42 BEDFORD ROW BARRISTERS

FINANCIAL REMEDIES UPDATE

February 2023

Siân Smith

Xanthopoulos v Rakshina [2022] EWFC 30

- Mostyn J
- *"The preparation for this hearing can only be described as shocking"*
- Skeleton arguments – too long and filed late.
- Statements – too long and filed late.
- Bundle - five bundles and a total of 1,878 pages

"It should be understood that the deliberate flouting of orders, guidance and procedure is a form of forensic cheating, and should be treated as such. Advisers should clearly understand that such non-compliance may well be regarded by the court as professional misconduct leading to a report to their regulatory body."

Xanthopoulos v Rakshina [2022] EWFC 30

- H's application for LSPO
- W's application for release from an undertaking concerning £11m
- Costs – "*apocalyptic*" and *"self-harming"*
- The parties had by this interim hearing incurred costs of £5.4m.
- *"In my opinion the Lord Chancellor should consider whether statutory measures could be introduced which limit the scale and rate of costs run up in these cases. Alternatively, the matter should be considered further by the Family Procedure Rule Committee. Either way, steps must be taken."*

LEGAL SERVICES PAYMENT ORDERS

Xanthopoulos v Rakshina [2022] EWFC 30

- H had "*greatly overspent*" on the sum that had been provided.
- See Re Z (No 2) (Schedule 1: Further Legal Costs Funding Order; Further Interim Financial Provision) [2021] EWFC 72
- H's application could not proceed as his solicitors had come off the record and therefore the costs schedule were entirely redundant.
- Consideration was given to the various elements of H's claim for funding and indications given that it was unlikely that he would have been granted the relief sought.
- "*it cannot be right*" that where there is an enormous overspend that the applicant returns seeking more costs for the same period.

MAINTENANCE PENDING SUIT

Collardeau-Fuchs v Fuchs [2022] EWFC 6

- Mostyn J
- H's net assets: £1.245b
- W's application for MPS for £130,000 per month, after payment of overheads by H.
- H offered to pay £31,000 per month plus overheads (£2.78 m).
- W's total claim including overheads - £4.34m per year.
- PNA prior to marriage and post marriage modification agreement – no deficiency of process or pressure alleged.
- Total costs of £917,000 at this hearing

MAINTENANCE PENDING SUIT

Collardeau-Fuchs v Fuchs [2022] EWFC 6

- Summary of the law at paragraphs 40-46
- No interim budget submitted by W – not necessary on the particular facts of the case (as in Rattan v Kuwad [2021] EWCA Civ 1).
- MPS awarded: £72,535 per month.
- W's backdating claim adjourned to be determined at substantive hearing if pursued.

Collardeau-Fuchs v Fuchs (Rev 1) [2022] EWFC 135

- Detailed summary of the law on child maintenance – paragraphs 112-138
- *"I suggested in CB v KB at [49] that the child support formula should apply to gross annual incomes in excess of £156,000 up to £650,000. That pragmatic, and I believe useful, guideline is obviously intended to apply forcefully to those cases where the court is considering child support as a subsidiary claim within a wider financial remedy claim. It will be a rare case where the court in a financial remedy claim between divorcing spouses will spend much time and forensic energy analysing a child maintenance budget. In contrast, in a case under Schedule 1 the child maintenance budget is the principal litigation battleground."*
- *"…the case law under Schedule 1 is relevant to those claims for child maintenance made under the 1973 or 1984 Acts where there is no corresponding spousal claim being heard at the same time."*

Collardeau-Fuchs v Fuchs (Rev 1) [2022] EWFC 135

Applicable principles

- The welfare of the child must be a constant influence
- The award can extend beyond the direct expenses of the children and can meet the expenses of the mother's household but not expenses which are directly personal to her but have no reference to the children.
- The reasonable level of household expenses to be judged by F's current standard of living and the standard of living of the family prior to separation.
- The level should be such that the mother is not burdened by unnecessary financial anxiety.
- Assessing the budget should be done with a broad brush.
- The concept of a carer's allowance should be confined to the history books.

HD v WB [2023] EWFC 2

- Peel J
- **Computation -** Minority shareholding - liquidity
- A two stage process:

"i) A finding as to the likelihood of the third party assisting the spouse in accessing funds belonging to him/her within a structure where there are issues of (a) liquidity and (b) respect for the interests of the third party. That finding will depend on the facts of the case, to be judged by all relevant evidence including any pattern of previous such assistance

ii) Having reached the relevant finding, the court will then have the evidential platform to make an order, if thought fit, which might amount to judicious encouragement to the third party, whilst staying alert to make sure that it does not cross the boundary into improper pressure on the third party."

