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# Albion Chambers MATRIMONIAL FINANCE TEAM NEWSLETTER

## Case law update

***R v K [2020] EWHC 841 (Fam)***: Post-FDR, the parties were told their final hearing was being pulled for lack of judicial availability, so they decided to pursue arbitration. The arbitrator made an award H didn't like so he sought to have it set aside, and have a final hearing after all. Specific issues were: a) Should permission to appeal be given under s69 of the Arbitration Act 1996? – No, b) Should the award be set aside for serious irregularity under s68 of the 1996 Act? – No and c) Should an order under s25 of the Matrimonial Causes Act 1973 be made in the terms of the Award? – Yes. The case looks at the test to be applied for challenging an arbitration award, and the way any award will link in with the courts. A helpful elucidation of the principles of approving arbitration awards are found in the body of the judgment.

***W v H [2020] EWFC B10***: Reported decision from HHJ Hess which gives a steer as to how courts might make use of the PAG pensions report. It's 'only' a first instance decision. HHJ Hess was so involved with the PAG report and decided this case should be reported. Emphasis is on viewing pensions as income-producing vehicles in retirement which should be treated separately from capital assets, and that in the vast majority of cases pensions would be used to meet needs. Interestingly, having determined that this was a needs case, HHJ Hess opted for equal sharing of the pension income at age 60 rather than an unequal division based on need.

***KM v CV (Pension Apportionment: Needs) [2020] EWFC B22***: Another modest asset pension case where the pension was only c.£130k. W's position was that she had worked for 15 years in the police force. The parties had separated in 2011 and the post-separation portion of her pension should not be taken into account. The PAG report post-dated the judgment at first instance. The judge held that the relevant date for assessing the pension was the date of trial not 2011. The judge

## Editorial

I have always enjoyed writers who are able to bring apposite and apt quotes from obscure and profound writers to their pages. Those at my immediate disposal as I write this are not particularly learned or obscure, and doubtless known to you all: 'It was the best of times, it was the worst of times, it was the age of wisdom, it was the age of foolishness, it was the epoch of belief, it was the epoch of incredulity, it was the season of light, it was the season of darkness, it was the spring of hope, it was the winter of despair' and 'The past is a foreign country; they do things differently there'. How true the former, never have such events overtaken in my lifetime and never has the legal system faced such challenges. But, for all the difficulties and strain, I have seen the best of colleagues, staff and solicitors all putting their shoulders diligently to the wheel in effort to keep the system they believe in turning effectively. Our team at Albion, both those at the bar and those in the administration team, have risen to the challenge in superb style. We can all look back now and marvel at the pace of change, the computers, ebundles and the remote hearings we have all got to grips with despite the twin setbacks of ever-changing valuations and fragmented connections via CVP, Teams or Zoom! I hope the resources proffered by members of the finance team during the lockdown period were helpful, they can be found on our website in the Matrimonial Finance page. For those of you that missed Mr Sproull's star turn as judge in HHJ Wildblood QC's play 'Daisy through the looking glass' it was unmissable, inexplicably I understand the creative director of The Bristol Old Vic has not been in touch.

I have taken over the editorship of the newsletter from David Chidgey; the team are grateful for his contribution over the years. He has kindly provided an article on mediation entitled 'Expert Communication: five lessons from mediation training' which I hope you will find as thought provoking as I have. As many of you know, David has recently been appointed a Crown Court Recorder as well as already sitting as a Deputy District Judge. Mention should also be made of Deborah Dinan-Haywood's recent appointment as a Deputy District Judge. The appointments are well deserved and testament to their quality.

My move from 1GC in London only two years ago, was at a time when there was already significant increase in utilising arbitration and private forums. The current pressure on court lists has certainly lead to an increase in work for our team in those fields, and will doubtless be a fertile area of expansion in the months to come. It is a valuable option for so many of our clients; for those of you who have not yet ventured into alternative dispute resolution, it provides a bespoke and useful tool.

**Caroline Middleton**

was clear that this was a needs case and to that extent W's contributions did not over ride needs. The appeal was allowed and remitted for rehearing to allow for the s25 analysis to be properly undertaken to consider the apportionment of W's pension.

