High Net Worth Seminar

Financial Remedies - Update

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BEDFORD ROW
CHAMBERS

Ratcliffe v Ratcliffe [2021] EWCA Civ 247

Court of Appeal set aside a financial order on the basis that a flawed value for a development provided by the wife had undermined the calculations underpinning the award.

- A key asset in the financial remedy proceedings was a site of land bought by H (with others), which came to be owned by a company, HH.
  - HH had initially been owned 90% by H and was set up to develop the site.
  - The other owners sold their interests to H, and H's interest was settled on trust for HH.
  - H and the eldest son, T, became equal shareholders of H at some stage.
- H contended that neither the site nor any profit generated through its development were marital assets.
  - If they were, at most their value was £300k as at separation.
- W contended that they were marital assets and the value was as at the date of the hearing.
- At the final hearing, the judge found that the site was a marital asset, that its development had been well established at separation, and that funds used to acquire the other interests in the site were from family assets. [16]

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- At the hearing, the parties presented a composite asset schedule setting out their competing positions for the total available capital resources.
- W contended for just under £9m, H contended for £4.75m - the key distinction being the values attributed to HH by each party [32]
- The judge took a figure of £6.87m, midway between those sums, and awarded W half
  - The explanation given by the judge was not merely splitting the difference
  - But rather, reducing "*the likely capital 'pot' … by a sum equal to half the difference properly reflect[ed]*" the factors in the case
    - This meant that W's award should be less than half the arithmetical total asset figure [19]
    - In particular to reflect the fact that W was receiving secure rather than risky assets and the impact of H's post separation work.
- The judge preferred W's figures for calculating the valuation of the development, taking that as the starting point, and then discounting. [43]
- The judge discounted on 3 bases [44]:
  - 1. The *Wells* factor – caution was required in taking values from estimates for the development.
  - 2. Tax – the impact of H's transfer of shares to T, and the resultant impact on H to be able to obtain entrepreneur's relief.
  - 3. Post-separation efforts.
- H appealed on the basis that this determination was flawed because W's figures included a significant element of double counting, having the effect of distorting and invalidating the award.

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- The CoA (Moylan LJ) held that the judge's decision was flawed and should be set aside.
- The case was remitted to the original judge for rehearing.

- As to double counting, the figures W used for her position in the composite schedule did not match the calculations in W's valuation (see [27], [32]-[33], [47]).
  - The judge's award, even after tax & discounting, was therefore based on a flawed analysis of the value of the development.
  - This was sufficient to undermine his ultimate determination to require it to be set aside. [47]
- As to whether the CoA could itself produce an amended result after excising the double counting, it posited a number of questions that it could not answer ([49]) and concluded it could not properly and fairly answer them.
  - To try to do so would have required a significant rewriting of the judgment (and also neither party had requested the court do so).

Ratcliffe v Ratcliffe [2021] EWCA Civ 247

- Of note, the comments on the discount applied by the judge [56]:
  - The judge had taken *Wells*, H's contribution and tax into account.
  - He had reduced the resources available by way of a 'broad evaluation'
  - He did not consider it appropriate to ascribe 'a precise mathematical figure'.
  - The judge was entitled to take this broad approach for the purposes of determining what award would be fair and he had sufficiently demonstrated how these factors impacted on his award.
  - Applying para [96] of *Hart v Hart:*

"If the court has not been able to make a specific factual demarcation but has come to the conclusion that the parties' wealth includes an element of non-matrimonial property, the court will also have to fit this determination into the section 25 discretionary exercise. The court will have to decide, adopting Wilson LJ's formulation of the broad approach in the Jones case [2012] Fam 1, what award of such lesser percentage than 50% makes fair allowance for the parties' wealth in part comprising or reflecting the product of non-marital endeavour. In arriving at this determination, ***the court does not have to apply any particular mathematical or other specific methodology. The court has a discretion as to how to arrive at a fair division and can simply apply a broad assessment of the division which would affect "overall fairness".*** *This accords with what Lord Nicholls said in McFarlane v McFarlane and, in my view, with the decision in the Jones case*." (emphasis added)

Villiers v Villiers [2021] EWFC 23

The final hearing in the High Court of W's section 27 application in the long-running Villiers litigation.

- The parties had been married, with one child (now adult), from 1994 to 2012, during which time they had lived in Dumbarton, Scotland.
- Post-separation, W moved to London, and became habitually resident in England.
- W issued for divorce in Eng in 2013; H lodged a writ for divorce in Scotland in 2014.
- W's application was stayed pursuant to s.5(6) DMPA 1973 and eventually dismissed by consent.
- W then issued an application under s.27 MCA 1973 in England in Jan 2015, seeking a lump sum by way of capitalised maintenance, along with an indemnity re marital debts.

