

# Financial Remedies under Matrimonial Causes Act 1973, & Civil Partnership Act 2004

We will be talking about spouses in financial remedy proceedings under MCA1973,  
but the principles apply equally to civil partnerships.

**Andrew Pote & Siân Smith**

# Introduction

- A multicultural, international world, where the number of marriages between spouses from different countries, sometimes with neither from UK, coming before the courts, seems never to have been higher, when it comes to cases involving assets overseas.

# Foreign Assets

## ■ General Principle

The operation of MCA1973, Part II is not confined to assets held within the jurisdiction: it applies to all assets of the couple, wherever situated.

# Foreign Property

- When one party , or both, have an interest in property which is located outside the jurisdiction, it is still property or a financial resource that the court should have regard to under section 25(2)(a).

## Problems & Issues

- Disclosure
- Injunctions
- Valuations
- True Ownership
- Trusts
- Pensions
- Enforcement

# Disclosure

- Essential to make sure that a client has disclosed all overseas assets. If not and non-disclosure comes to light it may be grounds for setting aside a final order.

# Injunctions

- An order under section 37 MCA, or under Senior Courts Act 1981
- Can freeze foreign assets on the basis that a freezing injunction acts against a person rather than the property. *Hamlin v Hamlin* [1986] 1 FLR 61
- Civil Jurisdiction and Judgments Act 1982 (Interim Relief) Order 1997 (SI 1997/3020) High Court power to grant freezing injunctions and protective orders in support of proceedings anywhere in the world.
- *Suisse v Cuoghi* [1998] QB 818, CA

# Valuations

- Some countries have very different land registration to England & Wales.
- E.g. India can be a difficult country to access land documents and obtain independent valuations. No one document guarantees ownership and is established by a number of documents, including registered sale deeds, record of rights, property tax receipts and government survey reports.



- Very important to state exact address, especially if the property is part of a building, e.g. flat, apartment or a shop.
- Fields and building plots can be especially difficult.
- Expert should provide report in English, if possible, and state the value in local currency and sterling exchange rate at date of report.
- Expert must understand nature of duties under Part 25 FPR 2010.

- “Unless in proceedings for ancillary relief the court considers it to be its duty under section 25... to enquire into the matter itself, it is for the owner of the property to establish, if such be the case and unless it is self evident, that its value cannot be realised (which includes being borrowed against *Newton v Newton* [1970] 1FLR 33 at 44) or if realised that its proceeds cannot be transferred to the place at which it is suggested that they can be deployed.”

Per Wilson LJ at paragraph 21 *Behzadi v Behzadi* [2008] EWCA Civ 1070

## True Ownership

- In *Gadhavi v Gadhavi* [2015] EWCA Civ 520 the Court of Appeal supported HHJ O'Dwyer's determination that a property held by the husband's mother in India, but founded on his income, was a financial resource of his. However, they allowed the appeal on a second ground concerning the value of the property at £400,000 net. There was no evidence to support this and the case was remitted back to the judge for directions as to valuation evidence and a rehearing on the question of the valuation upon which the quantification of the terms of a new order would depend.

## Third parties claiming ownership

- May have to be dealt with in the relevant foreign jurisdiction first.
- N.B. Article 22(1) was replaced by Article 24(1) of regulation (EU) 1215/2012, the recast Brussels I Regulation in relation to proceedings instituted on or after 10<sup>th</sup> January 2012; the substance of the new provision is the same. BUT since the UK's final departure from EU on 31<sup>st</sup> December 2020 this Article has no application to proceedings issued since that date.

Webb v Webb [1994] QB 696 concerned an application concerned with a father applying for a declaration in the English Court that a flat in France, held in his son's name was held on trust for the father who had provided the purchase funds. This application was referred to what was then the Court of Justice of the European Communities that held that the application was an application in relation to rights in personam, not rights in rem and could be dealt with in the English Court.

For a case concerning a wife applying for an order of sale of a property in London under TLATA owned by her and her husband, who had moved back to Poland in 1991 see Magiera v Magiera [2016] EWCA Civ 1292 court had jurisdiction as the case concerned rights in rem and the property was in this jurisdiction.

# Trusts

- Tax implications
- Foreign property may have been kept offshore for tax purposes and specialist expert tax evidence may be required.
- The approach of English courts:
- Degree of realism;
- Consideration of whether the tax liability is likely to be incurred.

- In *BJ v MJ and HSBC Trustees (CI) Ltd.* [2011] Mostyn J. refused to adopt the husband's approach of calculating his assets on the basis of their value after the deduction of tax due on the repatriation of the offshore funds, stating, "This completely unreal. The whole point of the structure is to avoid paying tax, and H has never remitted any offshore income".
- A similar approach was taken by Body J in *K v L* [2010] EWHC 1234 (Fam) when he only deducted tax due on repatriation of offshore funds which he determined the wife would be likely to remit in due course.

## Pensions

- An overseas pension is clearly an asset to be taken into account by the court.
- Pension sharing order unable to be made in relation to a foreign pension.
- Possible to make a periodical payments order see *Goyal v Goyal* (No.3) [2017] EWFC
- May, in the right case off set if sufficient other funds.
- Lump sum payable once pension is in payment or capable of drawdown in the right circumstances.
- Important to understand how the pension works and what are the tax implications when an overseas pension becomes payable.



## Enforcement

- Court unlikely to make any order in respect of foreign assets that is not capable of being enforced.
- Make clear in order by way of recital how overseas assets have been taken into account, if not specifically mention in the main provisions of the order.

- Andrew Pote – [Andrew.Pote@42br.com](mailto:Andrew.Pote@42br.com)
- Siân Smith – [Sian.Smith@42br.com](mailto:Sian.Smith@42br.com)