***AW v AH [2020] EWFC 22***: Roberts J grappled with the loss of a staggering £86 million between 1998 – 2011 when H was declared bankrupt. There were no visible assets, although the court believed that H was in operational control of a variety of companies transferred out of his ownership. Despite W's best efforts in proving the existence of assets she was unable to do so, in part due to a complex business structure. Roberts J found H to be dishonest, had used covert tactics and that his conduct was tantamount to litigation conduct. It was marked in an award of costs to W. W's claim was adjourned for a period of seven years with a variety of declaratory recitals sought by W as to H's beneficial entitlements.

***Haskell v Haskell [2020] EWFC 9***: Involved the not unusual phenomenon of a previously high earning H in much reduced circumstances by the time of financial remedy proceedings. Mostyn J considered that H's reduced circumstances were temporary. H has not engendered the sympathy of the court. Mostyn described H's behaviour towards W and the children as 'invidious coercive control' this behaviour culminated in W and the children on the cusp of eviction from their London home. H gave evidence, which was accepted, that he needed two years to turn his fortunes around. Mostyn, therefore, ordered an award of just over £5 million, payable in two years (by instalment).

***RC v JC [2020] EWHC 466***: Reiteration that relationship generated compensation claims are 'truly exceptional'. In many of these cases the assets will be such that any loss is already covered by the applicant's sharing claim. The court found that W had a very good chance of becoming a partner at the law firm she was employed by prior to having children and taking lesser paid roles capped at c.£90k - £100k. By contrast H became equity partner at the law firm W used work at and earned in the region of £1m net pa. However, this was a rare case where the court made a finding that there was relationship-generated disadvantage, awarding W an additional £400,000. A clean break was ordered, H only had a further four years of work ahead of him.

***Villers v Villers [2020] UKSC 30***: H was in Scotland whilst W was in England. W had acquired habitual residence in England. H filed for divorce and filed an Initial Writ in Scotland. W agreed to an order dismissing her petition in England but by January 2015 applied for pps in this jurisdiction pursuant to s27 MCA 1973. As practitioners will be aware, the Scottish awards in maintenance are a fraction of those available in England. The term is often limited to years (usually not greater than three) as opposed to joint lives. Essentially H pleaded that the English court a) did not have the right to determine maintenance or b) should not exercise its jurisdiction in the matter. The Supreme Court disagreed and held (with Wilson and Hale dissenting) that it is possible for the English court to have proceedings in both jurisdiction, thus W's maintenance claims could be determined in England whilst the other elements of capital and pension can be determined in Scotland.

***Moutreuil v Andreewitch & Anor [2020] EWHC 2068 (Fam)***: Dispute between an unmarried couple who had been cohabitants regarding the ownership of shares in a company. That company owned the family home. The claimant claim extended also to an application under Sch 1 CA 1989. On 31 July 2000 it was agreed between the parties that the entire shareholding in the company was transferred to the claimant. The defendant asserted that this was not to provide the claimant with ownership, but that the common intention was only ever that she held the property as a bare trustee with the defendant retaining the beneficial ownership. Somewhat ill-advisedly, he took it upon himself to transfer the shares to the parties' 14-year-old son in February 2019, a move that Cobb J described as 'preposterous'. The principles in declarations of trust, the search for intention as set out in *Stack v Dowden [2007]* UKHL 15 were applicable to company shares. Cobb J implied a common intention at the point of transfer to give the claimant the legal and beneficial interest.

***FS v RS and JS [2020] EWFC 63***: Highly unusual case. The applicant was the child of the respondents who were married; they were very wealthy. He was 41-years old and sought maintenance and financial relief from his parents. His parents had always supported him but, more recently, relations had deteriorated and the support his parents were prepared to extend to him was significantly reduced. He made claims under MCA 1973 s27, Sch 1 CA 1989 and the inherent jurisdiction. Munby J determined against the applicant and dismissed the claim.

