Family Affairs – Financial Remedies Update June 2021

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Not for the first time, the reported cases are dominated by parties with limited connection with England and Wales, or indeed with the quotidian financial experience of most of those involved in litigation before our courts. There is a handful of cases which address the impact of the pandemic but, as Judge Kloss observed in one, the fact that there has not been a 'tsunami' of Barder applications suggests that the exceptionality condition for such applications is being recognised.

In AG v VD [2021] EWFC 9 after an 8 year marriage (which Cohen J held to have ended in 2017) the mature parties (ages W:51 and H:56) had divorced in Russia in 2018. The relationship had been somewhat semi-detached, and W and her daughter (S, aged 17) had lived in the jointly owned London home since 2010, while H's business interests kept him largely abroad. Financial proceedings took place in Russia under which W had received half the London home and half the shares in a company owning a Majorcan property, but which took no account of entities not owned by the parties. W would have to repay H half the proceeds of the Majorcan property (£1.5m) from her half of the London home (£2.5m) and in Russia H was pursuing an appeal by which he sought repayment from W of a loan and interest (£1.3m) leaving W with nothing. W brought a claim under Part III (Matrimonial and Family Proceedings Act 1984). In the Part III claim W sought a sharing award of what she claimed was a marital acquest. H contended the Russian award had made fair and reasonable provision. Cohen J reviewed the conditions for engaging Part III (summarised in Agbaje v Agabje and Zimina v Zimin) and concluded there was a 'substantial connection with' England, that it was appropriate for the court to make an order and that the Russian order did not

provide adequately for W and S. H's wealth was largely earned before the marriage (or on the back of pre-existing investments) and although H's disclosure was inadequate and the court was unable to establish his full wealth and interests (mostly overseas), ultimately it was a needs case, the judge rejecting W's case on marital acquest and noting what had been earned during the marriage had funded the high standard of living and the FMH in London and the Majorcan property which were being brought into account anyway, and must not be double counted. Cohen J declined W's invitation to draw adverse inferences from H's inadequate disclosure on the basis that inferences have to have a factual basis, although he was satisfied H had access to undisclosed assets. He declined H's invitation to add back to W's assets her expenditure which Cohen J did find to be irresponsible but not 'wanton dissipation' and of which in large part H had known and even financed (and which replicated a level of expenditure of which to some extent H was also guilty). In 2011 H had placed most of his wealth in a foundation established in Curaçao to which he claimed to owe large sums leaving him with (-£6m) of assets. W claimed their combined assets were £29m of which her assets (her share of the London home) were £2.5m. The judge rejected H's contention that he had no interest in the businesses transferred to the foundation or that he had gifted wealth to his son. He assessed W's net assets as £2.66m, H's as £3.087m and the foundation at around £17-19m (which he held remained H's beneficially). W sought the whole FMH plus a Duxbury sum of £3.8m. In assessing her needs the judge had regard to the value of the previous home and assessed her housing budget at £3.4m but, given the fairly short marriage and that W brought no money to it, took the view she should expect to sell her current home in due course, and that the very high standard of living could not predominate over other factors. She had no significant earning capacity. He assessed her needs at £100k pa (against her reduced budget aspiration of £250k pa) giving a Duxbury sum of £2.06m, resulting in a lump sum of £320k in addition to the FMH. Provision was made for S, and H was ordered to indemnify W against any further award against her in the Russian litigation. Cohen J criticised the 'self-indulgent' conduct of the litigation where each party took extreme and unreasonable positions and in which costs of £2.1m had accrued and the rules for efficient conduct had been ignored. Conducting the case had been 'reminiscent of a visit to a museum'.

