ThoughtLeaders4 HNW Divorce • December 2021

HNW Divorce MAGAZINE

ISSUE 7

What has 2021 meant for the HNW Divorce Community?

2021

Our Year in Review issue looks back at this stop-start year with one eye firmly fixed on 2022 and what the future holds.

2021, YEAR IN REVIEW

INTRODUCTION

"The new year stands before us, like a chapter in a book, waiting to be written."

Melody Beattie

2021 has been another turbulent year as we continue to live alongside COVID-19. Amongst the challenges, we are proud to have seen the HNW Divorce community re-connect with old and new contacts, as we returned to in-person events.

To wrap up this year, we present a Year in Review. This 7th edition will round up the most significant cases and trends over the past 12 months, from the advance of ADR, to cashflow forecasting after a divorce, to the importance of valuing a business.

Thank you to all of our authors, members, and community partners for their continued support. The new year stands before us, ready for new industry insight and a fresh perspective. We look forward to hearing from you all in 2022 with more captivating content as we continue to navigate the legal maze.

The ThoughtLeaders4 HNW Divorce Team

Paul Barford
Founder / Director
020 7101 4155
email Paul

Chris Leese
Founder / Director
020 7101 4151
email Chris

Danushka De Alwis
Founder / Director
020 7101 4191
email Danushka

Maddi Briggs
Content Production Manager
email Maddi

ABOUT HNW Divorce

Through our members' focused community, both physical and digital, we assist in personal and firm wide growth.

Working in close partnership with the industry rather than as a seller to it, we focus on delivering technical knowledge and practical insights. We are proud of our deep industry knowledge and the quality of work demonstrated in all our events and services.

Become a member of HNW Divorce and...

- Join a community of experts, referrers and peers
- Attend events in all formats
- Immediately benefit from our Virtual Forward of events
- Interact using our digital Knowledge Hub
- Learn and share expertise through the Community Magazine
- Grow your network and business
- Build relationships through a facilitated Membership directory

CONTENTS

CONTRIBUTORS

Olive Gathoni, **International Family Law Group**
Jessica Crane, **London & Capital**
Fred Brown, **Grant Thornton**
Emma Williams, **Grant Thornton**
Alex Carruthers, **Hughes Fowler Carruthers**
Sarah Bailey-Munroe, **Conyers**
Jack Rundall, **1GC**
Nancy Chien, **Bedell Cristin**
Elizabeth Shaw, **Bedell Cristin**
Amy Harvey, **Peters & Peters**
James Roberts QC, **1KBW**
Leonie James, **1KBW**
Connie Atkinson, **Kingsley Napley**
Elizabeth Doherty, **Macfarlanes**
Kate Hart, **Quantuma**
Jessie King, **Quantuma**
Fiona Wilson, **Goodman Derrick**
Petra Teacher, **29 Bedford Row Chambers**

AN UNPRECEDENTED YEAR

KEY 2021 THEMES

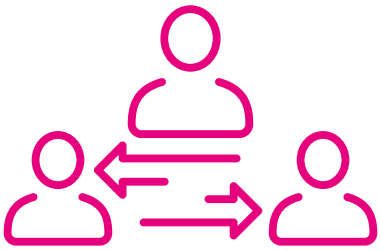
Authored by: Olive Gathoni - International Family Law Group

The year 2021 began with the country being in its third national lockdown and trying to navigate its way through the Covid-19 pandemic. In his *'Road Ahead'* article of 10 January, Sir Andrew McFarlane, President of the Family Division, noted footfall in court buildings would be kept to a minimum, courts would facilitate remote attendance of all or some of those involved in hearings as the default position. Mass vaccinations were a most welcome light at the end of the tunnel, although the return to anything like the normal working of a family court may not be achieved for some time. The President predicted that beyond the relaxation of the rules, there would still be a significant proportion of remote and hybrid hearings as the country got back to normality. The *'Road Ahead'* guidance given in June 2020 would continue to apply, with the key concerns being the significantly high volume of work remaining with an expectation of limited facilities to conduct face-to-face hearings. It was accepted that any delay in cases would prejudice the welfare of children; adjourning cases for many months would not be an option. By July 2021, the President continued to be profoundly impressed by the delivery of family justice in navigating a complicated system so different from the norm.

On 20 October 2021, the Farquhar Committee produced a report on the role of remote courts in the post-pandemic environment and the procedures of the Financial Remedies Court (FRC) [1]. Amongst its findings, advantages of remote hearings outweighed the disadvantages and recommended that most hearings at which no evidence is to be given, should be heard remotely. Electronic bundles would remain the norm unless otherwise ordered.

There was also guidance specific to the FRC to include time estimates for specific hearings, court staffing, length of court documents, hearing dates and specific references to Forms E, consent orders. The changes in the family courts are expected to be gradual, and policies kept under review as the court continues its recovery from the pandemic which has undoubtedly accelerated the modernization of the family court; the positive elements of the pandemic will be retained.

In this article, I explore some 2021 themes that have been key and continue to play part in unprecedented times in the family law world.



Mediation

In March 2021, the Ministry of Justice announced a £1 million mediation scheme. 2000 families would be able to apply for a £500 voucher towards mediation. Shortly after the announcement, it was reported that Mediation Information Assessment Meetings (MIAM'S) had increased by 14% between October and December 2020, compared to the previous year. By 25 June 2021, these had increased by 43% in the period April to June 2021[2]. Owing to its popularity, on 5 September, the government extended the scheme by an additional £800,000. MIAMS and family mediations generally decreased significantly following the Covid-19 restrictions, but volumes have now increased and exceeded pre-covid levels. The backlog and delays seen in the courts have directed more people to mediate their family disputes with the

1 https://www.judiciary.uk/publications/reports-of-the-farquhar-committee-on-the-financial-remedies-court-parts-12/

2 https://www.gov.uk/government/statistics/legal-aid-statistics-quarterly-april-to-june-2021/legal-aid-statistics-england-and-wales-bulletin-apr-to-jun-2021

hope of a quicker conclusion. Until the court fully recovers, mediation numbers are likely to continue to increase.

The same could be said for other alternative dispute resolutions (ADR), Private FDRs and Arbitration.

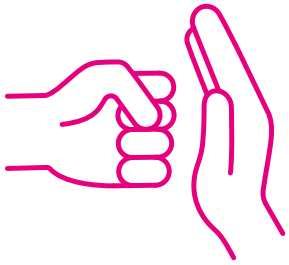
A July 2021 report by a law firm found that a quarter of people wished they had used mediation/ arbitration as the answer to divorce.

This report emphasises the need for family law practitioners to advise their clients on ADR schemes at a time where the court is struggling with listings. In a world where family law is rapidly changing, the overwhelmed court system has made room for alternative solutions.

ADR Case spotlight - in Haley v Haley [2020] EWCA Civ 1369 clarification has been provided to confirm that arbitral awards can now be challenged if there is a real prospect of success or that the award was wrong. In the subsequent case of A v A (Arbitration: Guidance) [2021] EWHC 1889 (Fam), Mostyn J took the opportunity to set down some procedural guidance concerning challenging an arbitral award.

No fault divorce

The government's Divorce, Dissolution and Separation Act 2020, passed in June 2020 reforms the divorce process to remove the concept of fault. New legislation will replace the five facts with a new requirement to provide a statement of irretrievable breakdown, remove the possibility of contesting the divorce, introduce an option for a joint application and use of plain English. Following the case of *Owens v Owens* [2017] EWCA Civ 182, family law practitioners and their clients were delighted by the change, hailed as the biggest shakeup in divorce law for 50 years, eliminating the impact allegations and blame have on family, particularly, children. The intention was for the law would come into force from autumn 2021 but the government announced in June 2021 that its application would be delayed until 6 April 2022. The impact of this change is so great that some clients are willing to put matters on hold to avoid the unnecessary acrimony brought by the current blame system.



Domestic Abuse Bill

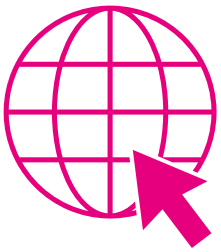
Acclaimed as one of the successes of 2021, the Domestic Abuse Bill became law on 29 April; 4 years after its first mention in the Queen's speech. For the first time, the legal definition of domestic abuse will incorporate a wide range of abuses beyond physical violence, including emotional, coercive or controlling behaviour and economic abuse. Within the family courts, actions and support for victims will be introduced to ensure victims have better protection and access to special measures (screens and video links) in the court room. It will also prevent abusers directly cross-examining their victims. The police and the courts will be given new powers to hand out orders and prevent offending.

The significant increase on domestic violence was widely reported during the Covid-19 pandemic. In their 18 August 2021 report *A Perfect Storm – The Impact of The Covid 19 Pandemic on Domestic Abuse Survivors*, Women's Aid reported that domestic abuse had worsened during the pandemic.

- **61% of those experiencing domestic violence reported it had worsened, with more than two thirds stating they had no one to turn to during lockdown**
- **Over 53% of the victims reported that children had seen more abuse and 33% said the abuser had shown an increase in abusive behaviour towards children**
- **The pandemic saw a 40.6% reduction in the number of refuge vacancies in England during the period 23 March to 31 May 2020**

The introduction of the law has provided markers for change to include the Home Office awarding £11.3 million to 25 Police and Crime Commissioners towards domestic abuse intervention programmes.

Case spotlight - *H-N and Others (children) (domestic abuse: finding of fact hearings)* [2021] EWCA Civ 448 gives guidelines on how family law practitioners should address elements of controlling and coercive behaviour in schedules of allegations, within children proceedings.



Online Divorce and Financial Remedy Proceedings

HMCTS have expanded the online divorce and financial remedy portal since its launch in May 2018, as of June 2021, 86% of all citizen divorce applications and 75% of all solicitor applications were via the portal. In progressing the online expansion, as of 13 September 2021, it became mandatory for all divorce applications to be made online for represented petitioners. January 2021 also saw the launch of online contested financial remedy applications, by way of Form A. On 21 June 2021, all FRC became digital. It is expected that on 6 April 2022, when the Divorce Dissolution and Separation Act 2022 comes into force, there may be further changes made to the Family Procedure Rules and the online portal. Whilst HMCTS was on its way to becoming more *'online'*, the pandemic has played a part in accelerating the process.

I conclude by nothing that whilst Covid-19 has impacted different sectors in varied ways, it is clear that it has helped improve the justice system in many ways.

international FAMILY LAW GROUP LLP

- Divorce & Separation
- International Recognition of Marriages & Divorces
- Resolving & Enforcing Financial Disputes
- Finance & Forum Disputes
- Marital & Relationship Agreements
- Child Relocation & Abduction
- Surrogacy & Adoption
- International Mediation & Arbitration
- Financial Provision after an Overseas Divorce
- Specialist International Accredited English Solicitors

"A specialist firm that looks after International and National families" *Legal 500*

Ann Thomas
Managing Partner
Email

David Hodson OBE MCI Arb
Partner
Email

Lucy Greenwood
Partner
Email

Helen Blackburn
Partner
Email

Lucy Loizou
Partner
Email

Stuart Clark
Partner
Email

Michael Allum
Partner
Email

James Netto
Partner
Email

The Law Society EXCELLENCE AWARDS 2019 CELEBRATING EXCELLENCE WINNER

+44 (0)20 3178 5668
enquiries@iflg.uk.com
www.iflg.uk.com
Follow us:

CASHFLOW FORECASTING AFTER A DIVORCE

Authored by: Jessica Crane - London & Capital

A major life event such a divorce is often the catalyst for re-evaluation of future financial needs, and cashflow forecasts are undoubtedly one of the more valuable tools to do this. When well executed, they can offer reassurance about sustainable levels of spending and that someone is unlikely to run out of money, but inaccurate forecasts can lull someone into a false sense of security leading to complacency and overspending. Planning your financial future can be a daunting task at the best of times- but especially when many areas of your life will have changed and you are unsure of future spending patterns and lifestyle costs.

It is here where cashflow modelling is crucial: it helps to give a holistic view on someone's finances, while making clients feel more engaged with the advice process. Crucially, it gives guidance that influence financial behaviour and spending patterns.

Why do you need cashflow modelling?

Cashflow modelling is a comprehensive overview of an individual's assets, liabilities, income and expenditure projected over time. This helps evaluate the individual's ability to cover future financial needs and objectives. It uses a series of assumptions from aspects such as inflation and growth to future income and tax considerations. From here, individuals or families can consider questions, including:

- Is my spending sustainable?
- How do I achieve my financial goals like buying a second home, paying off debt or gifting money to relatives?
- What happens on retirement? When can I retire with my desired lifestyle?
- How does my investment strategy handle incidents of significant loss?
- Where should I choose to take income from?