# The new costs rules

The Family Procedure (Amendment) Rules 2020 SI 2020 No 135 (L.7) provide new costs rules which came into force on 6 July 2020. The instrument includes the substitution of Family Procedure Rule 9.27 and the revisions of Forms H and H1. Rule 9.27(8) now requires the court to record in a recital to its order details of costs estimates/particulars filed. Rule 9.27(9) requires the court to record in a recital to its order any failure by any party to comply with the requirements to file estimates/particulars of costs. Rule 9.27A relates to open offers and a real change and approach to the issue of costs.

The headline points in respect of r9.27 are:

- Not only are costs to date provided in advance of each (including all interlocutory hearings), but an estimate of future costs to the next hearing must be detailed. Specific reference is made at 9.27(3) to the FDR appointment
- 14 days prior to the final hearing an estimate of costs must be produced detailing past and costs likely to be incurred to final hearing to *'enable the court to take account of the parties' liabilities for costs when deciding what order (if any) to make for a financial remedy'*
- Costs are to be recorded on the face of the order – failure to comply with the procedure will be recorded and orders for provision of Form H must be made within three days of the hearing or other date fixed by the court.
- Those schedules must include a statement of truth AND confirmation that the client has been appraised of the contents. See PD9A(3.2 A-C) for the amended wording.

r9.27A imposes as duty on the parties to make open proposal for settlement 21 days after the FDR if the court does not direct a different date. If no FDR has taken

place then the proposal for settlement shall be made by such date as the court may direct or, in default, 42 days prior to the final hearing.

There has long been judicial disquiet in respect of the issue of costs. There is little doubt that the ever-present threat of paying the other party's costs could be remarkably effective in the distant past, when I was first in practice. It is worth considering *MAP v MFP [2016]* 1 FLR *'Now we no longer have Calderbank offers litigants must be encouraged to make open proposals as early as possible that are designed to encourage settlement. If the other party spurns such an offer, the court is entitled to ignore it completely and decide the case entirely on the merits'*. A similar approach is taken in *FB v PS [2016]* 2 FLR 697 *'At trial, she argued for [more than her open proposal]. She is perfectly entitled to do this'*. These are useful cases and perhaps offer a level of reassuring protection under the new rules.

There has therefore been, for some time, reference to costs and managing costs in cases culminating in the amendments to paragraph 4.4 of FPR Practice Direction 28A on 27 May 2019: "*In considering the conduct of the parties...the court will have regard to the obligation of the parties to help the court to further the overriding objective... and will take into account the nature, importance and complexity of the issues in the case. This may be of particular significance in applications for variation orders and interim variation orders or other cases where there is a risk of the costs becoming disproportionate to the amounts in dispute. The court will take a broad view of conduct for the purposes of this rule and 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. Where an order for costs is made at an interim stage the court will not usually allow any resulting liability to be reckoned as a debt in the computation of the assets.*"

There is a real frustration in needs cases where one party has pursued an unrealistic case or amassed significant and disproportionate litigation costs. All too often the court has bowed to the 'needs' argument and provided 'costs by the back door' to one or other of the parties. Francis J voiced his concern about costs in the case of *WG v HG [2018]* EWHC 84 where he stated on the issue of a costs application by W *'…people could not litigate on the basis that they were bound to be reimbursed for their costs'… 'No one enters litigation simply expecting a blank cheque'.* Francis J considered that W's case had been unreasonable, and whilst some allowance had to be made for the litigation loan, she was expected to meet a proportion of her costs from the Duxbury fund award.

It may also be pertinent to point the court towards the judgment of HHJ Hess in *W v H [2020]* EWFC B10 which is that rare species of a reported needs case with modest assets at [41] where he references W seeking costs 'by the back door'.