HD v WB [2023] EWFC 2

- **Pre-Marital agreement – validity**
- Summary of the applicable law – paragraphs 44-55
- H argued that the PNA should be disregarded on the basis that he entered it hurriedly, with no legal advice and with insufficient disclosure. He did not understand. In any event it did not meet his needs.
- H did not receive legal advice but had represented that he had and had plenty of time to obtain it.
- H had understood the agreement. H's arguments that he did not understand were not accepted 'even for a lay person the broad gist was relatively easy to appreciate'.
- Financial disclosure was in broad terms accurate.

GENERAL PRINCIPLES

HD v WB [2023] EWFC 2

- **Pre-marital agreement – fairness**
- Change of circumstances – W received £55m from the sale of the family business 2 years after the PNA. H knew that W was wealthy but at the time of the PNA this was tied up in illiquid shares.
- Needs – the PNA did not address H's needs fairly. Needs had not been discussed at the time of the agreement.
- Award formulated to meet his housing and income needs in a way which bears some resemblance to the marital lifestyle enjoyed for 20 years.
- Housing fund of £2.5m for H during his lifetime, on trust for W, lump sum for furnishing, capital costs for setting up business, payment of debts, £1.2m capitalised maintenance.

HD v WB [2023] EWFC 2

- **Costs**
- Both party's open offers '*missed the target by a considerable margin'.*
- H to pay 20% of W's costs due to his unsuccessful challenge to the PNA. £120,000 to be deducted from the lump sums to be paid by W .
- Proportionate to invade the needs based award.
- *'He cannot be insulated from the consequences of litigation.'*

VV v VV [2022] EWFC 41

- Peel J
- Short marriage: 5 months. No children. "*Such cases should be easy to resolve*."
- Issues:
  - Extent of pre-marital cohabitation.
  - Extent to which the sharing principles applies to H's assets.
  - Whether H is guilty of misconduct in having sold part of his entitlement to AB company shares and concealed this from W and the court.
  - Whether W is guilty of misconduct having prevented the release to H of his shares in the company.
  - W's needs.
- Offers:
  - H offered W a lump sum of £400,000
  - W sought over £6m gross (less any tax to be paid on shares/proceeds of sale)

VV v VV [2022] EWFC 41

- **H's conduct**
- H pre-sold over half his entitlement to shares in AB, for $11.5m.
- H did not tell W or the court. H denied that there had been any sale.
- H did not disclose as he was concerned that W would tell AB company founder who might make it difficult for him to realise his shares upon listing.
- H's conduct was "deplorable".

VV v VV [2022] EWFC 41

- **W's conduct**

- W was in contact with AB company founder (sharing confidential information from the proceedings). He advised her "If you can prevent [H] from acquiring the units, it will be much easier for you to negotiate a settlement". W accepted she had been "played".

- W's solicitors wrote to AB company asking them not to release shares to H pending a settlement. This was not copied to H's solicitors. AB company wrote to H and informed him. It refused to release the shares without W's consent. W refused and sought an agreement in injunctive terms on the listing day. She threatened but did not apply for a freezing injunction.

- W's solicitors wrote saying she would have no hesitation in seeking damages if the units were released without agreement and she suffered loss.

VV v VV [2022] EWFC 41

- **Conduct**
- Summary of the law at paragraphs 69-70
- H's conduct was litigation misconduct which would ordinarily sound in costs.
- H acted prudently in making the pre-sale and did not do so to defeat W's claims.
- W's conduct was gross and obvious. She recklessly interfered with H's contractual rights. At the very least she should have applied to the court.
- W caused a loss to H of up to $76m (on H's evidence), in the tens of millions.

VV v VV [2022] EWFC 41

- **Cohabitation and engagement**
- Summary of the law at paragraphs 40-48
- *"In the end, it is a fact specific inquiry. Human relationships are varied and complex; they do not easily lend themselves to pigeon holing. The essential inquiry is whether the pre-marital relationship is of such a nature as to be treated as akin to marriage."*
- The parties' intentions should be considered.
- *"In my view, engagement may be an indicator of the strength of the commitment and shared life, and may be an evidential factor pointing towards a period of cohabitation, but it should not ordinarily be seen as a separate event which by itself gives rise to a sharing entitlement."*

VV v VV [2022] EWFC 41

- **Sharing and needs**

- W not entitled to share in H's shares in AB company – entitlement accrued before the period found to be cohabitation.