A wealth manager can then combine the cashflow modelling with investment objectives and create an investment strategy suited to each person's needs.

As with all models that extend into the future, these assumptions must be continually adapted to ensure they still reflect real life. We recommend a full review at least every couple of years, and certainly after a major life event such a marriage or divorce. A good cashflow model can enable families to build a picture of how their wealth will develop over time and the options this may provide for them.

Some of the most common challenges when modelling cashflow

Inflation not factored in

Inflation can truly erode wealth. By not increasing the projected expenditure in line with a base level of inflation almost

guarantees that purchasing power won't be maintained into the future. The Bank of England's inflation target is 2%; we recommend using this as a minimum figure when modelling inflation into cashflow.

Use realistic expectations for asset classes

With interest rates still remaining low, asset class return expectations are likely to remain low as well. If expectations are overstated, then the cashflow model is going to show unrealistic levels of possible spending.

Introducing stress tests

While we hope not to see dramatic market crashes very often, they do happen. In order to make the cashflow model as robust as possible, factor in a 10% fall every 10 years.

Not using accurate expenditure figures

This is probably self-evident, but if a client understates their spending requirements and consistently takes more income than expected, the cashflow model will be inaccurate.

To illustrate the point, the below charts show the different outcomes when the above are not factored in: Angela has received a divorce settlement of £4 million. She has initial spending requirements of £170,000 (including university fees for some years for her children Amy and Jack)

Diagram A

This diagram shows what her cash flow would look like if her spending requirements are not linked to inflation, her portfolio were to return 6% per year gross of charges and there were no market downturns. It shows her spending can easily be maintained at this level for the rest of her life.

Diagram B

This diagram shows a more robust cash flow model including inflation linked spending at 2.5%, university fees increasing at a rate of 3% per year, a 15% market downturn every 10 years and a portfolio return of 5% gross of fees. In this scenario, despite a £4 million settlement, if she continued to spend at this level, Angela would run out of money at age 77

Diagram A

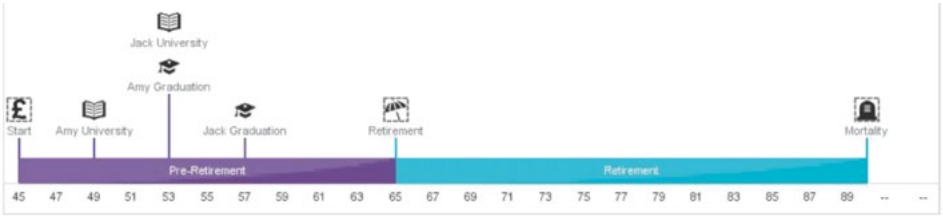
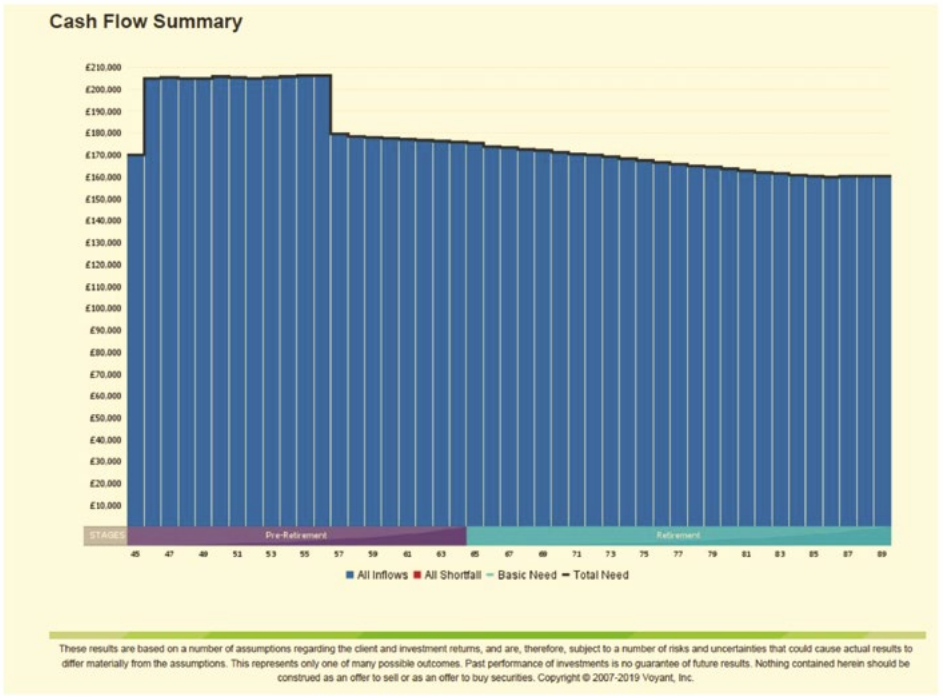
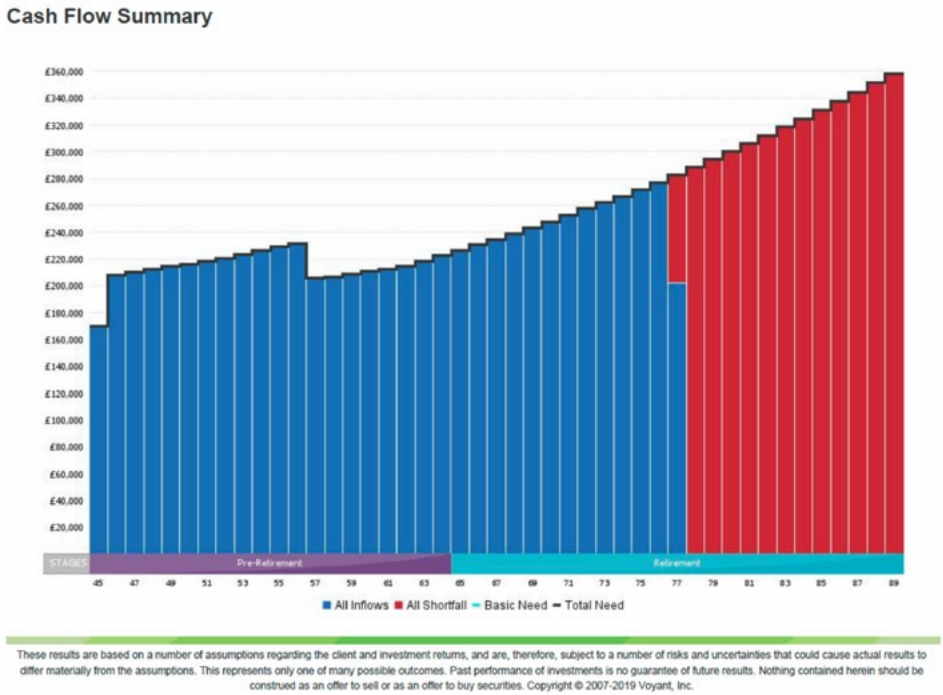


Diagram B





The value of investments and any income from them can fall as well as rise and neither is guaranteed. Investors may not get back the capital they invested. Past performance is not indicative of future performance. The material is provided for informational purposes only. No news or research item is a personal recommendation to trade. Nothing contained herein constitutes investment, legal, tax or other advice.

London
&Capital

A FRESH START: WEALTH MANAGEMENT POST-DIVORCE

For someone who has gone through a divorce and finds themselves managing their finances independently, the risks associated with financial decision-making can be a real concern.

We provide guidance on how to manage and sustain a settlement in the longer term, making it work for a lifetime. Our role is to guide our clients during this pivotal time, unravelling the complexities to ensure that their financial position can be understood, and the right decisions are made.

To arrange an introduction, please call 020 7396 3388 or, email us: invest@londonandcapital.com

JENNY JUDD
Director

JESSICA CRANE
Executive Director

THE CHALLENGES OF VALUING AN INTERNATIONAL BUSINESS IN 2021

Authored by: Fred Brown and Emma Williams - Grant Thornton

What is it worth?

Some things in life are easy to put a price on; others are not so straight-forward, leading to differences of opinion and, sometimes, disputes. International businesses can be tricky to value at the best of times, not least in the wake of a global pandemic that has wreaked havoc on certain industries.

The good news is that when valuing an international business (for the purposes of this article, defined as one operating largely or completely outside the UK), the same tried and trusted methods of business valuation apply as when looking at those closer to home. And our approach remains the same today as it was at the beginning of 2020; we always come back to the same core principles. The International Valuation Standards serve as a useful and widely respected reference. However, there are some areas that require careful consideration when valuing an international business.

Availability of information

Regardless of the location of the business we are valuing, or the approach we use, first and foremost we need to understand it. What does it sell? How has it been performing? What is its market position? How is it likely to grow? We need financial information to answer these questions.

One of the biggest challenges can be limited access to information. Quite simply, not all countries have a freely, publicly available registry like Companies House. It can be challenging to obtain the financial information needed to understand a business, assess its performance, and ascribe a value if not readily available from the business in question.

In some cases, the financial information developed by the business may also be less extensive, reliable or informative as a result of differing reporting and audit requirements in different jurisdictions and differing levels of investment in technology. Lack of information can of course be true of businesses in all jurisdictions, including the UK, although we benefit from minimum requirements for external reporting and audit. There can also be huge variances in the quality of available information at an industry and country level in developing regions, which can further confound estimates of, for example, market share, economic growth rates and inflation levels.

Country risk

Many practitioners use 'country risk premia' to reflect the different perceived levels of investment risk in different countries. This is used within the income approach and adds a premium to increase the discount rate applied to calculate the present value of future cash flows, thereby reducing the value. This is often intended to capture political, economic and financial risks, including factors such as:

- Government stability
- Socioeconomic conditions
- Law and order
- Internal and external conflict
- Real GDP growth
- Budget balance as a % of GDP
- Foreign debt as a % of GBP[1]

There are several ways of measuring this premium, which can have a significant impact on concluded value and can vary hugely between experts. Where the business operates in many different countries, premia can be calculated for each country and applied appropriately to the cash flows.

1 Example factors taken from the PRS Group "International Country Risk Guide"

Comparable businesses

In the market approach, we identify comparable companies that are either publicly listed or have recently been privately transacted and for which there is available pricing information. We take the price of the transaction or share price and the business' financial information and derive a market multiple as a comparable measure of value (most commonly, enterprise value – 'EV'/ EBITDA).

To find companies that are most comparable, we would naturally look for those operating and selling in the same country. It may be necessary to broaden the geographic search when seeking to identify comparable companies. In addition, there are a wide variety of stock exchanges globally and the valuer will need to be comfortable that the identified listed share prices reasonably reflect market values.

The impact of COVID-19

The impact of COVID-19 has varied hugely by sector and country, depending on the level and length of 'lockdowns' implemented and on the pandemic's impact on business models and supply chains. Clearly, in general terms it has been an extremely difficult time to run or sell a hospitality or events business, and a great time for businesses selling remote working software tools. In general, global equity markets have recovered strongly (particularly in the US where the S&P 500 and the heavily technology-focused NASDAQ are up 40% and over 60% respectively from their 1 January 2020 position), while the UK FTSE100 and All Share indices remain slightly below their January 2020 marks [2]. Each country and business must be considered carefully for the impact of COVID-19. Particular care should be taken when using market data affected by volatility in the period (predominantly Q1 2020) in which market prices were extremely turbulent due to the uncertainty at the beginning of the pandemic.

Currency

Finally, we must accurately translate financial information from local currencies to the valuation currency. This can be complicated by several factors.

- The performance of the business can be masked by changing forex rates. For example, a business may be deteriorating over time, but the forex rate improving, such that if you look solely at the translated financials, the business appears relatively stable. For this reason, the trends in the business may be best seen in the local current results.
- Economic growth and inflation rates can vary hugely by country and must be considered when assessing the forecast cash flows of the business. The (nominal) business forecasts may look exceptional where these are high, but in real terms, once strong economic growth or inflation is stripped out, the project growth may look a lot more modest or even become negative. Care must be taken to assess the likely trajectory of the business in real terms.
- Local government policy and availability of foreign currency: in some countries there are two (or more) exchange rates, an "official" rate and a parallel market rate. This can lead to confusion concerning underlying business performance and the potential for over-valuation of businesses.

So as ever in business valuation, there are many tricky issues to consider, but rest assured the same fundamental valuation principles apply.

2 Financial Times market data accessed at 19 October 2021

High net worth divorces and family disputes

Our aim is to work collaboratively and strategically with legal teams to achieve the best possible outcome for clients.