Two recent 2020 cases are also of note:

- *MB v EB (No. 2) [2020]* 1 FLR 1086 *per* Cohen J *'in my judgment, it is not for the wife to bankroll this litigation which I find to have been unreasonably conducted by the husband.'* This resulted in H having to meet the shortfall in his own costs liability. Cohen J found H to have been *'irresponsible and unreasonable'* in his conduct of litigation, he did not respond to offers or enter into negotiations. The costs reached a staggering £1.25 million. A word of caution, *MB v EB* did not involve children or that the capital/income awards were to meet a child of the family's needs.
- *OG v AG [2020]* EWFC 52 Mostyn J reiterated the clarion call thus: *'It is important that I enunciate this principle loud and clear: if, once the financial landscape is clear, you do not openly negotiate reasonably, then you will likely suffer a penalty in costs. This applies whether the case is big or small, or whether it is being decided by reference to needs or sharing'.* Of note in this case, that despite H's 'abysmal and let there be no doubt, dishonest, presentation' W was still expected to engage in meaningful negotiations even at a late stage (weeks prior to the final hearing) and in the teeth of H's misdemeanors. Of note too was W's failure to disclose bank accounts which although minor in comparison to H's behaviour Mostyn stated, 'The message should go out that if you are guilty of deliberate non-disclosure, even if it is relatively minor, you will pay the penalty in costs'

Practitioners need to be wary of failure to embrace the new rules and the potential sanctions in costs that will flow from an unrealistic position being adopted by a client. There is a clear need for forward planning and an early assessment of the merits of the case. Parties should seek to place pressure on the other side at the earliest point. Clients will lose the sympathy of the court if proposals are unrealistic. It is plain that the new rules will lead to an increase in orders for costs at final hearings, which will provide practitioners with the leverage to focus a party's mind on the very real prospect of a costs order in particular post FDR.

There is a reluctance thus far in my experience, to embrace the new rules, and on more than one hearing it has been argued that exceptionality due to covid-19 means that offers cannot be sensibly or realistically be made shortly after FDR despite an FDR having been effectively engaged in by both parties. It is not clear if practitioners will continue to use the rule at 9.27A(1)(a) to set later dates for open proposals. It remains to be seen whether these new rules go far enough in curbing the excesses of litigation and protect against vexatious and unreasonable litigants.

**Caroline Middleton**

# Expert communication

## Five lessons from mediation training

How you speak to your client and to your opponent matters. Thinking about this will make you more effective. More importantly it will make your life easier. This short article draws on mediation training and also on two books. Firstly, the well-known book "Getting to yes" (Fisher and Ury). Secondly the more recent "How to have impossible conversations" (Boghossian and Lindsay).

**1.** The first point is about building rapport. In "impossible conversations", the authors say you should build rapport immediately. With a client this is very important.

On a practical level: The Family Justice Council's Best Practice Guidance on FDRs notes that there should usually be a conference with counsel prior to the day of an FDR. Unfortunately, people sometimes try to dispense with this, for costs reasons. This is a mistake. If money is tight, a good strategy can be to ask counsel's clerk for a combined price for

conference and hearing. Most barristers much prefer to have a conference before the day of the hearing. By the time the hearing approaches, they then know all about the case. The conference informs the barrister's preparation of their case outline and their submissions. For a barrister to meet the client on the morning of a hearing gives them insufficient time to build rapport with the client. Such clients are unlikely to have time to take on board a barrister's opinion if it differs from their previously held view. And if the other side have had a conference before the day of the hearing and you have not, you are at a distinct disadvantage.

In terms of building rapport, the same authors make a useful specific point: do not engage in "parallel talk". The example they give is if in conversation someone tells you they have just been to Cuba. A parallel talker is someone who says: "I have been to Cuba too" and turns the conversation into a recitation of their visit to Cuba. A good listener would ask about the first person's experience of Cuba instead.

**2.** The second point is about listening… really listening. It can be very effective to use the Rappoport method. That is: once you have listened to what the other person has said, repeat it back to them in a detailed way. Build on it if you can. A good guide is said to be if the other person says back to you: "I wish I had put it that way myself". This can be very effective with clients. It shows that you truly took in what they were telling you.

Another useful phrase is "I hear you".

There is a mistake which can arise is where you start speaking and the other person interrupts you. If you are interrupted just after you say: "my opinion is that", give way to your client to hear what their concern is. Then, if you can, start off with a different form of words. If you start off with "my opinion is that", it might suggest that the other person's comment was an interruption or was unwelcome and you were just waiting to continue.