- H was specifically ordered to provide full updating disclosure prior to the final hearing, and to ask the trustees of the family trusts whether they would release funds/make any capital distributions to him – but he had not done so.

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- W's application was dismissed by Mostyn J, on the basis that he considered the condition precedent for s.27 was not satisfied
  - i.e. the court was not satisfied that in the period prior to W's application that H had failed to provide her with reasonable maintenance.
    - The judge also observed that H should have challenged jurisdiction on this basis (of merit) back in 2015, rather than take the route he did
  - The orders for interim maintenance and legal costs (unpaid by H) were discharged *ab initio*

- The reasonableness aspect of failure to provide reasonable maintenance is looked at in two ways:
  - 1) The court has to consider <u>whether</u> a sum of maintenance should be paid – determining whether the failure to pay was from inability rather than choice.
  - 2) If it is a case of 'won't pay' rather than 'can't pay', the court then considers <u>how much</u> should be paid from the payer's means, having regard to the s.25(2) factors.

Villiers v Villiers [2021] EWFC 23

- If an award had been made, there was a discretion available to the English court to provide that it should not continue after the divorce in Scotland.
  - s.28(2) provides only a maximum limit of maintenance, detailing how the discretion could be, not should be, exercised.

- Mostyn stated that the discretion should normally be exercised either by:
  - discharging an order made where there has later been a valid foreign divorce, or
  - where a claim is pending and a future divorce is envisaged, disposing of the maintenance claim in a way that limits the period up to the date of divorce.
- This gives effect to the influence of the common law duty to maintain.

- In reaching that conclusion, Mostyn J undertook a lengthy historical analysis of the common law duty to maintain, its application in domestic and foreign divorces, and the evolution/reform of the statutes into s.27 MCA 1973 (paragraphs [13] – [53]).

Villiers v Villiers [2021] EWFC 23

- In brief, the key points arising:
  - The original basis of s.27 – the phrase "*wilfully neglected to provide reasonable maintenance*" – had to be interpreted by reference to the common law duty to maintain (*Gray v Gray* [1976] Fam 324)
  - A 'fault rule' historically existed that could forfeit entitlement to maintenance, for example in cases of adultery, although that was removed by the DPMCA 1978.
  - Mostyn J considered the common law duty to maintain remains alive, minus the fault aspect.
  - The common law duty to maintain endures only for as long as the marriage subsists (*Hyman v Hyman* [1929] AC 601; *Price v Price* [1951] P 413)
  - However, this did not carry across directly to the statute, and a discretion was retained, as shown in old cases, which Mostyn felt was "*a manifestation of the syndrome of chauvinism*"
  - For domestic divorces, the payer of maintenance had to apply for discharge of the maintenance order, even after divorce (*Bragg v Bragg* [1925] P 20).
    - Mostyn sought to explain this on pragmatic grounds, essentially convenience allowing local courts to be able to order maintenance – now less important
  - For foreign divorces, case law had suggested that a maintenance order should be discharged on proof of a foreign divorce, but *Wood v Wood* [1957] P 254 put paid to that notion and held that the discretion survives the cessation of marriage.
    - The underlying rationale appeared to be that this assuaged fears that the foreign divorce would not deal with the claim justly by English standards.
    - The court has to take into account the convenience of the foreign forum.

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- After a foreign divorce, if the result is demonstrably unjust, parties can apply for relief under Part III MFPA 1984 – save where the marriage is dissolved by a court in another part of the British Islands.

- There is no duty to consider a clean break with a s.27 application – s25A & s.28(1A) MCA 1973 do not apply.

- Mostyn J also concluded that the trustees would not make any funds available to H, despite his entitlement as a discretionary beneficiary.
  - The key question here was the *Charman* question – whether, on the balance of probabilities, the trustees, having been apprised of all relevant facts, would respond positively to a request for funds to be made available to the beneficiary.
  - Mostyn J cited in full *KEWS v NCHC* [2010] HKCFA 10, at [36] – [53], which set out the court's approach to the question and the concept of judicious encouragement.

Kicinski v Pardi [2021] EWHC 499 (Fam)

High Court judgment addressing the application to the Thwaite jurisdiction, in particular the requirement for a significant and relevant change in circumstances.

- Financial remedy proceedings settled on 4th day of the final hearing (late Oct 2019) - reaching an agreement the court approved as a *Rose* order.
- One part of the proceedings = c.€8m transferred from H's uncle and aunt (U&A) to W during the marriage.
- U&A had issued a notice of claim in Italy for W to return the funds to them (NB: Withers acting for W both in Italy and in the divorce)
- The agreed Heads of Terms that formed the *Rose* order made a tripartite binding agreement between H, W and U&A.
    - The HoT included agreement that U&A would enter into deeds prohibiting further proceedings against W and her advisors.