In Kicinski v Pardi 2021 EWHC 499 (Fam) Lieven J highlighted the difference between a Xydhias agreement (which may give rise to a 'show cause' application) and a Rose order (which is an order of the court, treated as final and binding, notwithstanding that it still requires perfection and sealing) and rejected the idea that a Rose order could be some form of hybrid order that did not have the legal attributes of any other kind of order. She then considered the application of the Thwaite jurisdiction to vary an executory order in the context of a Rose order. After reviewing the jurisprudence, she concluded that there are two issues conditioning its exercise: (1) whether there has been a significant and relevant change of circumstance since the order was entered into, and (2) if so, whether it would be inequitable not to vary the order. She resisted the invitation to place limits on the Thwaite jurisdiction, either in respect of Mostyn J's suggestion (SR v HR (Property Adjustment Orders) [2018] 2 FLR 843) that it should be contained by an 'extremely cautious and conservative' approach (which she felt added nothing), or the suggestion (argued before her) that the change of circumstances should be unforeseen. In the instant case (on appeal from G v C [2020] EWFC B35 – see Family Affairs November 2020) W had received €8m from H's uncle and aunt who sought to recover it in proceedings in Italy. At the FR final hearing a settlement was reached by which W agreed to pay out all but £1.6m from this fund in return for a clean break, and a cessation of the Italian proceedings and protection from further litigation. The uncle and aunt failed to comply with the agreement and W had not paid out the money. In the circumstances Lieven J found the agreement was executory in its implementation (and rejected H's argument that W should have argued a failure of a condition precedent, revoking the whole deal and re-starting the FR proceedings from scratch), there had been a significant and relevant change in circumstances (W did not have the clean break and protection she had expected) and it would be inequitable to hold her to the deal.

It is not clear if the parties in Hussain v Hussain [2021] EWFC 13 (a case of modest assets) had originally been litigants in person but they had failed to obtain a valuation of the FMH or obtain certification of the mortgage which required

redeeming, and (as the judge commented) no one seems to have thought to get the office copy entries, which would have revealed the identity of the lender and opened the door to getting an accurate statement of the outstanding mortgage on the property. As a result, HHJ Hess had made an order for a lump sum, on W's expressed (but erroneous) understanding of the equity and where H had failed to engage with the proceedings, for nearly three times the actual equity (which was the only asset) and was thus unenforceable. As Cohen J noted: "It is inconceivable that the judge would have made such an order if he had known the correct figure." H applied for permission to appeal way out of time and Cohen J would have refused permission had it not been for the wholly fallacious basis upon which the order had been made. Cohen J observed "I am afraid this unhappy saga illustrates the danger of shortcuts."

W's attempts to enforce her somewhat greater FR award (£454m) continued in Akhmedova v Akhmedov & Ors. [2021] EWHC 545. Knowles J found that W had been the victim of a series of schemes designed to put every penny of H's wealth beyond her reach. Their son, who the judge found to be an active (and dishonest) participant in the schemes, confirmed his father would rather see the money burned than that W receive it. In this instalment W applied under s.423 Insolvency Act 1986 and s.37 MCA 1973 to set aside transfers (made for no consideration or for undervalues) by H and his companies to the son, a Cypriot company and trustees of various trusts, as intended to defraud creditors and defeat her claims, and for payment of sums direct to her. In a judgment of 125 pages Knowles J addresses a multitude of contentions beyond the scope of this note but which (inter alia) provide illustrations of the practical approach to inferences from inadequate disclosure and refusal to answer potentially incriminating questions (para 171-177); the application of the principles developed in children cases relating to lies, told during an investigation and during a hearing, to the assessment of evidence in family court financial proceedings (para 117-118); the exercise of discretion in the context of granting relief under s.423 (passim). She allowed W's applications and rejected the argument that the creditor under s.423 or a wife under s.37 had to prove the debtor had insufficient assets to meet the liability, without allowing the application (para 78-104 and 114-116). S.423 was

available because the transfers were sufficiently connected with the jurisdiction (an English judgment in English proceedings, to the jurisdiction of which H had submitted, while W, as victim, was an English resident and the transfers were substantially arranged and executed from England) and rejected the argument that the relief sought had exorbitant extra-territorial effect (para 216). She rejected the argument that no relief (by way of money judgment) should be granted against the trusts on the basis that such would be futile (as unenforceable), contrasting cases involving pensions or real property (para 219-222). She was not persuaded the trustees would face prosecution in Lichtenstein if they complied with her order (para 226-233). The judge sets out the law in respect of s.423 from para 77 (and from para 84 in respect of remedies and s.425, including the power to order a direct payment to the creditor – see also para 237 as to the lack of any causation requirement in s.423) and from para 105 in respect of s.37. At para 112-113 and 116 she notes the differences between the two provisions (and the more generous provisions of s.37 in the context of FR applications, but the more circumscribed relief available: para 238). Knowles J cites Tolstoy to characterise this saga, referring to the Akhmedov family as one of the unhappiest to appear in her courtroom. The 16 published judgments in the case now begin to rival War and Peace.