The authors of getting to yes, say: "the cheapest concession you can make to the other side is to let them know that they have been heard."

Turning to an opponent, showing that you have listened to them encourages reciprocation, it encourages them to listen to you. It also means if they interrupt you, you can reference the fact that you have listened to them.

**3.** In Getting to yes, the authors' main focus is on negotiation. They say that for principled negotiation you should "insist that the result be based on some objective standard". This useful principle has several applications to the financial remedies process. Of course, if there is a clear precedent in your favour you will want to tell the other side about it. It is also why in negotiations, if you can give precise figures it can be more persuasive than plucking a figure out of the air. Another application is in relation to arguing before a judge. Citing a precedent which is not well-known, early on, can be useful, particularly before an experienced judge. As the authors of impossible conversations say, people need time to wrestle with doubt. You also need to see if you can build a "golden bridge" for someone who you are asking to retreat: "Find ways for your conversation partner to avoid social embarrassment if they change their mind… Few people will admit that they have a mistaken belief if they think humiliation will be the consequence."

**4.** A few specific words:

(a) "Why" can be quite an aggressive question. For example, if you ask a client: "why do you say that your husband's spending is relevant?" It can create the impression that you have already formed a view and you are asking the client to justify their position. Better to ask: "what is it about your husband's spending which you say should be taken into account?" Once you have listened, you can then advise about the case law on the topic. One way of showing you took the concern seriously is to make a study of the spending referred to. This shows the client you took their point seriously and did not dismiss it because you did not want to do the work.

(b) Change "I disagree" to "I'm sceptical". This suggests that you could be open to persuasion.

**5.** Finally: two points of my own:

(a) If a judge or client interrupts you to deal with a specific point, deal with it there and then, if you can. Unless it would really disrupt your presentation, this is the correct course. It shows respect to the other. You have their full attention at that point. Also, if you try to put off discussing the point until later, they may be distracted.

(b) An annoying phrase in response to a question is "as I said earlier". I have heard a judge say to counsel in relation to this phrase "please don't say that, it makes it sound like you are suggesting I was not listening".

**David Chidgey**

# Barder (again)

In June I wrote an article about the prospects of successfully applying to set aside an order on the basis that the pandemic was a Barder event, within the meaning of the test set out in *Barder v Barder (Calouri intervening)* [1988] AC 20, as subsequently interpreted by cases such as *Cornick v Cornick* [1994] 2 FLR 530, *Critchell v Critchell* [2015] EWCA Civ 436 and DB v DLJ [2016] EWHC 324.

That article was written in the light of a case Dan Leafe and I had done, in which the Barder event was not the pandemic, but the death of the wife's mother and her subsequent inheritance. Since then, as luck would have it, I have been involved in another application to set aside an order, and this time the supervening event was the pandemic. Given how topical these issues clearly are, I thought it might be helpful to set out some lessons learned.

This second case concerned a couple in their early 50s who had been married for 25 years. They had three children and various properties of modest value. By far the biggest asset in the case was their ownership of a successful business in the construction sector based in the Midlands.

The case came on for final hearing before a District Judge in Birmingham in June of 2019. The shares in the business (owned 60% by him and 40% by her) had been valued at about £3.4m by the SJE. There was very little liquidity in the company, but it did generate significant profits, which enabled the husband to draw about £250,000 net pa. The District Judge made an order dividing the parties' assets 50/50 (with no discount for the nature of the assets) and ordering the husband to pay a series of lump sums over the next 10 years or so, until the wife

had received her share.

Since then the husband has proven remarkably litigous and has paid the wife as little as possible. He first launched an appeal against the order and then, when Covid struck, also applied to set it aside on *Barder* grounds.

In support of his application the husband filed a statement in which he asserted that the business was struggling as a result of the shut-down of the construction industry caused by the pandemic. He attached to his statement a forecast prepared with the assistance of his accountant, which suggested that the downturn in the business was significant, but also that it would be short-lived. He omitted to provide any recent statutory accounts, but when these were obtained by the wife it was seen that the introduction to the accounts also suggested that any impact on the company would be short-lived, and the husband was confident the business would recover strongly. No bank statements, VAT returns or management accounts were produced to show how the business had actually done. In evidence the husband agreed that he had obtained a bounce-back loan, but he failed to produce the application for that loan (no doubt because that too expressed confidence for the future).