- Drafting the order proved contentious (and deeds between U&A and W were not completed) - W made an application in late Feb 2020 for:
    - (i) Indemnities from H for any liability on W or her advisors arising from U&A commencing proceedings
    - (ii) A lump sum for costs of any future Italian litigation
    - (iii) H to pay her costs since the *Rose* order
- These applications were brought pursuant to the *Thwaite* jurisdiction.
- W also made subsequent applications for H to retain funds in a UK account and to maintain an address for service in the UK, by way of security for W's indemnities.

Kicinski v Pardi [2021] EWHC 499 (Fam)

- Recorder Allen QC refused to make the indemnity sought by W and refused W her costs.
- The judge did not consider there was a material change of circumstances that triggered the *Thwaite* jurisdiction - in particular on 2 points:
  - 1) Failure to execute the two tripartite agreements did not represent a change of circumstances, as the parties must/should have known more work would be needed to finalise them (especially in the context of the previous hard-fought litigation).
  - 2) U&A's failure to withdraw their claim in Italy against W did not represent a change in circumstances, being a 'known unknown' at the time of compromise, and W must/should have known there would be further negotiations before resolution of the Italian proceedings.
- The judge also held that it was not inequitable to hold W to the terms of the *Rose* order.
- By way of *obiter*, the judge also considered whether, if his conclusions as to the *Thwaite* jurisdiction were wrong, he should grant the indemnities sought by W – he declined to do so.

- NB: the judge's analysis of *Rose* orders and the *Thwaite* jurisdiction is at paras 34-46 of his judgment and was endorsed by Lieven J as 'exemplary', and made be a useful *aide memoire* for the law on both (https://www.bailii.org/ew/cases/EWFC/OJ/2020/B35.html)

Kicinski v Pardi [2021] EWHC 499 (Fam)

- W appealed, and her appeal was allowed by Lieven J

- Lieven J set out the law on the *Thwaite* jurisdiction at [25] – [33], including:
  - *Thwaite v Thwaite* [1982] Fam 1
  - *L v L* [2008] 1 FLR 13, para 67
  - *Bezeliansky v Bezelianskaya* [2016] EWCA Civ 76, paras 37 and 29
  - *US v SR (no 4) (Executory Mainframe Distribution Order: Change in Circumstances: Extent of the Court's ability to Revisit Terms)* [2018] EWHC 3207, paras 51, 52 and 56.

- Two questions have to be asked:
  - 1) Whether there has been a significant and relevant change of circumstances since the order?
  - 2) If there has been a change, whether it would be inequitable not to vary?

Kicinski v Pardi [2021] EWHC 499 (Fam)

- The judge had been wrong in answering both questions in the negative.
  - As to the first question, Lieven J concluded that W was in a very materially different position now
    - W believed U&A were agreeing to the HoT and would not pursue further litigation
    - U&A could now still pursue Withers
    - Although the court could not determine the likelihood of U&A suing Withers, the risk perceived by W was not fanciful
  - The change in circumstances does not have to be wholly unforeseen
  - As to the second question, it would not be inequitable to vary the order, as W's only other remedy was to entirely void the deal and the court wanted to avoid that 'nuclear' option
  - There is very considerable judicial discretion as to whether a particular course is or is not inequitable.

- Lieven J also confirmed that a *Rose* order is a final and binding order, even though not yet perfected and sealed by the court.

S v T [2021] EWFC B11

Judgment dismissing application brought by W to set aside a consent order relying on the prohibitive impact of combustible cladding on her ability to obtain lending against the FMH.

- The parties reached agreement at an FDR on 13 September 2019.
- W retained the FMH, and H would receive a lump sum of £300,000 in exchange.
- W's intention (not fully disclosed to H) was to raise these funds by way of additional borrowing against the FMH from the existing mortgagees, YBS.
- A valuation obtained for lending purposes revealed the absence of a fire safety certificate and put the value of the FMH at nil (for borrowing purposes).
- W made enquiries of the freeholders and was told there were no combustible materials .
- The SJE in the financial proceedings also had not identified any cladding issues.
- W therefore went forward under the impression that the issue was "of a technical nature capable of being overcome" – i.e. a fire safety certificate was needed and should be easily obtainable.
- Against that backdrop, W signed the consent order on 12 November 2019 & DDJ Butler approved the order on 21 November 2019.