We know that divorces can be messy, emotionally charged and sometimes extremely acrimonious. But we also know that with the right team in place, realisations can be maximised and even well-hidden assets recovered, so enabling your client to make a fresh start on a firm financial footing.

To find out more about how we can assist your client going through a divorce or dealing with a family disputes, please do get in touch.

We help you resolve disputes through:

- Intelligence and research
- Expert witness services
- Valuations
- Asset tracing and management services
- Formal appointments
- Insolvency appointments
- Debt enforcement and recovery strategies

Visit grantthornton.co.uk to find out more, or contact:

Hannah Davie
Director
T +44 (0)20 7865 2849
E hannah.davie@uk.gt.com

Grant Thornton

DS1966

60-SECONDS WITH:

ALEX CARRUTHERS PARTNER, HUGHES FOWLER CARRUTHERS

Q What would you be doing if you weren't in this profession?

A Almost impossible to imagine. I have been doing it for 25 years and I am so entrenched in it! I remember when I was a callow youth discussing the same question with a barrister whom I was instructing. He said that he would be a guide for historical sites. I said that I would be a taxi driver. He is now LJ Moylan.

Q What's the strangest, most exciting thing you have done in your career?

A I had to travel to the Cayman Islands to represent a client there who believed that all the local lawyers had been bribed by the mafia. The money laundering rules were less strict then and my fees were paid in cash. Of course, by the time my involvement ended in the case, she accused me of being bought off by the mafia.

Q What is the easiest/hardest aspect of your job?

A Undoubtedly, the hardest aspect is handing over clients to barristers and/or judges at hearings. You have lost control. I still find it very difficult! I sit at the back of the court wanting to stand up a correct everyone. Meeting new clients is the "easiest" and most enjoyable.

Q If you could give one piece of advice to aspiring practitioners, what would it be?

A Stick with it. When I was young, I would walk to work, worrying about the day ahead, and look at people with jobs that I thought were less stressful and think that they had an easy job because they didn't the worries that I had. When I would walk back from work, having had a successful day, I would look at them and think – I had a great day – and I wouldn't swap my job for anything in the world.

Q What has been the most interesting case you have seen in 2021?

A I am bound by confidentiality rules but one case in particular has been unique. The judge described it as the most extraordinary case he has dealt with in 40 years of practice. It involved astonishingly bad conduct by the other party.

Q What do you think will be the most significant trend in your practice over the next 12 months?

A The change to no fault divorces is undoubtedly going to remove one of the initial headaches in proceedings. It makes no sense for parties to argue about why a relationship has broken down. It is normally for a number of reasons and discussion of the issues that led to the breakdown only serves to open old wounds. The breakdown of a relationship is difficult enough with it!

Q If you could learn to do anything, what would it be?

A To write music. I am cloth eared and tone deaf, but enjoy listening to music. It baffles me how people can do it.

Q What is the one thing you could not live without?

A Wine and Cheese. They are two things but the combination is so good, it should count as one.

Q If you could meet anyone, living or dead, who would you meet?

A Charles Darwin. I studied Philosophy of Science at university and it effected by outlook on life. The impact that Darwinism has had on our perception of life, the universe and everything cannot be underestimated. It would be interesting to discuss this with Darwin himself, as he would probably have resisted some of the conclusions that people draw from it.

Q What songs are included on the soundtrack to your life?

A A medley of disco hits. I can't resist Dad Dancing. Always the first and last on the dance floor…..

Q What does the perfect weekend look like?

A A combination of time with family and friends mixed with playing and watching sport.

Q Reflecting on 2021, what have you been most grateful for?

A That it's coming to an end. Lockdown has been mixed. I am not someone who enjoyed it and it has brought a number of challenges. I hope that 2022 will allow things to move on to a better, more "normal" place.

FOREIGN DIVORCES AND ENGLISH REMEDIES

A REVIEW OF RECENT CASE LAW

Authored by: Sarah Bailey-Munroe - Conyers

Introduction

English proceedings which follow in the wake of foreign divorces entail complex rules and procedures which many practitioners may be unfamiliar with unless they regularly deal with international divorces.

Several reported cases this year have served as a reminder of the complexities of determining whether a foreign divorce will be recognised under English law and the procedure to be followed in relation to any Part III claim which may follow. The following provides a summary of the key points to take away from those cases.

Recognition of a foreign divorce

Whether a foreign divorce is recognised under English law will determine whether a petition for divorce (and the associated remedies) can be pursued or merely a claim under Part III. The Family Law Act 1986 set outs the circumstances in which recognition of overseas divorces **will be granted or refused.** Section 46 (s46) sets out the grounds for recognition as follows:-

- The validity of an overseas divorce, annulment or legal separation **obtained by means of proceedings** shall be recognised if:

  a) The divorce, annulment or legal separation is effective under the laws of the country in which it was obtained; and

  b) At the relevant date, either party to the marriage must satisfy the following:

     i. Was a habitual resident in the country in which the divorce, annulment or legal separation was obtained; or

     ii. Was domiciled in that country; or

     iii. Was a national of that country.

- The validity of an overseas divorce, annulment or legal separation **obtained otherwise than by means of proceedings** shall be recognised if:

  a) The divorce, annulment or legal separation is effective under the law of the country in which it was obtained; and

  b) At the relevant date:

     i. Each party to the marriage was domiciled in that country; or

     ii. Either party to the marriage was domiciled in that country and the other party was domiciled in a country under whose law the divorce, annulment or legal separation is recognised as valid; and

     iii. Neither party to the marriage was a habitual resident in the United Kingdom throughout the period of one year immediately preceding that date.

- Please note that the “relevant date” refers to:

  a) In the case of an overseas

divorce, annulment or legal separation obtained by means of proceedings, the date of the commencement of the proceedings; and

b) In the case of an overseas divorce, annulment or legal separation obtained otherwise than by means of proceedings, the date on which it was obtained.

Unfortunately, where the s46 criteria are not observed, a divorce which is perfectly valid overseas, may nevertheless be refused recognition under English law creating the unsatisfactory situation that a couple divorced in one jurisdiction may remain married in another. Perhaps unsurprisingly, the need to comply with the s46 criteria is not always known to those divorcing overseas without the benefit of legal advice. The difference in status may have significant consequences not only for the financial relief available under English law, but also on ancillary matters such as their immigration status, or ability to re-marry. The following cases demonstrate the general approach to questions of recognition.

Botwe v Brifa

In *Botwe v Brifa* 2021 EWHC 2307 Fam, the court was tasked with determining the factual dispute as to whether a valid divorce had taken place at all, pursuant to Ghanaian law and, if so, whether that divorce satisfied the s46 criteria for recognition or not.

W and H had married pursuant to local customs in Ghana and H asserted that they had divorced in the same manner. It was H's case that W had participated in the divorce proceedings (albeit that she was not physically present) but that she now sought to deny this for immigration purposes. The court accepted H's evidence on this point and further accepted expert evidence that W's physical absence from the divorce ceremony did not invalidate the divorce under Ghanaian law.

Having concluded that there had been a valid divorce pursuant to Ghanian custom, the court went on to consider whether it fulfilled the s46 criteria. The first step was to determine whether the parties have divorced by way of proceedings or otherwise. The expert evidence was that although it is commonplace to register a customary divorce in Ghana, registration was entirely optional and formed no part of the divorce process itself.

In the absence of any registration requirement, the court found that the customary divorce had proceeded "other than by means of proceedings". As set out above, such divorces may only be recognised if neither party had been habitually resident in the UK in the two months prior to the divorce.

As both W and H accepted that they had been living in the UK, the Ghanaian divorce could not be recognised in the UK. As a result, W was free to pursue relief in the English courts.

Hussain v Parveen

In *Hussain v Parveen* 2021 EWFC 73, revisited the question of when a divorce will be an "overseas" divorce for the purposes of s46.

The case concerned W's petition for divorce from her second husband. H sought to persuade the court that W's first divorce was not an "overseas" divorce within the meaning of s46 at all, but was in fact transnational and therefore could not be recognised as valid under English law.

W had married her first husband in Pakistan in 2000. They later divorced as a result of H failing to make arrangements for W to join him in the UK. The divorce was obtained by the first husband pronouncing Talaq via a letter to W's brother in the UK, which in turn, was converted into a divorce certificate by an English mosque. W then received a copy of the divorce in Pakistan and provided a copy to the local union council in Pakistan.

Having effectively divorced under the law in Pakistan, W remarried and later relocated to the UK with her new spouse. Sadly that marriage also came to an end and it was as a result of this second divorce that the validity of the first (under English law) came into question.

W's second husband argued that the Talaq (which took place in the UK) and delivery of the divorce certificate to the union (in Pakistan) were both integral parts of the divorce. It followed that whilst the process had concluded in Pakistan, it had begun in the UK and could not be considered an overseas divorce pursuant to s46.

The court accepted H's submission, in line with previous authority that dealt with a transnational get. The court accordingly declared W's second marriage a nullity, as a result of the fact that her first marriage was still subsisting under English law. This conclusion had little impact on W's ability to obtain financial remedies, but left her open to significant consequences within her religious community where polyandry was a religious offence.

J v J

Finally, in *J v J* 2021 EWFC 43, whilst there was no question that the Chinese decree obtained by H met all of the s46 criteria, the court was invited nonetheless to refuse recognition pursuant to section 51 of the Family Law Act 1986.

In this case, the wife had issued English divorce proceedings in May 2019. However, by the time the matter came before Mr Justice Peel in 2021, decree nisi was still yet to be pronounced owing to a combination of court delays and H's evasion of service. By this time, H had himself petitioned for, and obtained, a decree of divorce in China in October, 2019. Thus rendering W's application untenable unless the court refused to recognise the pre-existing Chinese decree.

As such, W's only option was to demonstrate that H had failed to take reasonable steps to notify her of the proceedings or that the decree was obtained without W having been given a proper opportunity to participate in proceeding pursuant to section 51(3)(a) of the Family Law Act 1986.

The court accepted W's evidence that she had been unaware of the Chinese proceedings prior to April 2020. That said, as the matter was not finally disposed of until December 2020, Mr Justice Peel concluded that W had not suffered any prejudice as a result of the initial delay. Further, although the court accepted W's evidence that she had not received any other emails regarding the proceedings, it was apparent that she was aware of at least some of the hearing dates and yet failed to obtain advice or attend.

The court was satisfied that H was entitled to use the email address which W had held for many years –an address which had been effective in communicating the April hearing date. No more could be expected of H, and it would be wrong to refuse to recognise the decree he had properly obtained in such circumstances.

The court noted that in these circumstances, W would almost certainly be able to avail herself of a claim udder Part III given the limited scope for financial remedies in China following divorce. However, the failure to obtain an English decree could have had significant consequences had a different jurisdiction been in issue.

Potanin v Potanina

In *Potanin v Potanina*, the court was concerned with an application under Part III. This followed hard fought proceedings in Russia over a four-year period. Although W had been awarded 50% of the matrimonial assets in those proceedings, and significant child care expenses, the final award failed to take into account assets beneficially owned by H which represented the vast bulk of his wealth. As a result, in 2019, W sought leave to apply by relying upon the lacuna in Russian law and the inability of the current award to meet her needs as grounds for a Part III claim.

W was able to pursue her claim on the basis that she was habitually resident in the UK having moved there in 2014. W's application proceeded before Mr Justice Cohen on an *ex parte* basis as is required. During that hearing the judge expressed a clear view that the matter ought to be re-listed on an inter partes basis before making a determination as to whether to grant W leave. Ultimately however, he was persuaded against that course and leave was granted.

Unsurprisingly, in due course H applied to set aside the judgment alleging that W had misled the court in relation to both fact and the law. H's submissions clearly made an impression on Mr Justice Cohen who expressed some regret about his failure to list the matter *inter partes.*

He decided to list the set aside application for a two-day hearing, contrary to the procedure set down in Agbaje which provides:

"Once a judge has given reason for deciding at the ex parte stage that the threshold has been crossed, the approach to setting aside leave should be the same as the approach to setting aside permission to appeal in the Civil Procedure Rules (CPR), where (by contrast with the Family Proceedings Rules) there is an express power to set aside, but which may only be exercised where there is a compelling reason to do so: CPR r52.9(2). In practice, in the Court of Appeal, the power is only exercised where some decisive authority has been overlooked so that the appeal is bound to fail, or where the court has been misled… in an application under section 13, unless it is clear that the respondent can deliver a knock-out blow, the court should use its case management powers to adjourn an application to set aside to be heard with the substantive application."

