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Albion Chambers MATRIMONIAL FINANCE TEAM NEWSLETTER

Called to account

Trusts of Land

With a jointly owned property, if the improvements you have paid for have not increased the value, you are unlikely to get your money back.

Tolata itself does not provide an exhaustive regime for determining occupation rent.

The Trustee in Bankruptcy cannot expect to be treated the same as the joint owner into whose shoes he steps.

The principles of equitable accounting are relatively well settled. In essence, where one joint owner of a property does not contribute as much as they should, the other joint owner can claim an account from them. Some areas of uncertainty remain however. The recent case of *Davis v Jackson* [2017] EWHC 698 provides a useful case study and clarifies a few points. Cases regarding equitable accounting are not often reported. As with a number of other accounting authorities, this one comes from the High Court.

It is always tempting to skip over the facts, but they are important here. The case came before Snowden J. The parties were married. Tolata became relevant because the Husband was declared bankrupt and the Trustee in Bankruptcy sought a share of the property.

From 2001 the parties were estranged and lived apart. Mrs Jackson bought the property in London in 2003. The property was conveyed into her sole name. For a reason which was unclear, Mrs Jackson executed a trust deed indicating that she held the property on trust for herself and Mr Jackson. She said her solicitors had told her it would protect the interests of the children should anything happen to her. Under the deed Mr Jackson agreed to pay half of the mortgage payments (but did not).

Mrs Jackson remortgaged the property in 2007 and, when she did so, the new lender required that it be transferred into the joint names of Mr and Mrs Jackson. The TR1 transfer form was ticked to show that they held the property for themselves as joint tenants.

In 2012 a bankruptcy petition was presented against Mr Jackson and a bankruptcy order was made. Following an application to the county court, the Trustee in Bankruptcy obtained an order that the property was to be sold and the proceeds divided equally between Mrs Jackson and himself.

On appeal, Snowden J refused leave to appeal. Mrs Jackson had argued that Mr Jackson was not entitled to half of the property on the basis that he had not contributed half of the mortgage payments as per the deed. The problem was that she had transferred the property into joint names in full knowledge of this fact. In an interesting procedural twist, the judge did vary the order for sale to provide for an equitable account to be taken as between the Trustee and Mrs Jackson.

Mrs Jackson was able to show that she had paid £123,906 in interest payments on the mortgage. She was also able to show she had made payments in relation to the running and maintenance of the property.

The Trustee contended that there should be an occupation rent paid by Mrs Jackson from the point of bankruptcy, which could be offset against her payments of the interest on the mortgage. The Trustee accepted that, since it was never intended that Mr Jackson should occupy the property, there should be no rent up until the point of bankruptcy.

There was a dispute about whether the previous case law in relation to occupation rent applied. In *Stack v Dowden*, Baroness Hale dealt with a question of occupation rent and stated that the statutory powers under sections 12 and 13 replaced the old doctrines of equitable accounting. Snowden J held that subsequent cases established that those provisions did not provide an exhaustive regime for the deciding of equitable accounting issues [43]. In particular he cited *French v Barcham* [2009] 1 WLR 124. Snowden J also referred to academic commentary which pointed out that there was nothing in Tolata which suggested it was intended to replace the principles of equitable accounting in relation to the payment of occupation rent. He said he found those arguments persuasive. The judge also pointed out that if that were so, then a bankrupt or the Trustee would never be able to claim an occupation rent because neither would be able to establish a statutory right to occupy under section 12 of the Act. Section 12(2) provides that a beneficiary does not have a right to occupy land if it is "unsuitable for occupation by him".

As to whether an occupation rent was payable in the period post-bankruptcy in this case, Snowden J found that there ought to be some conduct by the

occupying party, to justify the court in finding that it was appropriate to order the occupying party to start paying rent [61]. The default position was that where the claim for occupation rent was by a trustee in bankruptcy no occupation rent was payable.