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- After that date, W continued her efforts to secure lending against the property, but was continually hampered by the fire safety certificate issue.
- On 16 June 2020, it was finally confirmed that the building did not meet the fire safety standards, a certificate could not be issued, and remedial works were needed – the consequence being that W could not secure funds via borrowing to pay the lump sum.

- H sought to enforce the order, by way of a sale of the FMH.
- W applied to set aside the order of DDJ Butler on the basis of 'mistake'.

- HHJ Hess dismissed W's set aside application and made an order for sale of the FMH, but deferred the sale pursuant to s.24A MCA 1973 to allow time for the cladding issue to be resolved.

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- As to the set aside/mistake/*Barder* issue, the judge relied on Mostyn J's judgment in *DB v DLJ* [2016] EWHC 324 at paras 31-57, the key elements from that judgment being:
  - The four conditions of the *Barder* test summarised at [31].
  - *Per* Lady Hale in *Cornick* [1994] 2 FLR 530, for *Barder* to apply, "*it is a sine qua non that the event was unforeseen and unforeseeable*" – the question is therefore one of foreseeability ([32]).
  - The notes of caution in *Richardson* and *Walkden* – the latter in particular emphasising the importance of finality in settlements ([33]).
  - Even if the set aside test is met, the court has discretion, and should not grant set aside if alternative mainstream relief is available ([34]).
  - The second group of cases involving the "known unknown" – mistake cases, where the test of foreseeability would be very difficult to satisfy ([47]).
  - At [50], quoting again Lady Hale in *Cornick*, this time on mistake.
  - Distinguishing between *Barder* and mistake – "*in the former the relevant facts will exist at the time of the order, but will be unknown; while in the latter, the relevant facts will arise after the order*" [54].
  - If mistake is alleged, the claimant has to show that even by due diligence they could not have discovered the true state of affairs ([55]).
  - Summarising the 'mistake' set aside test at [57].

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- The test for 'set aside' was not met on the facts.
- The relevant fact in this case was the defective cladding – this existed at 21.11.19, but was unknown until June 2020, and as such was a 'mistake', not a true *Barder* event.
- This placed the current case squarely in the "known unknown" category of cases:

> "*at the time of the order a thing is known and assumed but in fact later eventuates to an extent that was not expected…Plainly it is very difficult to satisfy the test of unforeseeability in such a case*"

- W could have drawn the problem to the attention of H and the court in Oct/Nov 2019, before the order was finalised - the potential issue would very likely have been an *Edgar* vitiating factor.
- However, she chose not to – thereby taking a gamble that the cladding/fire safety certificate issue would resolve in time.
- W had also failed to show that even with due diligence she could not have discovered the truth.
- In ordering the deferred sale of the house, the judge relied on s.24A, and paid heed to *Birch v Birch* [2017] UKSC 53

WL v HL[2021] EWFC B10

Judgment written for the purposes of recording the use of the FPR Part 3 case management powers.

- Recorder Allen QC had decided two applications brought by W, leaving only minor issues remaining in dispute between the parties, principally as to whether they should re-employ a nanny and how to split the cost of the same.
- The judge considered it appropriate to exercise his case management powers under FPR Part 3.

- The court has the power under the FPR to adjourn proceedings to allow non-court dispute resolution to take place, but only where the parties both consent (*Mann v Mann* [2014] 2 FLR 928).
- Given the disproportionate costs, the judge adjourned the proceedings to enable the parties to consider non-court dispute resolution.
    - The parties agreed, and further stays to W's applications were granted on the requests of the parties' representatives.
    - This enabled the parties to largely reach agreement, with the judge required to determine one final point on papers.
- The judge considered that the approach take had reduced costs and led to a quicker and better outcome by agreement.
- The use of the case management powers also furthered the overriding objective.

LM v DM (Costs ruling) [2021] EWFC 28

Short judgment of Mostyn J on costs, giving a reminder of the importance of making a serious effort to negotiate openly and reasonably

- Mostyn J clarified that in proceedings for MPS, interim PPs for children, and LSPOs:
  - They are not governed by no-order-for-costs general rule in FPR r.28.3(5).
  - Instead, they are governed by soft costs-follow-the-event principle.
  - Calderbank offers are admissible.
  - The obligation to negotiate openly and reasonably is especially important in interim applications.
  - This is because they ought to be pragmatically settled in circumstances where, by definition, they do not make a final determination of the parties' positions.
- The applicant wife clearly won in the case – BUT made no serious attempt to negotiate openly and reasonably.
- Consequently, W only received 50% of costs.

"*Litigants must learn that they will suffer a cost penalty if they do not negotiate openly and reasonably*" [4]