At the conclusion of the two-day hearing, Mr Justice Cohen concluded that W had misled the court in three categories: fact, Russian law and English law. On appeal it was reiterated that the procedure in Agbaje cannot be circumvented; in the absence of a knock-out blow the set aside should be adjourned to be listed alongside the substantive application. The Court of Appeal stressed that the need for a two-day hearing in order to demonstrate a compelling reason indicated that those reasons couldn't be considered a knock-out blow.

Further, it will not be sufficient to show that the court has been misled in some peripheral matter. The respondent must demonstrate that the court was misled in a matter material to the grant of leave itself. The fact that the wife had incorrectly stated the child care award could not be said to be material given that her application invited the court to consider awards in her favour, not the child's. Similarly, although Mr Justice Cohen had expressed concern that W had described the Russian proceedings (W asserted that the Russian court had failed to assess her needs, rather than explaining that a needs claim was not available under Russian law) the Court of Appeal was satisfied that this did not impact the grounds upon which leave had been granted, namely that the lacuna in Russian had placed significant assets beyond W's reach and her needs have not been met as a matter of fact.

Finally, the judgment expressed concern that reliance had been placed on a finding that W had failed to inform the court that she had taken advice from divorce specialists in London prior to her relocation in 2014. W had not waived privilege in respect of the advice she received and did not give evidence as to her motivations for relocating. The Court of Appeal was clear that it was not open to the court to draw inferences from W's refusal to waive privilege and while conclusions could be drawn from W's evidence at trial, it was not a material consideration at the leave stage.

The take-away:

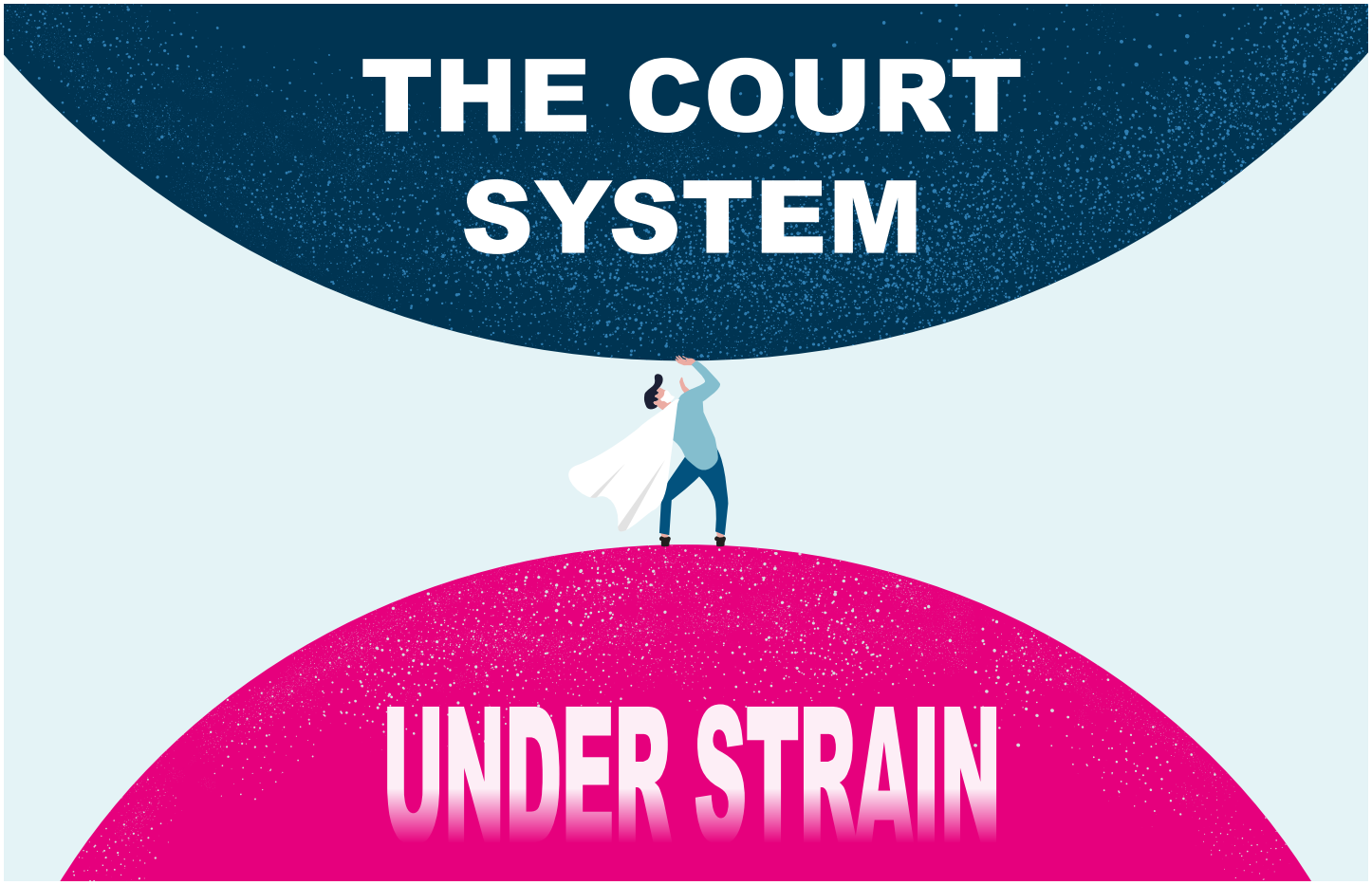
1. **In complex matters, an inter partes hearing will likely be appropriate;**
2. **Once leave has been granted, any set aside application will be adjourned unless the respondent is able to deliver a knock-out blow within a short hearing for that purpose; and**
3. **Applicants should be mindful that where a grant of leave is shown to have been inappropriate following a substantive hearing, cost consequences will likely follow particularly where the court has been misled.**

An expert lender, transforming litigation funding in Family Law.

Ampla combines extensive experience as lenders with outstanding technical expertise, to create a tailored loan product and a simple, user-friendly platform which streamlines every stage of the funding and payment process.

www.amplafinance.com

ampla finance



Authored by: Jack Rundall - 1GC

"Lack of judicial availability" are four words which over the last year have come to haunt every family lawyer.

This phrase is used by court offices across the country as the explanation for adjourning hearings, usually with about 24 hours' notice. Final hearings seem to be the worst affected and an analysis of my own diary over the last year suggests that (in finance at least) such hearings are more likely than not to be adjourned at least once. I have a couple of matters which have been adjourned twice and have heard of cases going through their fourth attempt to find a judge. Delays of 6 months or so between each listing are not uncommon and applications for financial remedies seem to be the worst affected, presumably because matters involving children are given priority. In each case these adjournments lead to unnecessary costs; not just wasted brief fees but inevitably extra correspondence, ongoing interim maintenance and mortgage payments and, in one of my cases, the need (following each of two adjournments so far) to update a chartered surveyor's valuation of various commercial premises and an accountant's valuation of a business. That's a total of four experts' reports placed in the shredder (or at least deleted).

Whilst there may be moves afoot to try to improve the position (for example, the increased recruitment of part-time judges and the introduction of the fast-track procedure for low-value financial remedy cases proposed in His Honour Judge Farquhar's October 2021 report), none are likely to resolve the crisis in the near future. So, if 2021 has taught us anything, it must surely be the desirability of looking outside the court arena to resolve disputes. Mediation remains a sensible option where the parties are able to work constructively but arbitration is more likely to be the solution for parties staring down the barrel of an adjourned final hearing since it provides a binding resolution. Despite this it remains something of a niche option in family law, albeit one that is becoming more common.

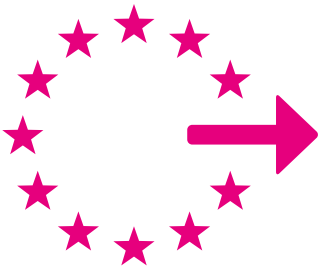
As of June 2020, 304 arbitrations had been notified to the Institute of Family Law Arbitrators (IFLA) in financial cases but, as of September 2021, this had risen to 407, not a big number but a 34% increase in one year.

The case of Haley v Haley[1] as well as the pandemic perhaps explains this trend; the judgment confirmed that the process of appealing an arbitrator's award is the same as appeals from a judge's decision, providing an extra layer of certainty to the process.

1 [2020] EWCA Civ 1369

Case law

A full review of the important cases of 2021 is beyond the scope of this short article. However, some particularly important decisions this year were *CA v DR (Schedule 1 Children Act 1989: Pension Claim)* [2] where Roberts J rejected a claim by a mother under Schedule 1 of the Children Act 1989 for maintenance to include provision to make contributions to a pension, *Oberman v Collins*[3] which confirms that, when dealing with arguments about constructive trusts in relation to a portfolio of properties, it is unnecessary for the court to analyse the intentions behind the beneficial ownership of each individual property and Roberts J's decision in *WX v HX (Treatment of Matrimonial and Non-Matrimonial Property)* [4] which contained a summary of the law concerning matrimonial property (at paragraphs 113-117) which now appears to be the 'go to' case for a distillation of the applicable principles. There has also been a body of important cases dealing with costs and the impact of paragraph 4.4 of PD28A. These include Mostyn J's decision in *LM v FM (Costs Ruling)*[5] where he considered that parties are still under a duty to negotiate openly and reasonably at interim applications (even though para 4.4 does not apply to these hearings) and the two decisions of *Azarmi-Movafagh v Bassiri-Dezfouli* [6] and *LF v DF (Financial Remedy Costs: Debts in a needs case)*[7] which both provide some much-needed clarity around the interplay between costs orders and needs.



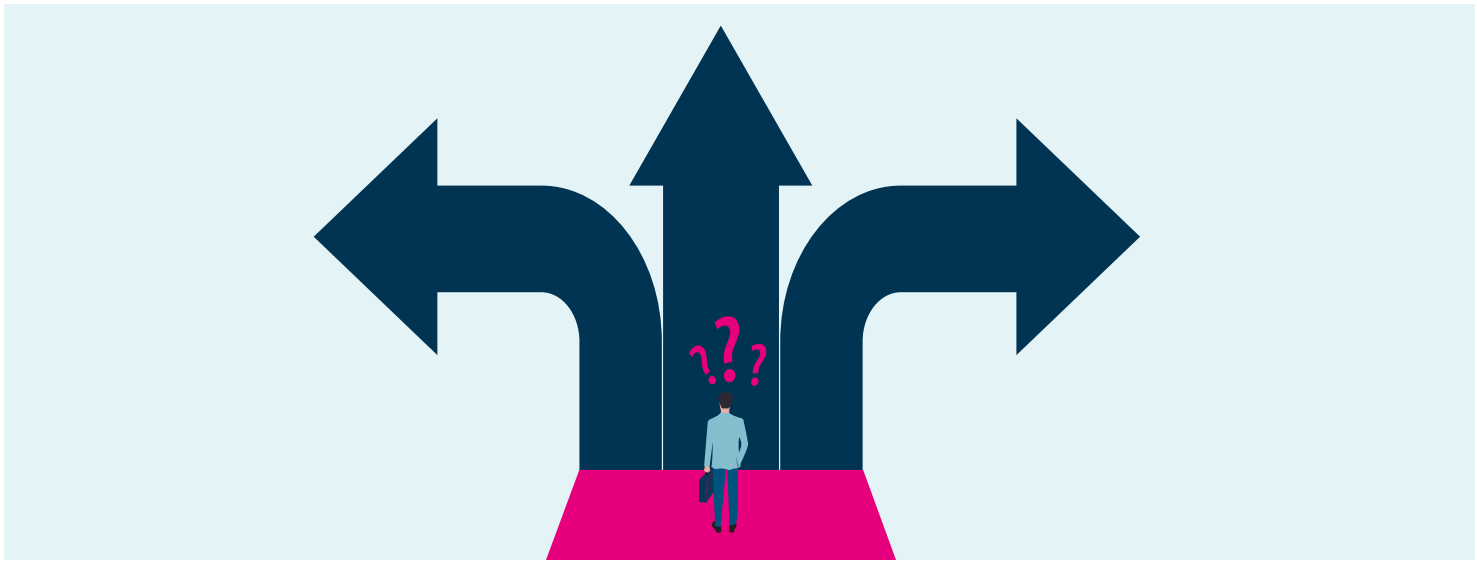
Brexit

As of 01.01.2021, the UK became a third country for the purposes of any proceedings initiated after 31.12.2020. Thus, amongst others, Brussels IIa, the maintenance regulation, the EU Services Regulation and the Mediation Directive have all ceased to apply. Perhaps the most significant impact of this is that forum for divorces and maintenance cases is no longer determined by lis pendens but instead is now based on forum non conveniens, thanks to the Domicile & Matrimonial Proceedings Act 1973. This raises the possibility of incompatible decisions between the courts of England and Wales and those of EU member states (for example, if one party applies somewhere in the EU on the basis of lis pendens and the other applies in London on the basis of forum non conveniens). The uncertainty surrounding all this means that, now more than ever, it is important to take advice early advice, and to take local advice in each jurisdiction which may be involved in a dispute.