In the present case, the property in question was never intended to provide a home for Mr Jackson. It could not be appropriate or in accordance with equity for the trustee to automatically become entitled to an occupation rent. [75]

As to contributions to the maintenance of the property, the judge rejected Mrs Jackson's claim for an account, on the basis that there was no evidence that the payments had increased the value of the property [32]. He quoted from *Re Pavlou* [1993] 1 WLR 1046. There is a curious passage in that case, which states that an equal joint owner who improves a property shall be entitled to an account for the lesser of half of the cost incurred or half the increase in value. The logical conclusion would appear to be that even if you spend money, unless you can show that it increased the value you cannot have an account. The approach of Snowden J seems to confirm that this interpretation is right and spending money on the property is not enough for an account. Of course equitable accounting is highly discretionary and the position might be different if, for example, there was an agreement that the expenditure should be incurred.

David Chidgey

Heads of Disagreement

Readers will recall *Xydhias v Xydhias* [1999] 1 FLR 683 where Thorpe LJ outlined the two-stage process that will normally apply to compromise agreements on divorce:

- Establish what the applicant is to receive and record it in the Heads of Agreement, signed by counsel and the parties; then,
- Express the agreement in the language of an order of the court – a process to which the parties will ordinarily make little contribution.

In the recent case of *G v S* [2017] EWHC 365 (Fam) the High Court (Hayden J) dealt with a case where the parties had signed Heads of Agreement, but disagreed as to the terms of the proposed order.

G v S concerned a mother's Schedule 1 application for financial provision for the parties' daughter, L. L's father was a man of considerable wealth who put forward the 'millionaire's defence', accepting that he would be able to meet any order the court might make. Having reached agreement on the main financial issues, the parties disagreed on the following when the order was drafted:

- Whether the father had provided the mother with sufficient assurances regarding security for his maintenance obligations;
- Whether the mother should be permitted to purchase an alternative property outside England and Wales;
- Whether the non-disclosure/privacy provisions were too onerous;
- Whether the mother should provide a P60 for her intended nanny;
- Who should bear the costs of sale and purchase of a replacement property;
- Whether and in what terms mother's 'intention' not to seek any further lump sum from the father should be recorded in the order.

The fact-specific nature of many of the points above limits a useful analysis, but Hayden J's approach to the question of the mother's ability to use the Schedule 1 fund to relocate is worthy of some discussion.

The father's original position was to include provision that the mother be restricted from purchasing an alternative property out outside England and Wales until L had completed her full-time primary education. That, he said, was the agreement between the parties. His counsel suggested this would provide L with stability until she was 11. Relying on Thorpe LJ's judgment in *Xydhias*, it was suggested the Heads of Agreement should be adhered to, so as to curb unnecessary "adversariality".

The mother's counsel suggested otherwise. He relied on Thorpe LJ's later judgment in *Re P: (Child: Financial Provision)* [2003] 2 FLR 865, in which he stated the welfare of the subject child was not just 'one of the relevant circumstances' but instead was a "constant influence" on the discretionary outcome. He argued that to prevent the mother from relocating would fetter the court's discretion in determining questions relating to L's welfare in the future. In addition, the case had a marked international aspect; the mother was Swedish and worked as a pilot, whilst Father was a US national of Swedish origin who lived in Switzerland.

Hayden J found in favour of the mother on this point. In giving judgment, he stated the father had "conflated 'stability and security' with a settled address", when in fact "the two are very different". Even if he had been satisfied that the strict interpretation of the Heads of Agreement represented both its philosophy and objectives, he would have come to the conclusion that this aspect of the agreement was "wrong in principle". Of significance to Schedule 1 applications, Hayden J stated that:

"Where a Court, at this 'second stage' of the process, to use Thorpe LJ's words, determines that an agreement between the parties is irreconcilable with the best interests of a subject child it is likely, in my view, that Xydhias principles will be disapplied".

The significance for practitioners is the potential watering-down of the Xydhias principles. Hayden J's judgment suggests that at the second-stage of the analysis, in finalising the agreement, the court will consider whether the agreement meets the welfare needs of the child.