- W's award:

  i) £60,000 to redeem her mortgage.

  ii) £237,000 to clear her net liabilities.

  iii) £450,000 which is £150,000pa for 3 years by way of rehabilitative maintenance (3 years is a little longer than the full length of the parties' relationship from March 2018 to June 2020)

  Rounded up to £750,000 total.

VV v VV [2022] EWFC 41

- **Costs**
- H sought costs of £450,000
- W ordered to pay £100,000
- W's litigation conduct in failing to establish her case on cohabitation and conduct issues was weighed against H's litigation conduct.
- *"It does not seem to me to be unfair to invade her needs based award to an extent. She should not be entirely protected from costs consequences."*
- *"How she trims her needs to take account of this costs order will be a matter for her. "*

WC v HC [2022] EWFC 22

- Peel J

- Introductory comments on the failure to comply with directions limiting the length of section 25 statements, content of statement and the late production of financial analysis of matrimonial expenditure:

"Court Orders, Statements of Efficient Conduct are there to be complied with, not ignored. The purpose of the restriction on statement length is partly to focus the parties' minds on relevant evidence, and partly to ensure a level playing field. Why is it fair for one party to follow the rules, but the other party to ignore them? Why is it fair for the complying party to be left with the feeling that the non-complying party has been left with the feeling that the non-complying party has been able to adduce more evidence to his/her apparent advantage"

MARITAL AGREEMENTS

WC v HC [2022] EWFC 22

- **Very useful summaries of the relevant principles for skeleton arguments:**
- Summary of the applicable law – paragraph 21
- Pre-marital and post-marital agreements – paragraph 22
- Inter vivos subvention – paragraph 23
- Inheritance – paragraph 24

WC v HC [2022] EWFC 22

- **Pre-marital agreement**
- Careful consideration of the events leading to the signing of the agreement
- Found that both parties were under pressure from H’s father and that W felt stressed.
- They were not under undue pressure and there was no reason not to uphold the agreement.

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WC v HC [2022] EWFC 22

"In almost every Pre or Post Marital Agreement one or other, or both, parties are under a degree of pressure, and emotions may run high. The collision of the excitement engendered by prospective marriage, and the hard realities of negotiating for the breakdown of such a marriage, can be acutely difficult for parties. Tension and disagreement may ensue. If, as here, one side of the family is applying pressure, the difficulties are accentuated. But in the end, each party has to make a choice and unless undue pressure can be demonstrated, the court will ordinarily uphold the agreement."

WC v HC [2022] EWFC 22

- **Post-marital agreement**
- Finding that the parties were under pressure but not undue pressure.
- Despite the terms being agreed in correspondence W did not sign the agreement which specifically required signatures to bind the parties.
- It did not therefore raise the presumption that it should be given effect to unless it was unfair to do so.
- The court was still entitled to take it into account and falls to be considered as one of the factors of the case.

WC v HC [2022] EWFC 22

- **Inheritance**

- On balance found that H will receive a significant inheritance, however:

"i) Such inheritance would be entirely non-matrimonial, received long after separation;

ii) It has always been understood by the parties, as recorded in the two agreements, that future inheritances should be excluded from claims by the other party;

iii) In terms of foreseeability of resource, it may be several years away, and is unlikely to be of immediate assistance to H. At best, it gives me confidence that H will not want for money in the long term."

WC v HC [2022] EWFC 22

- Final award - £7.45 m to W - 60%
- Approximates the amounts in the post-marital agreement but goes beyond in order to meet W's reasonable needs.
- Costs stood at £1.6m (13% of the assets)
- H's father had taken significant steps to stop inter vivos gifts to him and to
- Removed shares from a dynastic trust to stop H from possibly benefitting from up to 23m euros
- H accepted that his inheritance may be around 100m euros

X v X [2022] EWFC 95

- HHJ Hess
- H found to have forged bank statements that he presented to W during the marriage.
- W sought an adjournment of her capital claims on basis of the “complete failure of the husband to be transparent and clear …”
- W’s claims adjourned for ten years.
- Periodical payments - £5,000 per month

NO CLEAN BREAK

X v X [2022] EWFC 95

"If a litigant engages in conduct, which may include full or partial nondisclosure, which causes the court to conclude that a once-off division of capital now is likely to cause unfairness and injustice to the other party then the court, in exception to the normal practice, has a discretion to decide that the normal desirability of finality in litigation should be overridden to preserve the possibility of a fair outcome for the parties."