Remote hearings

Finally, HHJ Farquhar's May 2021 report on the future use of Remote Hearings in the Financial Remedies Courts suggests that these are here to stay, albeit in a rather more limited way than at present. In short, FDRs, final hearings, MPS and LSPO applications, appeals, and enforcement hearings where the respondent's liberty is at risk will all be heard in person by default. Other directions hearings and applications are likely to continue to be dealt with remotely. That being said, the court is likely to take a "permissive view" of applications for other hearings to be dealt with remotely if these are made in good time.

2 [2021] EWFC 21
3 [2020] EWHC 3533 (Ch)
4 [2021] EWFC 14
5 [2021] EWFC 28
6 [2021] EWCA Civ 1184
7 [2021] EWFC B50



We are

1GC | Family Law

a leading Barristers' Chambers with a first class reputation across the full spectrum of Family Law with both national and international expertise in finance and children cases including Modern Families, Child Abduction and Relocation.

> *"The fact that they undertake both private and public children work, as well as finances, means that you are always in safe hands in the most complicated of cases"*
>
> **Legal 500** 2020

Heads of Chambers

Nkumbe Ekaney QC
Andrew Norton QC

Tel **+44 (0)20 7797 7900**
Email **clerks@1gc.com**

@1GCFamilyLaw

1GC | Family Law
10 Lincoln's Inn Fields
London WC2A 3BP
www.1gc.com

JERSEY COURT FROWNS ON ANTI-SPOUSE MANOEUVRES

Authored by: Nancy Chien and Elizabeth Shaw - Bedell Cristin

In the last 18 months, the Royal Court of Jersey has handed down two important judgments in relation to asset protection on divorce. In both cases, settlor-friendly, asset-protection decisions made by trustees, which might once have been considered reasonable, were either set aside or not blessed.

Here, we look at the relevant cases and consider what this emerging trend might mean for settlors and trustees going forward.

Key cases

The first case, *B v. Erinvale PTC Limited* [2020] JCR 213, concerned an application to challenge a trustee's decision not to add the wife of the settlor as a beneficiary of a trust in her own right. The primary trust in question held all of the settlor's free estate. The applicant wife was not specifically named as beneficiary of the settlement, but was a current beneficiary due to her status as the spouse of the settlor. However, they were in the process of divorcing and the settlor's health was ailing. The wife's concerns were that, should the settlor die before the conclusion of the divorce proceedings, the matrimonial proceedings would abate and arguably, she would cease to be a beneficiary of the primary trust, as she would then be a widow. Further, if the settlor were to die after the finalisation of the divorce, but before the granting of ancillary relief, the matrimonial proceedings would continue, but she would cease to be a beneficiary of the primary trust, as she would no longer be his spouse. There was therefore a concern that the trust funds would not be available to meet any financial award in her favour.

Accordingly, the wife requested that she be added as a beneficiary by name, such that her eligibility to benefit from the trust was not dependent on her status as spouse. The trustee denied her request. The trustee did, however, acknowledge that support from the trust would be required to meet any award made in favour of the wife by the English matrimonial court. The trustee asserted that it would therefore add the wife as a beneficiary if the husband were to die before proceedings were completed in order that provision can be made for her, but that it did not consider it necessary to do so at this stage whilst she was a beneficiary and any financial award could be made under the current terms of the settlement.

In order to set aside the decision, the Court needs to be satisfied that (i) the decision is one which no reasonable trustee could have arrived at; or (ii) in making the decision the trustee failed to take into account a relevant consideration or took into account an irrelevant consideration.

The Court found in favour of the wife and set aside the decision not to appoint the wife as a beneficiary. Some key considerations in reaching that decisions were that the trustee had accepted that the wife would be appointed should the husband die and that, in the circumstances, holding the wife in a state of uncertainty was not something that any reasonable trustee would do.

It was noted that she was already a beneficiary (as the settlor's spouse) and so her addition by name would cause no disadvantage to the other beneficiaries.

This "pro-spouse" approach was demonstrated again in the case *Representation of Ocorian re the V Trust the W Trust the X Trust and the Y Trust* [2021] JCR 208.

In this case Ocorian sought the Court's blessing of momentous decisions on behalf of four trusts which it administered for one family (the **"Trusts"**). The beneficiaries of the trusts were the first respondent B, his wife ("**C**"), their son and daughter ("**D**" and "**E**" respectively). In an attempt to insulate the assets of the trusts from claims from future spouses, the trustee sought to remove the spouses, widows and widowers of B and C's children and remoter issue from the beneficial classes of the Trusts, and to create a new trust to hold circa £7.5m for the benefit of the newly excluded beneficiaries, along with B, his spouse or widow and children. The new trust would be on identical terms as the Trusts save for the power to add beneficiaries as the Trusts do not contain the power to add beneficiaries.

The trustee asserted that the decision to exclude would be within the range of reasonable decisions on a number of grounds, including that the beneficiaries were not yet ascertainable and it would be some 30-40 years before they would stand to benefit in any event.

However, the Court felt that there were certain aspects of the proposal which raised unanswered questions. In particular it was not clear how in practice the proposed new trust would work. For example, is the new trust only intended to be used to fund claims being made by spouses, or should it be used to provide benefits for them? How should the assets be held, in cash or other forms? What happens if there are no marriage breakdowns in 30-40 years' time? Would the power to add new beneficiaries dilute the interests of the spouses?

The Court acknowledged that the trustee's decision would not have been vitiated by any conflict of interest and that it has acted in good faith. However, ultimately the Court was left sufficiently uncomfortable as to the reasonableness of the decision given the unresolved issues that it declined to bless it. The Court did highlight that this is not the same as prohibiting the trustee from implementing its decision. They simply did not see fit to endorse it and release the trustee from any potential future liability in respect of it.

Key take-away for settlors and trustees

These cases highlight that trustees need to think carefully before taking a settlor-friendly approach in the context of divorce or matrimonial claims in respect of the settlor or other beneficiaries.

The Court will consider the interests of all beneficiaries seriously before decisions are made which might prejudice their interests.

The cases also illustrate the importance of giving consideration to the beneficial class when establishing trusts, as it may be difficult to change the beneficial class without giving rise to potential risks further down the line.

BEDELL CRISTIN

LEGAL SERVICES

Offshore legal services

Straightforward. Dynamic. Client-focused.

We give clear, expert advice on BVI, Cayman Islands, Guernsey and Jersey law. We pride ourselves on being flexible, agile and wholly focused on delivering success for our clients.

60-SECONDS WITH:

AMY HARVEY OF COUNSEL, PETERS AND PETERS

Q What would you be doing if you weren't in this profession?

A In a sliding doors universe, I would like to do something completely different – a glamorous interior designer perhaps. I'm not sure the clients would be any easier to deal with though.

Q What's the strangest, most exciting thing you have done in your career?

A In 2013/2014 I acted on a dispute involving superyachts against a very tricky opponent. I spent a lot of time chasing people and assets around – highlights included a lunch meeting with a potential witness in Monaco where we arrived by helicopter and skulking around shipyards in Turkey trying to assess various superyachts.

Q What is the easiest/hardest aspect of your job?

A The easiest aspect is the broad variety of work and interesting people you get to meet and work with. The hardest aspect is often the stress-transference when representing clients who find themselves in incredibly difficult and intense situations and the inevitable pressures that come with it.

Q If you could give one piece of advice to aspiring practitioners, what would it be?

A Never be afraid to ask and if you don't know, don't make it up. A slightly delayed yet considered response is always the better option!

Q What has been the most interesting case you have seen in 2021?

A The most satisfying has been acting for an overseas company in liquidation which had an ex parte freezing order made against it. We were able to immediately obtain an order ensuring that the liquidators were not prevented from undertaking their duties and subsequently obtained a discharge.

Q What do you think will be the most significant trend in your practice over the next 12 months?

A It was reported in August that the number of alleged civil fraud cases jumped by 50% in 2020. With the full impact of the pandemic still emerging, I think we are likely to see yet a further increase in civil fraud cases as traditionally more frauds are discovered in times of economic stress.

Q If you could learn to do anything, what would it be?

A There are so many things! I would really like to become proficient in another instrument (but I could easily do this if I found some time) so I think the alternative would be to have babel fish skills where I could speak and understand any language in the world.

Q What is the one thing you could not live without?

A Apart from my nearest and dearest it would have to be music.

Q If you could meet anyone, living or dead, who would you meet?

A They say never meet your idols and I think the pressure could be too much so I would like to have another day with a family member who died in 2020 so that I could ask him all the questions I didn't ask before.

Q What songs are included on the soundtrack to your life?

A It's very hard to only pick a few but my top 3 would be (1) Do I Love You (Indeed I do) by Frank Wilson which was the first dance at my wedding (2) Vivaldi's Gloria which never fails to cheer me up and (3) Total Eclipse of the Heart by Bonnie Tyler which is a good song to let it all out to and my go-to karaoke choice.

Q What does the perfect weekend look like?

A Most likely a day in Florence – coffee and breakfast in a sunny square whilst people watching followed by a stroll soaking up the city and art and a delicious dinner and wine, perhaps some late-night music. With 8 hours' sleep to end! If my children are accompanying me on this weekend then it's likely to be somewhat different.

Q Reflecting on 2021, what have you been most grateful for?

A Being able to see loved-ones and colleagues face-to-face again.

1KBW

"They are as strong on money as they are on children and they've got strength and depth in both silks and juniors." - Chambers & Partners, 2020

1KBW has a pre-eminent reputation in family law, both nationally and internationally. We are consistently ranked by the legal directories in the top tiers of leading sets for family law, and are unique in our strength in depth for both finance and children cases.

One Choice
One King's Bench Walk

1kbw.co.uk — Leading in family law - clerks@1kbw.co.uk

ARBITRATION, AND THE JOYS OF EARLY DISPUTE RESOLUTION

Authored by: James Roberts QC and Leonie James - 1KBW

The courts continue to struggle with a lack of resources, an overload of work and the after-effects of the pandemic. Regularly, hearings for which the parties have waited months and in respect of which they have incurred significant costs are being vacated by courts with little or no notice. Increasing, parties and advisors are looking for other options to court-based resolution of issues such as alternative dispute resolution ('ADR').

ADR takes many forms. This article is concerned with arbitration.

In arbitration, the parties agree to an independent third party (the arbitrator) making a binding decision on the matters in dispute.

The Institute of Family Law Arbitrations ('IFLA') is a not-for-profit organisation that incorporates a financial (launched 2012) and a children (launched 2016) arbitration scheme. The schemes are in increasing demand: between June 2020 and September 2021, the IFLA financial scheme saw the registration of more than ¼ of all arbitrations that have ever taken place under their scheme.

Arbitration is governed by the Arbitration Act 1996 and rules set out by the IFLA.

The IFLA has provided a list of applications suitable for arbitration. This includes most financial remedy applications (including under the MCA 1973, Schedule 1 of the Children Act 1989) and many Children Act applications (including Section 8 orders).

Parties can engage in arbitration at any stage of financial remedy proceedings (or even before issuing). They may ask an arbitrator to determine everything in dispute or very specific issues only (such as settling the terms of a letter of instruction to an expert per Moor J in **CM v CM** [2019] EWFC 16). The process is hugely flexible.

Where to start?

Parties start arbitration by first submitting to the IFLA signed forms indicating their agreement to arbitrate. This requires the parties to define the scope of the dispute upon which a decision is required, to agree to be bound by the rules of the arbitration and to agree to be bound by the decisions of the arbitrator. In financial proceedings, parties must give full and frank financial disclosure and in children proceedings, they must provide safeguarding information (including a DBS check).

An arbitrator is then selected by the parties. The arbitrator can be selected by IFLA but of course one of the beauties of arbitration is that the parties can pick their tribunal.

Where financial remedy proceedings are ongoing, a stay should be sought. The court is obliged by s9(4) of the Arbitration Act 1996 to grant a stay unless there is an issue with the agreement to arbitrate.