Counsel for the husband sought to argue that the downturn in the fortunes of the company was dramatic and undermined the court's finding that the husband would be able to pay significant lump sums from income to the wife. She sought to distinguish *Myerson v Myerson* [2009] EWCA Civ 282 on two bases: first that the pandemic was different in its foreseeability from the banking crash; and secondly that this was a case where the wife's award was to be met from income, whereas in *Myerson* it was a capital award only.

In response, on behalf of the wife, I argued that the attempt to distinguish Myerson was hopeless: no one could have foreseen the banking crash any more than the pandemic; and if the pandemic were to be compared with the outbreak of Spanish flu in 1918, the banking crisis was to be compared with the stock-market crash of 1929: both were once in a hundred year events.

History aside, I argued that anyone keeping a family business post-divorce does so in the knowledge that a SJE and a court can only ever provide a snapshot as to the capital value of a business and the maintainable income it might produce. Anyone not wanting to take the risk that either or both will head South should agree to a sale and a 50/50 division of the proceeds (which the wife had offered at the original hearing); and anyone who takes that risk should not subsequently complain if the gamble does not pay off. This is, of course, a point made by the Court of Appeal in *Myerson*.

Even though the District Judge was not unsympathetic to the husband's case, these arguments on their own would have been enough to get us home. Ultimately, however, the case foundered on a lack of evidence.

In order to succeed in a case such as this the burden is on the person trying to set aside the order. They have to prove that the rationale of the original order has been completely undermined by the supervening event. They also have to prove that the new event was unforeseen, occurred relatively soon after the making of the order, that they have acted promptly in making the application and that no third party is adversely affected. Even if they can prove all these things the Judge still has a discretion whether to set aside the order or not.

In order to have any hope of succeeding, the husband had to prove that the pandemic had torpedoed either the capital value of the business, or its ability to generate income, or both. Here, he proved neither. His assertions that the business was suffering were not enough – he needed to produce compelling proof to back up his claims. Even if he had done so he would still have faced an uphill task, but without it his claim was doomed.

Having lost, the husband then sought to argue that (Trump-like) he would not accept defeat and would appeal (again). He sought to suggest that in those circumstances the costs of the set aside application should not be awarded to his long-suffering ex-wife, but should instead be reserved to the appeal. Unsurprisingly, he lost that argument too.

Having not done a set aside case in my first 27 years in practice I have now done two in the past year. Both were interesting cases, but the lessons I derive from them are as follows:

a) The supervening event must be something truly remarkable and probably something personal, as it is unlikely that events which affect everyone, such as the banking crisis or the pandemic will be sufficient. An unexpected inheritance in a needs remains by far the most likely *Barder* event.

b) Solid evidence of the impact of the new event is needed, particularly if the effect is said to be negative. If a business is alleged to have been adversely affected it will be necessary to prove as much with actual evidence, either from raw data or an expert; mere assertion will not do.

c) A short-term impact is most unlikely to be sufficient, as everyone knows that the value of and income of businesses goes up and down all the time. Transitory events are unlikely to affect either the value of the business or its ability to pay funds to the owner in the long-term.

d) Even if all the other hurdles are jumped, the decision to set aside or not is discretionary, and is unlikely to be exercised in favour of someone who voluntarily took the risky asset.

e) If the justice of the case requires any intervention, the order may be varied, perhaps by extending time for payment of the lump sums, or setting aside part only of the order. Setting aside the whole order and starting again is extremely rare.

f) These applications are not subject to the "no order" principle in FPR 28.3. Instead, they are clean slate cases, which are subject to the "soft costs follow the event" rule, which usually means that the loser pays.

As far as I know, we are yet to see the first of these cases reach the Court of Appeal. If one does I would rather be defending the claim than bringing it.

**Nicholas Sproull**

# Albion Chambers Matrimonial Finance Team

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