SETTING ASIDE A PENSION SHARING ORDER

***Goodyear v Executors of the Estate of Heather Goodyear (deceased)* [2022] EWFC 96**

- HHJ Farquhar
- Consent order approved January 2021 – pension sharing order to W of 51%
- Decree Absolute July 2021
- W died August 2021 (prior to pension share being implemented)
- Wording in standard order was not used but not fatal to the application to set aside on the basis that W's death was a Barder event.

SETTING ASIDE A PENSION SHARING ORDER

***Goodyear v Executors of the Estate of Heather Goodyear (deceased)* [2022] EWFC 96**

- The “*thrust behind the pension share was in order to ensure that the parties had sufficient income during their retirement*.”

- *“If it had been known that Mrs Goodyear would not live more than 6 months after the order was entered into then the same pension share would not have been agreed”*

SETTING ASIDE A PENSION SHARING ORDER

***Goodyear v Executors of the Estate of Heather Goodyear (deceased)* [2022] EWFC 96**

- FPR PD9A, paragraph 13.8:

  *"…Ordinarily, once the court has decided to set aside a financial remedy order, the court would give directions for a full rehearing to re-determine the original application. However, **if the court is satisfied that it has sufficient information to do so, it may proceed to re-determine the original application at the same time as setting aside the financial remedy order**."*

- Pension sharing order of 51% set aside and substituted for an order for 25%
- To reflect the 'earned' share of the pension but providing a 'discount' for the many years over which income will not be required by W.

IMPARTIALITY OF EXPERTS

Gallagher v Gallagher [2022] EWFC 53

- Mostyn J.
- "In *Vernon v Bosley (No 1)* [1996] EWCA Civ 1310, Thorpe LJ memorably wrote:

"The area of expertise in any case may be likened to a broad street with the plaintiff walking on one pavement and the defendant walking on the opposite one. Somehow the expert must be ever mindful of the need to walk straight down the middle of the road and to resist the temptation to join the party from whom his instructions come on the pavement. It seems to me that the expert's difficulty in resisting the temptation and the blandishments is much increased if he attends the trial for days on end as a member of the litigation team. Some sort of seduction into shared attitudes, assumptions and goals seems to me almost inevitable."

Gallagher v Gallagher [2022] EWFC 53

“The evidence of the experts was hot-tubbed and I allowed them politely to interrupt each other. Mr Singleton's interruptions were forthright, abrasive and adversarial, even degenerating on one occasion to him rebuking the court for allowing Ms Longworth to descend, in his opinion, to excessive detail.

I therefore do regard Mr Singleton as parti pris.”

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P v Q [2022] EWFC B9

- HHJ Hess. Soft v Hard loans - once a contractually binding obligation is established the court will go on an decide whether the obligation is hard (and therefore will be in the computation table) or soft (in which case it may be left out).

"Factors which on their own or in combination point the judge towards the conclusion that an obligation is in the category of a hard obligation include (1) the fact that it is an obligation to a finance company; (2) that the terms of the obligation have the feel of a normal commercial arrangement; (3) that the obligation arises out of a written agreement; (4) that there is a written demand for payment, a threat of litigation or actual litigation or actual or consequent intervention in the financial remedies proceedings; (5) that there has not been a delay in enforcing the obligation; and (6) that the amount of money is such that it would be less likely for a creditor to be likely to waive the obligation either wholly or partly."

SOFT DEBTS

P v Q [2022] EWFC B9

"Factors which may on their own or in combination point the judge towards the conclusion that an obligation is in the category of soft include: (1) it is an obligation to a friend or family member with whom the debtor remains on good terms and who is unlikely to want the debtor to suffer hardship; (2) the obligation arose informally and the terms of the obligation do not have the feel of a normal commercial arrangement; (3) there has been no written demand for payment despite the due date having passed; (4) there has been a delay in enforcing the obligation; or (5) the amount of money is such that it would be more likely for the creditor to be likely to waive the obligation either wholly or partly, albeit that the amount of money involved is not necessarily decisive, and there are examples in the authorities of large amounts of money being treated as being soft obligations."

COERCIVE AND CONTROLLING BEHAVIOUR

Traharne v Lamb [2022] EWFC 27

- Cohen J
- H sought to hold W to a post nuptial agreement.
- W pursued an Edgar defence that she was subject to controlling and coercive behaviour.
- “Coercive and controlling behaviour would plainly be an example of undue pressure, exploitation of a dominant position or of relevant conduct.”
- H’s behaviour was not coercive or controlling.
- But - W’s pre-existing vulnerabilities were such that she was unable to make a rational and considered decision as to what was in her best interests.
- And – the agreement did not meet W’s needs.