As such, the decision leaves open the potential for practitioners to argue a signed written agreement in a Schedule 1 application should not be binding on the basis the agreement is irreconcilable with the child's best interests.

Alexander West

In light of *Assoun v Assoun*, is a Hadkinson Order still the ultimate nuclear option in family law?

Many litigants remain ignorant of the court's power to debar a party litigating in financial proceedings. Nonetheless, the power is well established and is colloquially known as a Hadkinson Order.

There is no doubt that an order debarring a party from their right to a trial constitutes one of the most draconian orders that a court can make. In financial remedy cases, it is a power that the court will exercise sparingly.

In *Assoun v Assoun* [No 1] [2017] EWCA Civ 21, the Court of Appeal gave guidance as to the appropriate procedure to be

followed when making such an application, along with the criteria that must be met before such an order can be made.

The facts were that H was ordered to pay periodical payments. He applied to vary down or discharge the order. The judge, however, granted a without notice application, made on behalf W, that H should not be permitted to proceed with his application until he had paid to W his debt under the existing court order (a Hadkinson Order).

The issue for the Court of Appeal in *Assoun* was primarily whether the Hadkinson principles were correctly applied to the facts of the case.

The facts in *Hadkinson* were as follows.

A mother abducted the only child of the marriage to Australia, in breach of an order that he should not be removed from the jurisdiction. The court ordered the mother to return the child within the jurisdiction. On an appeal by the mother against that order, father took the preliminary objection that the appeal should not be heard because the mother had been at all times, and still was, in contempt.

Delivering the Judgment of the court, in declining to hear mother's appeal, Somervell LJ stated:

"It is the plain and unqualified obligation of every person against, or in respect of, whom an order is made by a court of competent jurisdiction to obey it unless and until that order is discharged...

Such being the nature of this obligation, two consequences will, in general, follow from its breach. The first is that anyone who disobeys an order of the court (and I am not now considering disobedience of orders relating merely to matters of procedure) is in contempt and may be punished by committal or attachment or otherwise. The second is that no application to the court by such a person will be entertained until he has purged himself of his contempt". [1952] 2 All ER 285

Denning LJ added:

"It is a strong thing for a court to refuse to hear a party to a cause and it is only to be justified by grave considerations of public policy. It is a step which a court will only take when the contempt itself impedes the course of justice and there is no other effective means of securing his compliance.

I am of opinion that the fact that a party to a cause has disobeyed an order of the court is not of itself a bar to his being heard, but if his disobedience is such that, so long as it continues, it impedes the course of justice in the cause, by making it more difficult for the court to ascertain the truth or to enforce the orders which it may make, then the court may in its discretion refuse to hear him until the impediment is removed or good reason is shown why it should not be removed".

It is plain that the court must be satisfied not only that there has been disobedience, but that if the disobedience continues it will "impede the course of justice". These criteria have intentionally been set at an extremely high level, and accordingly it will be very rare for a party to be debarred in financial order applications.

In *C v C* (*appeal Hadkinson Order)* [2010] EWCH 1656 (Fam), Eleanor King J succinctly summarised the Hadkinson jurisprudence and stated:

"When considering the Hadkinson criteria, I bear in mind the draconian nature of the order, that the power must be exercised judicially, sparingly and proportionately".

It is against this backdrop that, at first blush, the Court of Appeal seemingly retreated from the established sparing use of this most draconian order, bearing in mind that the application in *Assoun* had been made without notice.

However closer analysis of the facts reveals that there has been no such retreat.

The Law

The court underlined the view that such an order should not be commonplace, stating that *"it is a case management order of last resort in substantive proceedings (for example for a financial remedy order) where a litigant is in wilful contempt rather than a species of penalty or remedy in committal proceedings for contempt".*

Moreover, in relation to the Law, the court set out the six questions that need to be considered by a court before which a Hadkinson application is made, stating that they are those summarised by Ryder J in *Mubarak v Mubarik* [2004] EWHC 1158 (Fam)[59]:

(a) Is the husband in contempt?

(b) Is there an impediment to the course of justice?

