewed the case law in civil proceedings and stressed that the pleading of fraud, deceit or conspiracy is a serious step, which may have serious reputational consequences, as well as significantly increasing costs, and should only be pleaded with reticence. Here, with the claims abandoned immediately before trial, H had had no chance to vindicate himself. Where such claims fail, they will usually be met with an order for indemnity costs, and so if the allegations are discontinued the same outcome will usually follow. W argued that CPR 38.6 is not expressly applied by FPR r.28.2 and that H had been guilty of a long list of litigation misconduct. The judge noted W's "fairly extraordinary" conduct of the litigation with costs to date of £900,000. She concluded that although CPR 38.6 did not apply directly, the principle was highly relevant to any order made pursuant to FPR r.28.1, especially where the allegations are of fraud and conspiracy. Although she had been critical of H's litigation conduct, that conduct might now be understandable but in any event was irrelevant to the issues now before the court. She rejected the suggestion that it would be difficult to identify those costs related to the preliminary issues, or that any delay to the FDR (or difficulty reaching a settlement) represented any reason not to apply conventional principles. An indemnity order was made subject to detailed assessment but with £80,000 being paid on account.

***CB v EB*** **[2020] EWFC 72** is an interesting read. H applied to set aside two consent orders from 2010 and 2013 on the basis that section 31F(6) of the Matrimonial and Family Proceedings Act 1984 ("MFPA 1984") and FPR 2010 rule 9.9A provide the court with an almost unfettered power to set aside any order of the Family Court where exceptional circumstances justify it. In rejecting this argument the judge reviewed the genesis of the current rules back to section 89 of the County Court Act 1846 and concluded that the set aside power in section 31F(6) was not a brand new break with the past. It did not usher in a brave new world. It was no more than a banal replication of a power vested in the divorce county courts from the moment of their creation in 1968. That power had been confined by the law to the traditional grounds for decades. Interpreting section 31F(6) purposively and with regard to its historical antecedents lead Mostyn J to conclude clearly that in the field of financial remedies its lawful scope, or reach, starts and ends with the traditional grounds of (i) fraud; (ii) material non-disclosure; (iii) certain limited types of mistake; and (iv) a subsequent event, unforeseen and

unforeseeable at the time the order was made, which invalidates the basis on which the order was made. In the latter case Mostyn J commented that: “If the challenge relies on "new events", i.e. a change of circumstances, then Lord Brandon's criteria must be complied with to the letter. If the change did not happen within a year, or if it was not unforeseeable, then the court does not have the power to intervene.” It may be thought that this goes a little further than Lord Brandon in fact did in terms of time (he had said “While the length of time cannot be laid down precisely, I should regard it as extremely unlikely that it could be as much as a year, and that in most cases it will be no more than a few months.”). Mostyn J also expressed disagreement with Gwynneth Knowles J in *Akhmedova v Akhmedov* [2020] EWHC 2235 (Fam) who had said at [131]: “"Whilst the categories of cases in which r. 9.9A can be exercised are not closed and limited to those identified in paragraph 13.5 of PD9A, the jurisdiction to set aside is to be exercised with great caution, not least to avoid infringing upon the finality of judgments, subverting the role of the Court of Appeal, and undermining the overriding objective by permitting re-litigation of issues." In his view “There is no lawful scope for imaginative judges to unearth yet further set aside grounds.” Insofar as the practice direction suggested otherwise it was wrong, was (in effect, and after referring to case law) *ultra vires,* and must yield to the limitations set by the law to the scope of the set aside grounds. Mostyn J did not explore the situation where the order remains executory (as to which see the different views expressed in his decision in *SR v HR (Property Adjustment Orders)* [2018] 2 FLR 843 and that of Roberts J in *US v SR (No. 4) (Executory Mainframe Distribution Order: Change in circumstances: Extent of the Court’s Ability to Revisit Terms)* [2018] EWHC 3207 (Fam)).

The crucial importance of a pension’s expert report being up to date and comprehensive was illustrated in ***Finch v Baker*** **[2021] EWCA Civ 72**. H was 69 and W 57. After some 11 years together, the parties had separated in 2012/13, twins having been born in 2011 for whose care W alone had been responsible and with whom H had little contact. W, a well-paid BBC executive (£90,000 pa net), had sought to argue conduct and a negative contribution by H The DJ found contributions to be the key issue. Roberts J refused W permission to appeal conduct or contributions. The CA robustly rejected W’s attempt to reargue these issues (negative contribution being “an unhelpful oxymoron” and no more than an attempt to argue conduct under a different guise.) The DJ in 2019 had found it likely that W would be made

redundant but in the event that had not occurred, but the CA were told (in November 2020) that it would happen in September 2021. Both the DJ and, on appeal the CJ, found a departure from equality was (for different reasons) justified. The CJ allowed W's appeal reducing a lump sum for H from £814,000 (gross) to £733,650 (leaving W with 73% of the non-pension assets) and a pension share in respect of W's BBC pension (c.£2m in 2019 but £2.7m by 2020) to 34% from 48.6%. W appealed again to the CA. H had debts of £66K (rising to £115K before the CJ) and a state pension in addition to a private pension with a C.E of £12K. There had been a pension report before the DJ dated 12 March 2018 based on the gross benefits at October 2017. No application had been made subsequently to adduce further evidence about the pension (or W's tax liabilities arising from it) until (informally) shortly before the appeal to the CA. The CJ varied the DJ's award because he considered that it did not sufficiently reflect W's contributions to the children's welfare and her and the children's future needs. Moylan LJ rejected the relevance of the accrual of W's pension post separation, on the basis that it was a needs case on which the date of pension accrual had no impact. He rejected the attack on the CJ's assessment of W's needs. It was far too late to be raising the absence of up to date evidence as to pension shares and tax. Although considered *de bene esse* the new material provided by W did not demonstrate with any clarity any factors impacting on the judge's assessments of need. No request had been made of the judge to admit further evidence until after his draft judgment when he had rejected what purported to be requests for clarification as challenges to the judgment itself. While the judge could have admitted further evidence, he was not wrong to refuse (especially when the question of further evidence had been raised and declined both by Roberts J and the judge on appeal). There will inevitably be some delay, and possibly an extensive delay, between the date of the pension sharing order and its implementation. As a result, depending on its form, the order may well have a different effect to that assumed by the court. The pension trustee will recalculate the CE value when implementing the order with the result that the value is likely to be different to that used when the court made the pension sharing order. An appeal will not, therefore, be allowed simply on the basis that a pension sharing order made by the court will, as implemented, not have the same effect as that assumed by the court on different figures and at a different time. The court's powers under the MCA 1973 are exercised in a broad, discretionary manner and not necessarily with the expectation of achieving mathematical precision. W's appeal was rejected on all grounds.