In Re C (A Child) [2021] EWFC 32 (although not strictly a FR case) Sir James Munby considers the application of Villiers v Villers (Sec State for Justice intervening) [2020] UKSC 30) in the context of a preliminary issue, and whether the English court had jurisdiction to hear M's maintenance application brought pursuant to Schedule 1 of the Children Act 1989 following earlier proceedings issued by F in Monaco.

FRB v DCA (No 3) 2020 EWHC 3696 Fam (Cohen J). After FR proceedings in which Cohen J had made "a series of condemnatory findings in relation to H's disclosure and honesty", H had been ordered to pay £12m to redeem the mortgage on the FMH before transferring it to W, and to pay £49m in two instalments (the dates of which he had himself proposed). H was refused permission to appeal by the CA, but had paid nothing (save maintenance at £720,000 pa) when in September 2020 he applied to vary the order both as to overall quantum and as to time for

payment on the basis of a variation (under s.31) or, alternatively, that the lump sum provision be set aside and re-quantified on a Barder event basis, the event being the global pandemic. H submitted evidence that his worldwide business interests which included hotels, airlines and care homes, had been dramatically affected but failed to provide any specific evidence as to the impact of global events on particular businesses, simply referring to the macro-economic picture. He failed to show how he would have paid but now could not. The judge was unimpressed, and found that while a re-time-tabling might be considered, a variation on the quantum of lump sums under s.31 could only exceptionally be allowed under s.31 in circumstances markedly different from those that would justify a Barder variation. The judge did not rule out the pandemic as a Barder event, but the evidence was insufficient to demonstrate such circumstances, and H's proposal to revalue his whole asset bases (at a cost of £300-400,000 over 6 months) was unacceptable. Further, the macro-economic picture was changing and within a couple of years might have returned to pre-COVID levels. Meanwhile W's application to vary the maintenance to £2.5m pa (on the basis of the judge's declared (and artificial) level of her maintenance need for Lugano Convention purposes) was rejected but her application for interest to be payable on an unpaid tranche of £30m was accepted, not at judgment rate (8%, which would be excessive) but at 4%. H needed an incentive to pay the lump sums. This would amount to £1.2m pa which (because interest would not be payable until after decree absolute for which W had good reason not to apply) would be added to the maintenance payable now, and back dated. In addition, the judge made LSPO provision notwithstanding W's potential access to funds, which he found it would be unreasonable for her to have to access.

A helpful practical analysis of a similar issue arose in HW v WW [2021] EWFC B20 before HHJ Kloss in Leeds (26.3.21) in which he also reviews the applicable law. At an FDR on 12 March 2020, 9 days before the first lockdown, the parties reached a settlement whereby (inter alia) H was to pay W a series of lump sums totalling £1m, the first of £750,000 in June 2020. Initially, on 5/6/20, H sought to 'stay' the lump sum provision 'for a period of 12 months with a review in 9 months'. The