(c) Is there any other effective means of securing compliance with the court's orders?

(d) Should the court exercise its discretion to impose conditions having regard to the question?

(e) Is the contempt wilful (i.e. is it contumacious and continuing)?

NOTE: the court expressed the clear view that the word "contumacious" added nothing to the threshold requirement that the contempt should be wilful in the sense of a voluntary, deliberate, knowing (and continuing) breach, by a person well able to comply with the order if he or she chose to do so.

(f) If so, what conditions would be appropriate? It therefore remains clear that the court cannot exercise its discretion and make such an order as a result of contempt alone, but that the contempt must be wilful and must directly impede the course of justice. Moreover, even if those significant hurdles are negotiated, the court will go on to consider if there is any other effective means of securing compliance with the order. Only if there is none will the court then go on to consider the exercise of its discretion.

In *Assoun* the husband was found to have been in *"wilful default, to have failed to discharge his obligation to provide full and frank disclosure and to have used every tactical device that he could to frustrate the wife and the English courts"*. H was in short very much the author of his own misfortune.

Procedure

Leave to appeal in *Assoun* was granted on the basis that the husband had no formal notice of the Hadkinson application or the basis upon which it was brought, so that he might effectively respond to the same. Accordingly, the court considered in some detail the procedure that should be followed in making such an application.

The court made clear its displeasure with the way the application for the order was made by W:

"an application for a Hadkinson order should have been made under part 18 FPR on an application notice stating the order being applied for and the reasons for the same.…

…In any future case I would expect there to be meticulous attention to the appropriate inter partes procedure unless the applicant has grounds to establish the need for an expedited and/or without notice application.…

…It is undoubtedly the case that no attempt was made by the wife to obtain formal compliance with the rules and there was no justification for a without notice procedure".

Notwithstanding the strength of the court's view, on the particular facts of *Assoun*, the court did not find that there had been a procedural irregularity.

H had himself failed to abide by the principles upon which the courts procedural rules are founded and had been warned in earlier proceedings that if his wilful default continued he was at risk of subsequently being subject to a Hadkinson order.

Finally, the court also dealt with the subject of proportionality, as to whether the Hadkinson Order was disproportionate and therefore not compliant with Article 6 of the ECHR, because a less significant condition

would have sufficed.

The court dismissed this argument stating that the concept of proportionality added nothing in this particular case and that, *"in the particular circumstances of this case the order was the only one remaining that might secure compliance and was accordingly the least restrictive and hence most proportionate".*

It is also important to note that there have been authorities that consider whether debarring a litigant might also constitute a breach of the right of access to a court under Article 6 (1) of the ECHR. It seems, however, that if a claim is struck out for non-compliance with rules and orders, the claimant will not normally be able to complain under Article 6; *Hayden v Charlton* [2011] EWCH 3144 (QB).

In summary, it is clear from the decision in Assoun, that Hadkinson orders very much remain the order of last resort in financial remedy proceedings.

It is equally clear that if a party wishes to use the ultimate option, the court will expect strict adherence to the appropriate procedural rules, namely those set out under Part 18 of the FRR.

Richard English

Stockpiling

Anticipating exactly how a court will distribute assets in a financial remedies application is difficult. First, what are the likely factual findings? Next, how will the court apply the statutory criteria? Finally, how will the court apply the guidance from the line of cases beginning with *White v White* [2000] 2 FLR 981 HL in seeking to achieve fairness?

A judge will of course consider both capital assets and needs, and income assets and needs. An interesting question arises as to the extent to which there is an interplay and overlap between the two types of asset. The recent case of *AB v FC* [2016] EWHC 3285 (Fam) (Roberts J) draws attention to the question of when income assets can be used to meet capital needs, a concept now widely known as 'stockpiling'.

There are two principal forms of stockpiling: the allocation of income from the payer to the payee to enable the payee to fund mortgage payments and thus build up a capital interest in property; and secondly, the allocation of income assets from payer to payee to enable the payee to amass a capital fund to meet future capital, or indeed, income, needs.