Traharne v Lamb [2022] EWFC 27

- **Open offers**
- H offered £465,091 (with £ for £ reduction of amounts paid by way of LSPO and MPS) – net sum £305,685.
- W sought £1,050,601 plus PSO of 14.3%
- W awarded income fund of £191,513, capital fund of £21,284 PSO worth £165,284.

Traharne v Lamb [2022] EWFC 27

- **Costs**
- H - £257,255, W - £403,150. "*woefully in excess of what should have been incurred in a standard financial case*".
- W's costs were excessive and disproportionate to H's costs and the assets. W's approach was misconceived – the conduct argument added nothing. Her sharing claim was unarguable.
- H's "*somewhat half-hearted reliance on the PNA was not realistic.*"
- H to pay £80,000 leaving W with costs bill of £70-80,000 which is "*entirely the result of her prodigal expenditure on costs and her approach to this litigation.*"

INTERVENORS

Uddin v Uddin & others [2022] EWFC 75

- HHJ Wildblood KC. “These are feral, unprincipled and unnecessarily expensive financial remedy proceedings.”
- Procedure followed was “misguided”: H issue a Form A. W issued trust proceedings by way of separate claim form.
- *“In relation to the trust claims the wife has never set out in any meaningful sense how it is that she seeks to justify the claims or the shares that she seeks in the two relevant properties”*
- No evidence of financial contribution or common intention that H have an interest in the properties.
- *“As I have made plain throughout this judgment, I consider that these proceedings are a disgraceful example of how financial remedy proceedings should not be conducted. The wife may wish to take advice about why her case was presented in this way and why so much expense has been incurred.”*

REPORTING RESTRICTIONS

Gallagher v Gallagher [2022] EWFC 52

- Mostyn J
- Lengthy judgment in respect of the law applicable to reporting restrictions and anonymity in cases which are not wholly about child maintenance.
- *"It is my opinion that the general practice is completely at odds with the correct interpretation of FPR 27.10 and 27.11 and with the binding authority of Scott v Scott. In my opinion the correct interpretation of those rules, in the light of that authority, must lead to the conclusion that the standardised anonymisation of judgments is unlawful and that a reporting restriction or anonymisation order can only be made in an individual case where it has been applied for, and awarded, after a full Re S balancing exercise."*

REPORTING RESTRICTIONS

Gallagher v Gallagher [2022] EWFC 52

"In Xanthopoulos v Rakshina at [127] I pointed out that were a party to give her counsel's skeleton, or even the skeleton of counsel for the opposition, to a journalist that would not amount to a contempt of court. Indeed, provision of the other party's (compulsorily disclosed) documents to a journalist covering the case would not be a contempt: Harman v Home Office [1983] 1 AC 280 per Lord Diplock at 306 - 307 and Lord Roskill at 327. The more usual scenario will be, however, where a journalist asks the court to direct disclosure of the documents."

- Reporting restrictions in respect of:
  - Names, photographs of the children, identification of their schools or the place that they live.
  - Content of advice from jointly instructed tax counsel
  - Advice given to H in respect of risks faced in Irish litigation

DOMESTIC ABUSE ACT 2021

Prohibition on cross-examination

- Came into force 21 July 2022.
- Relevant provisions are sections 31Q to 31Z of the Matrimonial and Family Proceedings Act 1984
- Prohibits in person cross-examination by a person who has been convicted or cautioned for a specified offence, of a victim or alleged victim of that offence and vice versa.
- Prohibits in person cross-examination of a person against whom there is an on-notice injunction of the person protected by the injunction, and vice versa.
- Court may make a direction preventing cross examination if the “quality condition” or “distress condition” is met.

Prohibition on cross-examination

- The “quality condition” is met if the quality of evidence given by the witness on cross-examination—

(a) is likely to be diminished if the cross-examination (or continued cross-examination) is conducted by the party in person, and

(b) would be likely to be improved if a direction were given under this section.

- The “significant distress condition” is met if—

(a) the cross-examination (or continued cross-examination) of the witness by the party in person would be likely to cause significant distress to the witness or the party, and

(b) that distress is likely to be more significant than would be the case if the witness were cross-examined other than by the party in person.

Prohibition on cross-examination

- Court must have regard to the list of factors at section 31U(5)
- Quality of a witness's evidence - quality in terms of completeness, coherence and accuracy.

- Court must consider if there is a satisfactory alternative means for the witness to be cross-examined or of obtaining evidence that the witness might have given under cross-examination in proceedings.
- If not, the court must invite the party to arranged for a qualified legal representative to undertake cross-examination.
- If the party does not do so, must consider whether it is necessary in the interests of justice for the court to appoint a qualified legal representative (QLR).