basis of the application was said to be 'the catastrophic impact Covid-19 has had upon HW's ...ability to raise the series of lump sums.' H did not pay the instalment and W applied to enforce with interest. In November H applied to set aside the order in its entirety on a Barder basis (which superseded the stay application). It was accepted that the effect of allowing H's application would be to require the case to start again with new valuations and disclosure. Unlike the position in FRB v DCA (No 3), which was considered, s.31 (variation) did not apply to a series of lump sums. H declined the judge's invitation to explore remedies pursuant to the 'liberty to apply' provision, the inherent jurisdiction, or the Thwaite jurisdiction. He had 'put all his eggs in the set aside basket'. H presented a dire financial picture of the impact of the pandemic on his business with figures detailing falls in turnover, profit and liquidity, but during the hearing evidence emerged, including a forecast document which had been provided to the bank to secure borrowing, which presented a very different picture. H's case was rejected. While the pandemic satisfied the test for a Barder 'event' and H had applied promptly, even though H may not have foreseen its consequences, the judge found they were foreseeable. The pandemic was a 'known unknown' at the time of the order. H did not have to know the full extent to which the risk would develop (any more than other known but unquantified risks to the business which he had chosen to accept). The court had to look to the long term. Business valuations are inevitably fragile and broad. Finality of litigation is prized and Barder imports a hurdle of exceptionality.

Another case decided in the context of the pandemic is AJC v PJP [2021] EWFC B25, a decision of David Hodson sitting as a DDJ in which he used r.9.20(1) to determine W's application to convert a nominal spousal maintenance order made in 2012 to substantive provision following her loss of her job as an airline pilot due to the pandemic. Mr Hodson sets out a thoughtful (and critical) reflection on the role of nominal orders, and concludes that they should only be activated (if at all) in cases of relationship generated need, probably where there are dependent children, and not where global misfortune, unrelated to the payer or the

marriage, has created a change of circumstance. It is not authoritative but worth reading.

The lockdown affected aspects of the court's assessment of (interim) need in R v R [2021] EWHC 195 (Fam) which concerned parties who were also litigating in "State A". Jurisdiction here was in dispute, the parties were in contention on multiple issues, and costs were already £1.3m. The judgment concerns H's claim for interim provision and a LSPO. The deputy judge (Nicholas Cusworth QC) held it to be a case where the condition that the court's intervention was 'manifestly required' was satisfied. While the jurisdiction issue and the impact of a post nuptial agreement awaited resolution, it was important that a proportionate financial balance was maintained between the parties. While W contested the claim that her wealth exceeded £29.2m, she acknowledged £9.6m of assets, but claimed that the parties had supported a high standard of living from capital not income (albeit that standard was also itself in issue). For housing the judge reflected that his function was not to replicate the marital standard of living but to provide H with a reasonable amount in an area close enough to the former family home, and of a standard, which would enable H to see the children (when that was ordered) without a significant perceivable gulf between that and the mother's accommodation (the judge concluded this was represented by £2,500 pw). For living expenses W offered £5,500 pcm and H claimed £21,703.50. pcm. The judge, reminding himself of the principles in TL v ML & Ors [2005] and BD v FD (Maintenance) [2014], assessed the level of expenditure during the marriage and reviewed H's budget critically, in particular H's limited opportunities to spend in light of the conditions of the pandemic. He ignored capital items (save for some set up costs and dental treatment incorporated into regular spending) but allowed for some increase in spending as lock down eases. £9,000 pcm was awarded. The judge reminded himself that the parties should not attribute great significance to the award which would not dictate the final award when any identified imbalance could be the subject of adjustment. It was agreed that a legal services order should be made but in issue were both quantum and whether H's past costs, including to a former firm no longer acting for him, should be covered. The relevant case law is reviewed. The correct approach was to make

such award as was reasonably required to ensure the provision of ongoing legal services (which might reasonably include some past costs of the current, but not a previous firm – the issue being what was necessary now to secure future representation) but having regard also to the jurisdictional issues and the merits and judging the application with appropriate caution. W's costs were greater than H's so proportionality was not an issue, but W proposed raising sums for herself and H by charging assets within the jurisdiction which could reduce the availability of assets for distribution. The judge did not accept it was appropriate for W's costs to be met in this way but directed that half of H's accrued costs with his current solicitors should be paid by W and £150k pm for 5 months on the basis of the projected date for a jurisdictional hearing. This award was a reasonable sum to secure representation having regard to the rate at which both parties had been spending and the complexity of the issues.