The modern foundation for the concept of stockpiling income assets can be traced to the judgments in *Miller McFarlane*, and in particular the passages of the judgment relating to the McFarlane case. The facts of McFarlane were: 16-year marriage, three children, equal earning levels pre-children and a matrimonial decision for W to give up lucrative job to care for children thereby allowing H to progress his career. H became a very high earner with income well in excess of the combined needs of the parties. The House of Lords, in reinstating the original order of the District Judge, approved the concept of a periodical payments award being used to meet a capital need. The House of Lords held that it would be manifestly unfair if an income award was confined to income needs. This acknowledged compensation for relationship generated disadvantage in the form of a share, by way of periodical payments, of the payer's income.

More recently the potential for a stockpiling award was considered in the case of *Fields v Fields* [2015] EWHC 1670 (Fam) (Holman J). Fields concerned a nine-and-a-half year marriage, children aged seven and five, the youngest of whom had developmental difficulties requiring continuous care. There were assets worth £6m. H earned £1.4m gross per annum, W did not work. Holman J divided the capital leaving W with £2.5m from which to purchase a home. Additionally, the court ordered joint lives spousal periodical payments of £320,000. That figure included £100,000 per annum for stockpiling. This would allow W to build up a stockpile of £1m over 10 years.

Holman J observed that the *"stockpile … must of course be saved and in some way ring-fenced, so that it is indeed available for future needs and can be identified and taken into account"* upon any future variation application". The judge declined to order further periodical payments from H to W to fund a mortgage, but did observe that "investing the element of stockpile in a mortgage would, in my view, be an acceptable and, indeed, wise way of saving and ring-fencing it". The stockpile figure took account of "the likely increase in value of the underlying home".

Against this background Roberts J in the case of *AB v FC* was faced with the following factual circumstances:

- W (31) and H (27);
- short marriage (less than two years);
- one child aged 22 months, living with W;
- H was a professional footballer with income of c. £1m net per annum, plus discretionary bonuses. It was accepted that his career playing football was finite; limited to a further four or five years;
- W not working;
- Little capital, FMH rented;
- High standard of living;
- Both parties accepted W's claim was limited to her needs.

Roberts J paid close attention to the decision in *Fields v Fields* and acknowledged that "the principle of allowing a former spouse to stockpile for the future is a well-recognised device for achieving fairness as between the parties" [80]. However, the judge made clear that stockpiling would only be applied in cases in which the facts warranted it. In *AB v FC* the rationale applied was as follows:

- This was a case where there were sufficient income resources to provide W and child with the security, in due course, of their own home;
- It was accepted that the position will change in the event of a material reduction in H's current income or the premature end of his playing career;
- Notwithstanding the absence of any marital acquest, this is a case where W's substantial ongoing contributions to the welfare of the family should be reflected in an entitlement to the future security which she sought both for herself and the child;
- Money paid to rent a home was effectively money wasted;
- It was not unreasonable to allow W to 'stockpile' a portion of the sums she receives in order to divert those sums towards the discharge of a mortgage liability. Notwithstanding the length of the marriage, she had many years of intensive child-rearing in front of her and she was entitled to find that contribution reflected in the periodical payments award.

The circumstances for a stockpiling order are therefore likely to be relatively

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limited. The most conducive background would be:

- Insufficient capital to meet capital (usually housing) needs;
- Sufficient income to cover current needs and also contribute to capital fund or mortgage payments;
- Payee spouse likely to have restricted earning capacity, typically as a result of child care commitments.

It should also be noted that a payee, of course, remains vulnerable to a variation application by the payer. In *Miller McFarlane* the House of Lords acknowledged that the responsibility for meeting child welfare needs will diminish in the future, thereby allowing that parent to resume an earning capacity. In that situation financial needs will diminish. In *Miller McFarlane* the court held that the burden should be on the payer to justify a reduction. However, on a variation application the court will consider whether a clean break had become practicable. The existence of a healthy stockpile is likely to mean that a clean break is indeed practicable, and fair.

Stephen Roberts