It is possible to seek court orders in support of the arbitration, such as a witness summons, if necessary.

Status of the arbitral award

The decision of the arbitrator (an 'award' in financial proceedings and a 'determination' in children proceedings) is binding. There is no absolute requirement to convert it into a court order, although it is often well-advised to do so and may be necessary to give effect to aspects of the award e.g. a pension sharing order.

To convert the arbitral award into a court order, a consent order should be filed with the court (marked confidential if privacy is an issue). It would be exceptional for a court not to convert a consent application into a court order.

Further guidance on interplay between the courts and arbitration is available in the Practice Guidance (Family Court: Interface with Arbitration) [2015] 1 WLR 59.

Challenging an arbitral award

If one party does not consent, there are extremely limited circumstances in which a court will refuse to make an order including, for example, *Barder* supervening circumstances and (exceptionally) mistake.

If a party seeks to challenge the award as unjust, it was previously understood that the threshold to prevent an arbitral award from being made into a court order was higher than the threshold for an appeal in family proceedings. In **Haley v Haley** [2020] EWCA Civ 1369, the Court of Appeal confirmed that when one party seeks to claim that an arbitral award is unjust, the test to be applied is the same test as appealing a family court decision – i.e. whether the award is 'just wrong'.

In Haley, King LJ suggested that the notice to show cause procedure should be used when a party seeks to challenge an arbitral award. Her guidance has now been supplemented by Mostyn J in **A v A** [2021] EWHC 1889 (Fam).

In A v A, Mostyn J considered himself to hold the same powers in a challenge to an arbitral award as he would have under a normal appeal. He set out detailed guidance (approved by the President of the Family Division) confirming the procedure to be followed by the party seeking to resile from an arbitral award or by the party seeking to convert the award into a consent order to which the other party objects.

In summary:

- **A Form A must be filed (if not already done).**
- **An application for notice to show cause should be made in form D11 using the Part 18 procedure within 21 days of the arbitral award in its current form.**
- **The papers should be placed before a circuit judge authorised to hear financial remedy appeals. This judge will then 'triage' the application without a hearing and decide whether the permission to appeal test has been passed.**
- **If the permission test if not passed, the judge will make the order and likely penalise in costs the party seeking to resile from the arbitral award. If the permission test is passed, directions will be given for an inter partes hearing.**

What next?

The combined effect of *A v A* and *Haley* is to clarify and confirm the status of an arbitral award. This clarification should reassure those considering arbitration. Arbitration is an increasingly popular option in both children and financial remedy disputes. It is a valid and effective avenue of dispute resolution that can be of use to clients and advisors in many cases.

Further information is available on the IFLA website.

SCHNEIDER

FINANCIAL SOLUTIONS

MATRIMONIAL LITIGATION FINANCE 2.0

ENHANCED PRICING MODELS
NEW PRODUCTS
FASTEST TURN AROUND TIMES

Scalable, Secure and Sustainable Lending Solutions

CONTACT ONE OF THE
EXPERIENCED MATRIMONIAL SOLICITORS
IN OUR UNDERWRITING TEAM NOW

0203 411 1033

solicitors@schneiderfs.com

FT FINANCIAL TIMES statista 1000 Europe's Fastest Growing Companies 2020

SPEARS 2021 FAMILY LAW INDEX

Greener Litigation

Schneider Financial Solutions Ltd | 1 King William Street | London | EC4N 7AF
www.schneiderfs.com

‘IT’S NONE OF YOUR BUSINESS’

A REVIEW OF THE ISSUES AFFECTING A DIVORCE SETTLEMENT WHEN BUSINESS ASSETS ARE INVOLVED

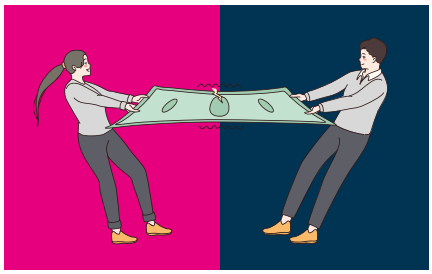
Authored by: Connie Atkinson - Kingsley Napley

Negotiating a financial settlement on divorce can be complicated when one of the assets includes a business. There is usually a need for significant disclosure, expert valuation evidence and tax advice. Thought needs to be given to what documents need to be provided, whether these should be front loaded to enable parties to take early advice and the appropriate expert to provide the parties and the court with a valuation upon which negotiations and decisions can be made.

In the last 18 months, the process has been further complicated by the Covid 19 pandemic and the unknown impact this will have on a business valuation and the economy in general.

While some took a cautious approach and put off financial negotiations in the hope of seeing a more stable future economic climate within which to negotiate, many court proceedings continued. Business valuations which have been obtained during the pandemic have been more fragile than usual; having often been based on different sets of assumptions and relied more heavily on information ‘on the ground’ provided by the business owner.

While some settlements have involved sharing the more risk laden assets in order to share the potential impact of uncertainty in the market, there are parties who have reached an agreement on the basis of one of them retaining the business assets which, as explored below, turned out to be a risky decision.



Barder and the ability to vary

We heard much speculation at the start of the pandemic about whether Covid 19 could be considered a Barder (Barder v Caluori [1988] A.C. 20, [1987] 5 WLUK 188) event and, with the benefit of time and a number of reported decisions, the position is a little clearer.

FRB v DCA (No. 3) [2020] EWHC 3696 (Fam)

In March 2020 the husband was ordered to pay the wife £64 million; comprising the matrimonial home and a lump sum by instalments of £49 million. £30 million was payable within six months of the order and £19 million within 18 months. Before the first instalment was due, the husband applied to vary as to quantum and timing or, in the alternative, set aside on the basis that the pandemic was a Barder event.

The judge refused the husband’s application on the basis that he had made only general statements about his assets and provided little evidence that his wealth had significantly reduced. The judge also took the view that major stock market indices had increased

and many commentators believed that the economy would return to its pre-pandemic position.

HW & WW [2021] EWFC B20

The parties had reached a settlement on 12 March 2020. The husband was the managing director of the family company which was involved in the wholesale distribution of commercial printers and software. The husband wished to retain the company, which was valued at over £3 million and represented the bulk of the family's assets. In accordance with the agreed settlement, the husband was to pay £1 million to the wife in three lump sum payments in lieu of her interest in the company. Prior to the first payment, in November 2020, the husband applied to set aside the order.

The judge, in refusing the husband's application, considered the conditions set out in Barder namely; (1) was there a new event since the making of the order which invalidated the basis on which the order was made; (2) a relatively short time between the order and the new event; (3) a reasonably prompt application. The court was satisfied that the pandemic was an extraordinary event taking place in close proximity to the consent order and that the husband made his application reasonably promptly.

The husband's claim failed, however, when considering the foreseeability test. The existence of the pandemic was known at the time the order was made and while the extent of the impact may not have been appreciated by the husband, it was foreseeable. Businesses were preparing for disruption, emergency economic measures were being taken and the stock market was falling. The husband had agreed to the order in any event.

"The court confirmed that the Barder threshold was deliberately high and there were sound public policy reasons why the finality of litigation was to be preserved, save in the most exceptional of circumstances."

What is the valuation date for the purposes of determining an award?

Issues which have been explored further in the last year are the extent to which the increase in value of a business after the date of separation is considered non matrimonial (and therefore potentially not capable of division) and the date on which the value of the company should crystallise for the purposes of the court's determination.

G v T [2020] EWHC 1613 (fam)

The husband was one of the founding members and largest shareholder in a business in the financial sector. Due to the nature of the business the husband argued that the value could be identified at the end of each day and that this represented the sum of the accumulated profit held by the business. The husband further argued that the date for the valuation of his shareholding should be the date on which the parties separated, in October 2017. The wife argued that the value should be taken as at October 2019.

The judge acknowledged that there was a superficial attraction to fixing a value as at the date of separation but was concerned that to do so would produce an unfair outcome for the wife. This was because there was no evidence before the end of the year to June 2018 that the husband took any extraordinary post-separation steps in respect of the value of the business and, owing to the company's restrictive sale policy, he would not have been able to sell any of his shares until after June 2018.

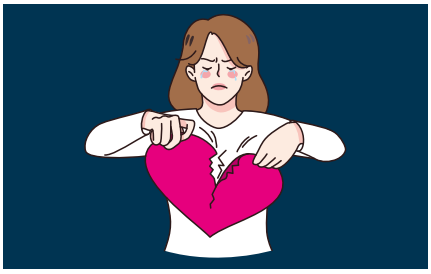
In respect of the wife's suggested valuation date, the judge considered that it was too far from the ending of the marital partnership to be fair and that the husband had made significant interventions to protect and preserve the value of business from the autumn of 2018 onwards. The valuation was therefore taken at June 2018.

E v L [2021] EHFC 60 (fam)

The parties began their relationship in 2015, starting cohabiting in 2016 and married in June 2017. They separated in 2019. The length of their relationship was disputed owing to disagreement about the cohabitation date and the date on which the marriage came to an end.

The husband was a successful production manager for live music events and had an interest in six businesses. Much of the disagreement between the parties centred around the value of one of the companies and the disparity in the parties' proposals related to the dispute about how, and if at all, the sharing of marital acquest applied to short, childless marriages. A single joint expert was appointed to value the husband's business and each party also had permission to appoint their own expert.

The judge disagreed that the fact that this was a short marriage should prohibit the sharing of the marital acquest and limit the wife's award to very conservatively assessed needs. The start date for the purposes of calculating the acquest (which, after appropriate discounting in respect of the value of the husband's business was to be shared equally) was found to be January 2016 (by which point the parties were in a very serious and committed relationship). The end point the time of the trial.



And finally…

Irrespective of the pandemic, we have been warned again about the difficulties in respect of valuations generally with the High Court reminding practitioners in the above cases that:

"detailed accounting is expensive, often of doubtful utility and, certainly in respect of business valuations, will often result in divergent opinions each of which may be based on sound reasoning."

"valuations of shares in private companies are among the most fragile valuations which can be obtained."

"The purpose of valuations, when required, is to assist the court in testing the fairness of the proposed outcome."

Kingsley Napley

"A stellar firm with well-regarded partners and associates alike. It is known for being very experienced in both finance and children cases. The firm as a whole provides a Rolls Royce service"

The Legal 500

kingsleynapley.co.uk/family | +44 (0)20 7814 1200 | @KNFamilyTeam

60-SECONDS WITH:

ELIZABETH DOHERTY
PARTNER, MACFARLANES

Q What would you be doing if you weren't in this profession?

A I love an old-fashioned book shop and I love freshly cut flowers. So I would be running a book shop-come-florist, where customers can browse with the scent and sight of flowers (and then buy some on the way out!). And if I could squeeze in a coffee shop too, all the better!

Q What's the strangest, most exciting thing you have done in your career?

A I'm not sure about the strangest, but certainly the most exciting was being called to our Senior Partner's office to be told I had made partner. I have grown up at Macfarlanes and have loved building my career here, and seeing it thrive while never compromising its culture. Making partner felt like the culmination of a lot of hard work and the beginning of a wonderful new challenge.

Q What is the easiest/hardest aspect of your job?

A The part of my job that I have always found the easiest, probably became the hardest during the pandemic. Meeting clients and interacting with colleagues and contacts has always been the part of my job that I most enjoy. It is so much easier to understand a client's true priorities and concerns when you can sit down in a room with them and so much easier to build a team, thrash out issues and provide support to colleagues (or seek it!) when you are in the same place. Learning to do all that 100% remotely was a challenge.

Q If you could give one piece of advice to aspiring practitioners, what would it be?

A Don't be afraid to build your career in your own way. No career path is linear, and a legal career is no different. Just because you aren't doing it in the same way or at the same time as your peers does not mean you aren't doing it right. Juggling the demands of my family life (I have two young boys) with my work commitments has not always been easy, but with the support of family, friends and colleagues and some creative thinking, I manage to keep the balls in the air most of the time!

Q What has been the most interesting case you have seen in 2021?

A My work in the Court of Protection (the Court with jurisdiction over those who lack capacity to make decisions for themselves). Cases in the COP are always deeply personal to our clients and are therefore incredibly important to them. They are also very challenging, both legally and emotionally, and guiding a client and a team through them is extremely rewarding.

Q What do you think will be the most significant trend in your practice over the next 12 months?