In ***MG v AG (Appeal out of time)*** **[2020] EWFC B49**, Recorder Salter, refused H's application for permission to appeal against a lump sum order and interest thereon, spousal periodical payments and costs, after what the judge found to be an intentional delay of 15 months. While a decision on its facts it provides a clear example of the court's approach to such an application, including the factors affecting relief against sanctions (FPR 4.6(1)) and the weight to be attributed to the merits of the appeal, namely that they are not by any means the only focus of the court's attention. They must rather be viewed against the broad canvass of the specific factors (under r.4.6(1)) and all the other circumstances. Such other circumstances also included the availability to the husband of alternative remedies.

In **Rattan v Kuwad [2021] EWCA Civ 1** the issue was what needs qualify as being 'immediate' and how should the court approach the determination of this question in an application for MPS under s.22 MCA 1973 although (inevitably) Moylan LJ noted that while in every case the key factors are likely to be the parties' respective needs and resources and the "marital standard of living", the court's approach will be tailored to the facts of the particular case. S.22 is designed to deal with short-term cash flow problems, which arise during divorce proceedings. Its calculation is sometimes somewhat rough and ready, as financial information is frequently in short supply at the early stage of the proceedings, but must be fair. There is not always a need for a specific MPS budget (income needs in Form E may suffice) and not all budgets require critical analysis, beyond being satisfied that the ultimate award is reasonable. 'Immediate' needs do not exclude items that are not paid monthly, but rather the court is concerned with an order for maintenance *pending* the final resolution of the financial dispute between the parties. There was no reason in principle why school fees should be excluded, nor need they be sought by way of a separate application.

In ***AZ v FM*** **(2021) [2021] EWFC 2** H applied to vary down maintenance for his daughter (M), aged 19 and studying at university, for the remainder of her tertiary education. The judge refused the reduction and ordered all payments to be made in full in advance upon which the order would be discharged (not dismissed). H had permission to appeal on a single ground which challenged the jurisdiction of the court to capitalise periodical payments for child maintenance. Mostyn J held that the commuted lump sum was not, and could not be ordered

under s.31(7A) or (7B) MCA 1973 (under which a lump sum can only be paid to a party to the marriage on discharge of a PPO whereas here the payment was ordered to W for the benefit of M). However, while s.31(5) prevented a property adjustment order being made in favour of a child on variation of a periodical payments order, and a lump sum could not be ordered in favour of a party to the marriage, there was no prohibition on a lump sum in favour of a child (even where the court has previously made a lump sum order in respect of the child (s.23(4))). It followed there was jurisdiction to make the order and in the circumstances of incessant litigation, H's residence in the USA, repeated defaults by H and M's age and thus the relatively short period of the remainder of the term, the order was appropriate. However, in the overwhelming majority of cases, capitalisation of periodical payments would not be appropriate (circumstances change unpredictably) and could only properly be considered where the Child Support Act 1991 could not apply (as here).

***Montreuil v Andreewitch (Contempt: Sentence)*** [2020] EWHC 3085 (Fam) provides guidance to sentencing for contempt where there had been numerous, flagrant and deliberate breaches of a freezing order which was clear and unambiguous in its terms, H had shown no insight into his breach and his explanations were contrived and disingenuous. The sanction whose purpose was punishment for the breach and to obtain future compliance, was imprisonment for 6 months suspended for 12 months, and costs on an indemnity basis.

**WX v HX (NX & LX Intervenors) (Treatment of Matrimonial & Non-Matrimonial Property)** [2021] EWHC 241 (Fam) concerned a family with tens of millions of pounds largely tied up in a complex web of trusts. Both parties had brought independent wealth to the marriage. H's wealth had been largely employed to benefit the family (and substantial provision had been made for the children and grandchildren) while W's wealth had been kept separate. H contended that W's wealth had been 'matrimonialised' but Roberts J found there had been no agreement it would be shared nor did H's role in managing her funds have this effect. The detail of the trusts is complicated but Roberts J's distillation of the principles and case law concerning matrimonial and non-matrimonial property at paras 113-116 is a helpful *vade mecum*. She also addresses the circumstances in which the incidence of tax may be ignored in computing resources (in particular where tax is unlikely to be suffered if assets are not brought on shore) at paras 82-84 and focuses on 'granular reality'. The judge rejected the

discounted value as a life tenant of H's continued occupation of the family's country home, despite it being in trust, as purely notional and not a reliable indicator of its true financial value to H now or in future. Its full value was attributed to his resources. After a 33 year marriage the outcome was a largely equal division of matrimonial assets, although the judge recognised this would result in an overall financial disparity in the parties' positions as a consequence of a legitimate historical alienation of funds in one trust from which H might still benefit (if indirectly).

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