Alternative dispute resolution is encouraged by the FPR which by rr.3.3 and 3.4 requires it to be considered and allows for the adjournment of proceedings to allow it. Private FDRs are also encouraged (and to be encouraged) They seem to have a higher success rate than 'in court' FDRs and they free up judicial resources. However, in AS v CS (Private FDR) [2021] EWFC 34 Mostyn J was keen to stress that 'going private' does not put parties in a better position than if they remain in the court system. In this case the parties agreed a private FDR to take place in October 2020 and an earlier arbitrated FDA (which was conducted on the premise of the private FDR occurring). The parties subsequently agreed the adjournment of that FDR subject to the agreement of the court which was given, and a new date set (and recorded in the court order) for March 2021. W's team concluded they had insufficient information and unilaterally cancelled the private FDR, in response to which H's solicitors applied to the court to convert a directions hearing in June to an in court FDR. Mostyn J concluded the approach of both sides was wrong. While the court cannot direct attendance at a private FDR there is power to disapply r.9.15(4) (whereby the court directs an in court FDR) and by r.4.1(4)(a) it can make any order subject to a condition which can be expressed as an order. FPR r.1(3)(o) empowers the court to "take any other step or make any other order for the purpose of managing the case and furthering the

overriding objective". The order disapplying the standard Rule 9 procedure was thus to be seen as containing an order (by way of condition) for the parties to attend the specified March private FDR and if W wished to be relieved of the obligation to attend, she should have (but had not) applied to the court for an adjournment, absent agreement. Mostyn J therefore directed that the March 2021 private FDR go ahead (unless W successfully applied to adjourn it). Even if disclosure was not complete issues of principle could be identified and the parties given an early neutral evaluation. For the future, where an agreement is reached that a private FDR will be held then an order should be made which (a) disapplies the in-court FDR process, (b) requires the parties to attend a private FDR on a specified date, and (c) provides that the date may only be altered by an order of the court (which may, of course, be made by consent).

Harrington v Harrington [2020] EWFC 99 was a decision made last year by DJ Hudd in the Central Family Court and not directly concerning financial remedies, but with W's application for permission to publish the DJ's final judgment in her FR proceedings in 2019 which would identify the parties and a witness. At paras 4-12 DJ Hudd reviewed the law and noted "an increasing trend towards transparency and open justice within family proceedings in recent years. Guidance given by Sir James Munby in his Practice Guidance (Transparency in the Family Courts: Publication of Judgments) issued on 16 January 2014 had highlighted the "...need for greater transparency in order to improve public understanding of the court process and confidence in the court system" and identified "public interest as being a factor potentially making anonymization of judgments inappropriate." She noted an expectation that permission to publish should be given where a judge is satisfied that publication would be in the public interest, but also identified the principle of confidentiality in FR cases (Clibbery v Allen). She noted the competing principles of open justice under Art 6, freedom of expression (Art 10) and privacy (Art 8). She noted the competing High Court decisions in this field but accepted it was not commonplace to allow publication of FR decisions without anonymisation. The judgment provides an example of the balancing exercise and consideration of proportionality necessary in such a case, with H's shortcomings in the conduct of the litigation given his position as a

former MP (during the proceedings he was still in office) being a relevant factor, there being a clear public interest in knowing that public figures are subject to the same treatment as other citizens. There was a lack of evidence supporting H's contention that publication would be harmful to a specific vulnerable third party (albeit it appears the parties agreed ultimately to this person's anonymity). H's witness, Mr Brooks, was not anonymised. He had participated, voluntarily, in his personal capacity as someone whose affairs were inextricably entwined with those of H, and not in his professional capacity as a solicitor. While he contended he did so in the expectation of privacy, and that publication would intrude upon his Art 8 rights, there was no evidence that publication would be harmful to his business, while as a regulated professional and an officer of the court, of whom high standards of probity are expected, the judge had expressed grave concerns about the probative value of the evidence that he gave to the court. She held that there was a public interest in publication and more limited force in the arguments about his Art. 8 rights being engaged than might otherwise be the case. The case exemplifies the need for cogent evidence to support an argument for anonymity if potential harm is alleged to arise from publication.

And finally –

For some time, readers will have noted the frequency with which cases of interest have been decided by Cohen J who retired in May. Happily, he will continue to sit for another three years.