A As a private client disputes team, we are seeing increasing numbers of cases involving regulatory investigations against settlors and beneficiaries. In some of these cases, trustees become directly targeted (for example where there is an issue about source of funds or claims are made against trust assets). Navigating the regulatory process, particularly where the regime of more than one jurisdiction is relevant, can be disproportionately complicated and expensive. Dealing appropriately with prosecuting authorities while making best interest decisions for beneficiaries and seeking to preserve trust assets and maintain liquidity creates an unusual and complex dynamic for trustees – and trust litigators!

Q If you could learn to do anything, what would it be?

A The ability to convince my children to eat vegetables and understand the importance of a lie-in at the weekend!

Q What is the one thing you could not live without?

A Coffee baristas (and also, Chancery barristers).

Q If you could meet anyone, living or dead, who would you meet?

A Without doubt, Her Majesty the Queen. I am in awe of her commitment and resilience and would love a few tips. My admiration is well-known to my friends. In fact, my best-woman invited her to my wedding. Her (very polite) letter declining the invitation is pride of place in my downstairs loo!

Q What songs are included on the soundtrack to your life?

A Barely a day went by when I was growing up when I didn't hear a Barry Manilow ballad blaring from the kitchen (my Mum is the ultimate Fanilow) and so I expect he would feature heavily…

Q What does the perfect weekend look like?

A These days, a day out in the countryside in our wellies followed by a long pub lunch and a glass of red wine.

Q Reflecting on 2021, what have you been most grateful for?

A When limits are put on travel and the health of loved ones can no longer be taken for granted, the world suddenly feels like a very big place. So I am grateful for time spent with friends and family and for technology for keeping me close to those I have not been able to see.


serle court
Universally high quality **from bottom to top**
...what we love is that they are so pragmatic and commercial, real team players
LUNA
chancery & commercial
@Serle_Court
Serle Court
+44 (0)20 7242 6105 clerks@serlecourt.co.uk www.serlecourt.co.uk

PITTING VALUATION THEORY AGAINST A FAIR OUTCOME?

Authored by: Kate Hart and Jessie King - Quantuma Advisory Limited

The recent judgment of Mostyn J in the matter of E v L [2021] EWFC 60 (Fam) again raises the question of the challenge and use of retrospective valuations in matrimonial disputes. The approach of Mostyn J over the years clearly demonstrates that he, and other Judges, are not afraid to adjust expert valuations in order to achieve a fair result for the parties.

In our experience, and put simply, retrospective valuations are required to understand the value of assets brought into the marriage and assess the extent to which the current value may be split between matrimonial and non-matrimonial assets.

The theory

A retrospective valuation, in theory, seeks to determine the value of an asset at a date in the past. In doing so, a valuer needs to take themselves back in time to the date of the valuation – they should only consider the information that was available to a hypothetical purchaser at the date of valuation as this is what the purchase price would be based on. In doing so, it is necessary to ignore the benefit of hindsight.

In his judgment Mostyn J rather aptly refers to this approach as a "blindfolded valuation".

For example, if we were valuing a company in October 2019 the word COVID-19 (sorry) would be completely alien to us. While it may seem wrong now to apply a value to a company at October 2019 ignoring the impact of the pandemic, this expectation applies the benefit of hindsight. This is quite a black and white example as the impact of the pandemic was not something "in the making" in October 2019.

A business being sold in October 2019 would have been sold on the basis that it would continue generating profits as it had done in the past. Since March 2020 many UK businesses have in fact generated significantly lower profits as a result of the pandemic. At today's date an October 2019 purchaser may be very unhappy with the price paid for a business, and we have seen legal claims brought as a result of the diminution in value caused by COVID-19. The success (or otherwise) of those claims is irrelevant to this article but the point remains that any purchaser in October 2019 is highly unlikely to have contemplated COVID-19.

By contrast, the matter of Jones v Jones [2011] EWCA Civ 41 raises the question of the extent to which a

company may be pregnant with value at a historic date. During the marriage the company at the centre of this matter demonstrated significant growth but to what extent had the foundations been laid prior to the marriage?

The challenge

This latest judgment pits "pure valuation theory" against "a broad analysis of fairness" in acknowledgement of the fact that the answer to questions regarding value can result in "an award of hard cash".

What is fair?

In reaching his conclusion, Mostyn J exercises "discretion" and excludes the valuations which he considers have been "invalidated by hindsight". While it may seem strange to ignore expert opinion, ultimately, the judge has a full picture of the relative positions of the parties whereas the expert will not – the expert usually has no idea what other assets or resources a divorcing couple have, or their value.

As such, it can seem completely arbitrary when a judge concludes on valuation based on their own interpretation of the financials, such as in:

- **Martin v Martin [2018] EWCA Civ 2866 where Mostyn J assumed straight line growth over the lifetime of the business which he considered "resonates with fairness" (the approach was upheld on appeal by Moylan LJ). The date of marriage was towards the beginning on the life cycle of the business and Mostyn J's approach resulted in a higher value than that which had been determined by the expert; and**
- **Jones v Jones [2011] EWCA Civ 41 (appeal) where Wilson LJ accepts a "highly arbitrary" value of double that determined by the expert accountants to reflect a "spring-board" in place, not recognised in the experts' valuations; or even**
- **Hart v Hart [2017] EWCA Civ 1306 [2018] 2 WLR 509 (appeal) where a "wholly speculative guess" as to the husband's pre-marital wealth was accepted.**

Given that the whole exercise is shrouded in the hypothetical, and retrospective valuations are inherently more difficult than current valuations, it could be argued that a valuation using an approach not based on theory is no less fit for purpose/robust than a formal valuation exercise.

Rather than leaving it to judges to draw valuation conclusions, should experts be instructed to conclude on a value that is fair?

That could be a risky approach – what is "fair"? And to whom?

As already mentioned, when instructed we may only have a small piece of the puzzle. Add to this the fact that (according to numerous judges) business valuations are already "fragile". If an expert starts tweaking a valuation for what may be fair, they risk stepping away from their expertise and producing a valuation that is even more "fragile" and of limited utility.

The answer…

Is probably for experts to keep doing what they are doing and provide the Judge with the starting point and the tools which can be employed to conclude on a fair result in the context of the divorce as a whole.

That said, the may be circumstances where it is appropriate for instructing solicitors to provide the expert with some assumptions to adopt. For example, if the date of marriage was at the height of the 2008 financial crisis and the company subsequently recovered, solicitors could instruct their expert to ignore the impact of the crash. Whether or not a) such instructions can ever be agreed and b) they can be used in practice by an expert remains to be seen.

Ultimately there is no "one size fits all" approach, as demonstrated by the different approaches adopted in different judgments.

ARC
ASSET RISK CONSULTANTS

www.assetrisk.com

Supporting Durrell & Jersey Zoo

Jersey Zoo is the heartbeat of the Durrell Wildlife Conservation Trust. All of their conservation work around the globe is underpinned by the zoo. Despite their hardest efforts, the present pandemic is having a devastating effect on the income of Durrell.

When they wrote to inform us that their global conservation program and 61-year history of saving species and habitats from the brink of extinction was in real danger due to the financial impact of the pandemic on Jersey Zoo, we asked how we could help.

After discussions with Durrell, we are delighted that ARC is now the proud sponsor of their Blue Poison Dart Frogs display.

Find out more about the Durrell Wildlife Conservation Trust, their work and the frogs on their website **www.durrell.org**

The Blue Poison Dart Frog

(dendrobates tinctorius azureus)

Native to Suriname

The poison frogs of Central and South America are famous for their toxic secretions, used by native communities when hunting. The poisons are not made by the frogs themselves, but are taken up from their diet of invertebrates, which have in turn ingested plant chemicals. However, in captivity the poison decreases considerably in strength as the food chain needed to supply them with their raw materials does not exist.

The frogs' bright colours advertise their poisonous nature. The blue poison frog's pattern of black spots on a blue background is particularly striking and varies from individual to individual. After they metamorphose into tadpoles, the male carries the young on his back to a small pool, water trapped in a hole or a bromeliad, where they develop into frogs after 10-12 weeks.

With the world's amphibians in crisis, captive populations are vital to conservation efforts.

Extremely sensitive to environmental change, amphibians give us early warning of problems that might be due to global warming, pollution and so on. The blue poison frog, like many others, is threatened with extinction.

Durrell has successfully bred this species, and their biosecure facilities at the Trust's headquarters in Jersey will enable them to continue studying and breeding the blue poison dart frog and other threatened amphibians in captivity, developing techniques to help slow their decline.

Asset Risk Consultants Limited
7 New Street
St Peter Port
Guernsey GY1 2PF

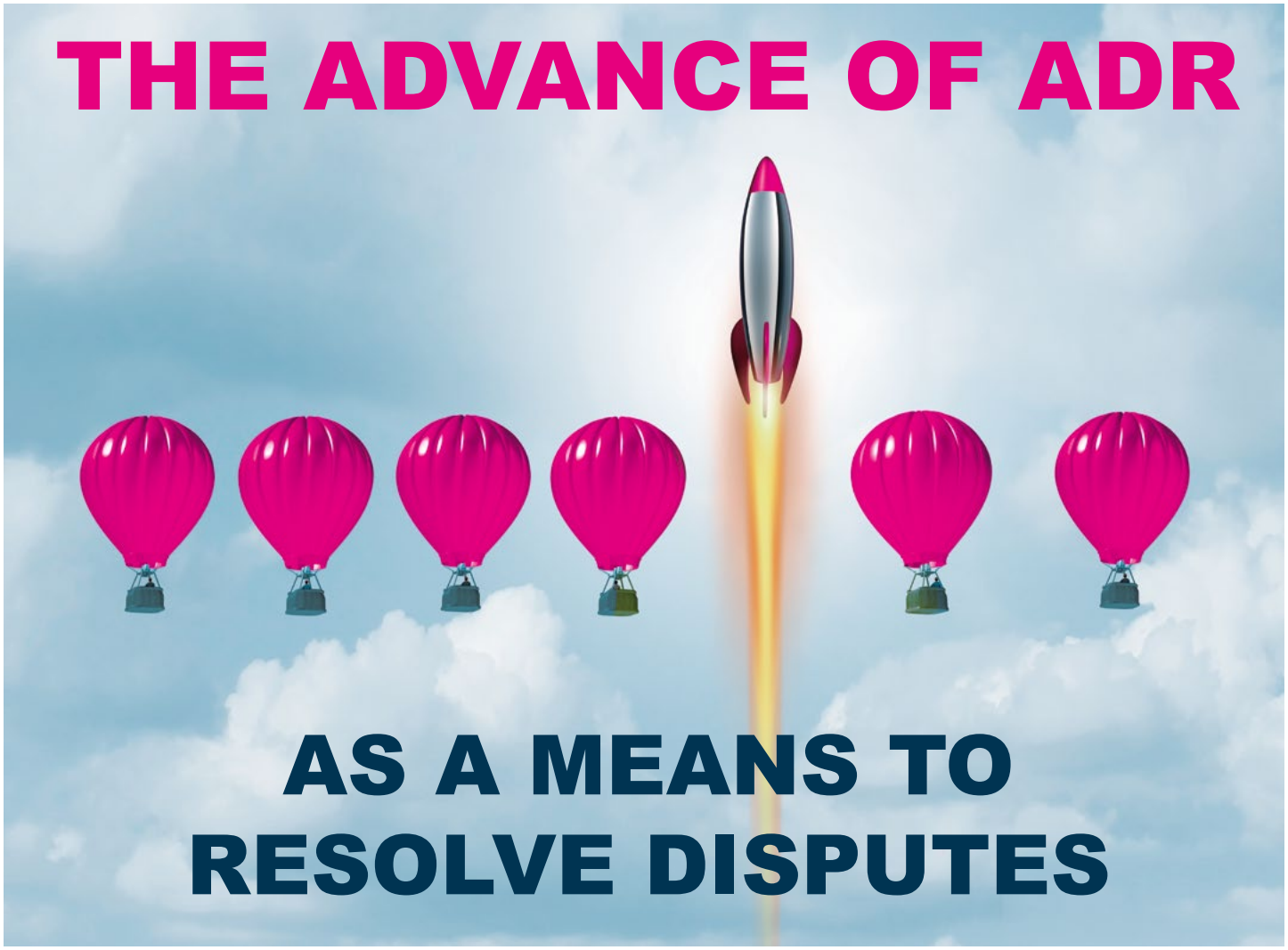
Asset Risk Consultants (Jersey) Limited
Charter Place
23-27 Seaton Place
Jersey JE2 3QL

Asset Risk Consultants (UK) Limited
46 Chancery Lane
London
WC2A 1JE

25 asset risk consultants 1995–2020

Love your Zoo

THE ADVANCE OF ADR AS A MEANS TO RESOLVE DISPUTES



Authored by: Fiona Wilson - Goodman Derrick

During 2021, no doubt to some extent because of the pandemic and the pressures that has brought to bear on the court system, I am sure I am not the only person who has found an increasing willingness on the part of the judiciary to look at other ways to resolve disputes outside the formal court process.

Without even mentioning mediation or arbitration, there has been an enormous increase in the encouragement of the use of Private FDRs or Early Neutral Evaluations and whilst there are some who argue that these are to all intents and purposes a privatisation of the court systems and are only available to those who can afford to pay for the private judge or evaluator, undoubtedly these options are increasing in popularity. The reasons for that that are pretty obvious as the benefits of a private FDR are huge. Not only do you have an experienced acting judge of choice, but you know they will have read the papers fully before the start of the session and that they will have time to hear submissions and then consider the issues carefully before giving their indication on how the matter could be settled. Many of these judges provide a written summary of the indication which can be invaluable in assisting in subsequent negotiations as it ensures your client can be taken through the points made by the judge and why they have been made so that they understand the indication fully. Again many judges will provide spreadsheets to show the effect of their indication in terms of sharing of assets or for payment of periodical payments and again these can be incredibly useful tools to help in negotiations. The fact that you can also go back to the judge for further input as negotiations proceed is a significant difference from the position increasingly in court where your client's case is only one of many that the judge is having to deal with and juggle their time accordingly.

Where agreements have been reached at a private FDR (or ENE) with the assistance of an experienced practitioner as judge, it is also more than likely that the draft order setting out the terms agreed will be approved by the court without questions being raised which means that often, the time between reaching an agreement at the private FDR and having a sealed order is very short.

Whilst the use of FDRs and ENEs is still voluntary, the courts themselves seem to be increasingly keen to use their powers to resolve disputes without lengthy and costly proceedings. I had direct experience of this in the early part of 2021 with the case I was involved in which has been reported as WL v HL 2021 EWFC B10. I was instructed by a client who needed to see a variation of an order made in 2018 to ensure the costs of childcare were met in part by her former husband, so that she could continue to work. Clearly an application had to be made to vary the original order as attempts to reach agreement on the issue were unsuccessful, but even if we were going to be able to use the fast-track process, a determination of issues through the usual court process was unlikely to happen swiftly enough to avoid serious financial difficulties for my client who in addition to needing funds to meet child care costs, would then be facing a quite considerable legal costs burden with little or no prospect of recovering those from her former husband.

When the application was issued in late 2020, we made an application for interim orders too. After exchanging financial statements by agreement at an early stage, we were fortunate enough to be given an early date for the interim application and for directions to be heard before Mr Recorder Allen QC. His approach from the outset was robust and extremely helpful in being able to bring matters to a satisfactory conclusion.

After dealing with the application for interim orders which provided my client with some means of helping to meet the child care costs in the short term, he then turned his focus to the powers available to him under FPR 2010 Part 3 which is entitled 'Non-court Resolution'.

Rule 3.3 states

(1) The court must consider, at every stage in proceedings, whether non-court dispute resolution is appropriate.

Mr Recorder Allen QC did just that. Rather than accede to any suggestion of largely standard directions being given with the aim being of having a final hearing listed at some unknown point in the future to determine the issues, he expressed his view that he would exercise the powers available to him under Part 3 of the Family Procedure Rules including the power to adjourn proceedings. He made it clear that he thought the parties could and should be able to resolve matters in mediation although neither party was very confident that that would be successful. He therefore made an order which adjourned the hearing for 4 weeks on the basis that the parties should avail themselves of the opportunity of going to mediation. He further required that a joint letter should be written by solicitors to provide an explanation of progress being made to determine what further action was necessary.

The parties did agree to go to mediation and although they were not able to agree matters there, no doubt conscious of the ongoing duty of reporting back to the judge on their progress though their solicitors, they did manage to come to a substantive agreement on all but one issue after further discussions between themselves. This was reported to the court and the hearing was adjourned again for a further short period of time given the progress that was being made. However when the parties were not able to agree the final issue, we were able to ask that Mr Recorder Allen QC determine that one outstanding matter on paper, it being agreed that the parties were Xydhias bound with regard to the other issues.

Short written submissions were made and considered by the judge who made a determination on the final issues so that an order could be drafted and approved. This occurred in less than 3 months after the initial hearing and well ahead of any expected final hearing had matters proceeded in the usual way. But in addition to the speed of the process, the costs savings for the parties was significant and as the substantive terms were agreed by them, they were both invested in the outcome with less likelihood of the order not being complied with.

It was the first experience I had of a judge taking such a proactive approach and making the most of the options open to him under Part 3 but it made a world of difference for my client.

It stands to reason then that if they find themselves in a similar situation, solicitors and counsel should not be afraid to ask their judge to remember their duty and powers under Part 3.

I understand that more and more of the bench are receptive to the idea that Part 3 should be made use of for the benefit not just of our clients but also to see court time being used effectively and efficiently. It will be interesting to see where we go from here.


29
BEDFORD ROW
CHAMBERS
A forward thinking, vibrant set of family law barristers with a dedicated client focus and highly recommended expertise. We are proactive in our approach and proud of our traditional values and strong reputation.
• One of the country's leading sets of Family Law Chambers
• Specialist knowledge and experience at every level of seniority
• Top flight practitioners covering all areas of family work
• Pioneers in Dispute Resolution
• Modern, flexible and user-friendly clerking team
Bedford Row Chambers
29 Bedford Row
London WC1R 4HE
DX: 1044 London
Telephone: +44 (0)20 7404 1044
Email: clerks@29br.co.uk
www.29br.co.uk

COSTS IN FINANCIAL REMEDY PROCEEDINGS:

YOU HAVE BEEN WARNED!

Authored by: Petra Teacher - 29 Bedford Row Chambers

Introduction

01 Disproportionate costs, all too prevalent in financial remedy cases, make it increasingly challenging either to settle cases or to achieve an outcome that is either fair to both parties or meets their respective needs. Judicial frustration at this is common. As observed recently by Peel J in *Crowther v Crowther* [2021] EWFC 88 *"The only beneficiaries of this nihilistic litigation have been the specialist and high-quality lawyers."*

02 The abolition of *"Calderbank"* offers and the introduction of the general "no order as to costs" rule (FPR r.28.3(5)) has sometimes meant that the costs implications of a particular stance in proceedings assumed less prominence. Amendments to the FPR and a run of recent cases have changed this, underscoring the responsibility to litigate sensibly and proportionately or risk the costs consequences of not doing so.

Costs: the new rules

03 On 6 July 2020, an amended version of rule FPR r.9.27 and a new FPR r.9.27A came into force, requiring, *inter alia*, detailed estimates of historic and future costs liabilities to be filed and served, the figures recorded on the court's orders, and the early exchange of open offers post-FDR.

04 These rules ensure greater emphasis on the role that costs will play in a dispute and mean that parties can be given appropriate warnings as to likely future costs expenditure. The early open offers require parties to engage with the parameters of their dispute. Indeed, read in conjunction with Practice Direction 28A r.4.4, it is clear that a party's negotiating stance will be highly influential as to whether there will be a departure from the general "no order as to costs" rule referred to above:

> *"The court will [...] generally conclude that to refuse openly to negotiate reasonably and responsibly will amount to conduct in respect of which the court will consider making an order for costs. This includes in a 'needs' case where the applicant litigates unreasonably resulting in the costs incurred by each party becoming disproportionate to the award made by the court."*

Judicial warnings

05 Fortified by the rule changes, judges are now far readier both to criticise litigants and to impose costs sanctions on them. As Mostyn J said in OG v AG [2021] 1 FLR 1105:

> *"I hope that this decision will serve as a clear warning to all future litigants: if you do not negotiate reasonably you will be penalised in costs.".*

06 This was reiterated by Mostyn J in *E v L* (No. 2) [2021] EWFC 63, where a costs order was made against the husband due to his pursuit of a case characterised as *"completely fruitless"* and by his apparently attempting to insinuate "conduct" into the proceedings:

"As I have said before, and will no doubt have cause to say again, if you do not negotiate openly, reasonably and responsibly you will suffer a penalty in costs."

07 This decision was made even though the award of £1.5m made to the wife was far closer to the husband's open position (£600,000) than the wife's (£5.5m). The costs order derived principally from the judge's rejection of the husband's argument to exclude the application of the "sharing principle" even though this had *prima facie* support from the Court of Appeal decision of *Sharp v Sharp* [2017] 2 FLR 1095. The message is clear: lose on the law and it may sound in costs.

Interim hearings

08 The obligation to negotiate reasonably applies to *interim* proceedings also – even though, technically, PD 28A r.4.4 only applies to r.28.3 cases. In *LM v DM* [2021] EWFC 28, the outcome was described as a "*win*" for the wife. Even so, Mostyn J reduced her costs award by 50% due to her lack of apparent willingness to negotiate.

09 In *Re Z (No.2) (Schedule 1: Further Legal Costs Funding Order; Further Interim Financial Provision)* [2021] EWFC 72, Cobb J, in dealing with an interim application to increase the costs allowance he had set the applicant at an earlier stage, sent out some words of warning, plainly frustrated that the costs had exceeded his earlier estimate:

"I set a budget within which I expected the mother's solicitors to work.

I am not prepared for my legal funding orders, and the rationale which lies behind them, simply to be disregarded.[...]

I am prepared to allow the mother a further sum [...] Any potential overspend will require prior court authorisation, or will otherwise need to be accepted at the solicitor's risk."

10 This approach is likely to gain greater traction in future as judges seek to exert greater control over costs, or, at least, greater control over the extent to which they can expect to be met by the other party.

Costs and needs

11 In *ND v GD* [2021] EWFC 53, the wife's costs were paid off in full from her needs-based award. The husband's liability in this regard was, the judge held, a consequence of his failure to negotiate openly in a reasonable manner (regardless of what his without prejudice position may have been).

12 If, however, the "receiving" party has incurred costs unreasonably, they cannot assume that their "reasonable needs" will be allowed to "trump" their liability to their solicitors/litigation funders. In MB v EB (No 2) [2020] 1 FLR 1086, the husband was left with a significant liability to his solicitors, even when such liability would leave him unable to meet his life-long income needs. Cohen J's conclusion was robust (particularly given the wife's resources amounted to c.£50m):

"This case has been conducted by the husband in a manner that I find to be irresponsible and unreasonable. [...] I see no reason why he should expect the wife to pay his costs unreasonably incurred."

13 Similarly in *WG v HG* [2019] 2 FCR 124, where a wife had to fund a costs liability of £500,000 from her Duxbury fund:

People who adopt unreasonable positions in litigation cannot simply do so confident that there will be an indemnity for the costs of the litigation behaviour, however unreasonable it may have been.

14 It is likely that meeting a costs liability from a needs-based *income* fund will be more readily acceptable then a liability that undermines a party's ability to re-house. In *Azarmi-Movafegh v Bassiri-Dezfouli* [2021] EWCA Div 1184, a wife had to pay a lump sum to her husband to enable him to re-house *and* pay off the bulk of his outstanding legal fees. In considering *WG v HG* and *MB v EB* the court concluded that, *"in none of these cases would the recipients' security of accommodation have been jeopardised as a result of the order made by the court"*, concluding that a first instance judge has *"a wide discretion"* as to whether an enhanced lump sum order should be made to satisfy an outstanding liability for costs.

15 Given the above, however, it would plainly be risky to litigate on the assumption that housing needs will invariably be met: anything that flies in the face of reasonableness and proportionality may well attract significant judicial censure.

ThoughtLeaders HNW Divorce

Meet ThoughtLeaders

Paul Barford
Founder / Director
020 7101 4155
email Paul

Chris Leese
Founder / Director
020 7101 4151
email Chris

Danushka De Alwis
Founder / Director
020 7101 4191
email Danushka

Maddi Briggs
Content Production Manager
07825 557739
email Maddi

Our HNW Divorce Community Partners:

1GC | Family Law

1KBW

29 Bedford Row Chambers

ampla finance

asset risk consultants — advising clients since 1995 — 25 asset risk consultants 1995-2020

BEDELL CRISTIN

CONYERS

Grant Thornton

international FAMILY LAW GROUP LLP

In aid of Refuge — For women and children. Against domestic violence.

Kingsley Napley

London&Capital — WEALTH AND ASSET MANAGEMENT

PCD Club

PETERS & PETERS

serle court

SCHNEIDER FINANCIAL SOLUTIONS

withersworldwide