Financial Remedies Update

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***Potanina v. Potanin* [2024] UKSC 3** saw the UKSC 3-2 majority, with a leading judgment by Lord Leggatt, knock out the previous test for setting aside of leave granted under Part III MFPA 1984. This had previously required some compelling reason to set aside, as demonstrated by a knock-out blow. In short, the UKSC have now '*knocked out*' the '*knock out blow*' test.

The parties were born, married and divorced in Russia. They had lived in Russia throughout their marriage. Divorce was pronounced in February 2014. Since the collapse of the Soviet Union in the 1990s, H had accumulated great wealth estimated from published sources to be in the region of $20bn. The largest part of his wealth came from his beneficial interest in a 30% shareholding in Russian metals and mining company, MMC Norilsk Nickel PJSC. Upon divorce, a blizzard of litigation ensued. W was awarded half of the assets legally owned by H. This did not include the vast majority of his wealth which was held via trusts and companies, although he did admit that he was the ultimate beneficial owner. Her award from the Russian courts was therefore only a fraction of the sum that she would have been entitled to had the beneficially owned assets also be taken into account.

In June 2014 W obtained an investor visa and purchased a flat in London. She spent increasing amounts of time in London from 2016 onwards. In 2017, her visa was extended. She stated that since 2017 she has been based in London. In October 2018, W issued an application for leave under section 13 for financial relief pursuant to Part III MFPA 1984. Leave was originally granted by Cohen J on an ex parte basis. H subsequently challenged this and sought to set the leave aside, arguing that the court had been materially misled. Cohen J expressed regret at not dealing with the issue of leave on an *inter partes* basis as he had initially been minded to do. He concluded that however unintentional it had been, he had been materially misled. He had no doubt that if he had had the full picture before him at the time of the *ex parte* hearing, he would not have granted leave. Cohen J therefore set aside his initial without notice order granting leave, and dismissed W's application for leave pursuant to section 13. W appealed this decision to the Court of Appeal. Giving the lead judgment, King LJ allowed W's appeal, therefore reinstating Cohen J's original order granting leave, despite him having concluded later with all the information that it was wrong. The Court of Appeal allowed the appeal on the basis that, once an order granting leave has been made, the respondent can only challenge that at an *inter partes* hearing if two conditions are satisfied: First, that the power to set aside may only be exercised where there is a compelling reason to do so. In practice this meant where a decisive authority had been overlooked or the court had been misled. Secondly, unless the compelling reason could be demonstrated by a '*knock-out blow*' then the application to set aside should be adjourned to be heard alongside the substantive hearing for financial relief under Part III.

In delivering the majority judgment, Lord Leggatt stated that if this was truly the state of affairs brought about on the law as it stands, then

This had previously required some compelling reason to set aside, as demonstrated by a knock-out blow. In short, the UKSC have now *'knocked out'* the *'knock out blow'* test.

the *'law is an ass'*. Thankfully, across paragraphs [34-68] of his judgment, Lord Leggatt determined that the test had come about by a series of unfortunate misunderstandings, arising from *obiter dicta to obiter dicta*, ultimately culminating in an incorrect FPR rules amendment in 2017 on the basis of a misunderstood chain of obiter comments. Where an order granting leave is made without notice, FPR r.18.10(3) and 18.11 are unequivocal in giving the respondent an unconditional right to argue for that order to be set aside. This right does not depend upon being able to show that the court was misled at the hearing or by virtue of some knock out blow. Instead, the right is simply a right to argue that the order should be set aside because the requirements under section 13 are not met. No more no less.

The route which ultimately led to the erroneous *'knock out blow'* test began with concerns expressed by Thorpe LJ in *Jordan v. Jordan* [2000] 1 WLR 210. However, his concerns which were in fact doubting the wisdom of dealing with section 13 leave on an *ex parte* basis at all were instead subsequently misunderstood as a concern regarding the right to apply to set aside such an order for leave once it had been granted. This misconceived statement of concern was restated as the case of *Agbaje* worked its way through the appellate courts. Comments made by Munby J, and Ward and Longmore LJJ in the earlier courts culminated in the obiter of Lord Collins in the UKSC in *Agbaje v. Agbaje* [2010] UKSC 13, where he stated that something must be done to prevent the waste of costs and court time caused by applications to set aside which only have a questionable chance of success. He went on to say:

> *'[33]... 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 knockout blow, the court should use its case management powers to adjourn an application to set aside to be heard with the substantive application.'*

Thereafter in 2010 the introduction of the Family Procedure Rules 2010 was imminently awaited. Rule 3.17 of the Family Proceedings Rules 1991 was replaced. R.8.25 of FPR 2010 removed the requirement for such an application to necessarily be made *ex parte* (see FPR r.8.25(1)-(2)). However, before the rules were implemented on 6 April 2011 further obiter comments were made, this time by Munby J in *Traversa v. Freddi* [2011] EWCA Civ 81. Munby J emphasized that:

> *'[58]... Under the new rules, as under the old, unless the respondent can demonstrate that he has some 'knock-out' blow, his application to set aside the grant of permission, if not dismissed then and there, should be adjourned to be heard with the substantive application.'*

Similarly to the comments made by Lord Collins in Agbaje, the above comments by Munby J appeared to Lord Leggatt to be obiter dicta pronouncements made without the benefit of any argument on that point as no issue about the applicable test for setting aside a grant of leave was live in the cases before them.

In 2017, an amendment brought FPR r.8.25 in line with what had been stated by Munby J in *Traversa v Freddi*. However, the amendment had no effect on the right of a respondent who, under r.18.11, has a right to apply to have the order set aside where it has been made without notice. Thus, an inconsistency between FPR r.18.11 and the practice adopted for section 13 applications had come about. Lord Leggatt said this had, as set out above, occurred through a series of misunderstandings without ever being subject to proper scrutiny. He therefore concluded that there is no requirement under FPR r.18.11 to set aside leave for a party to demonstrate a 'knock-out blow' or a compelling reason why the

court should set aside the order, nor that it was materially misled. It was therefore wrong for the Court of Appeal to reach the conclusion it did in this matter and set aside Cohen J's order made at the inter partes hearing.

Lord Legatt further provided clarification as to the level of threshold test that was required under section 13. He considered the comments of Lord Collins in *Agbaje* where he stated that the principal object of the section 13 filter mechanism was to prevent wholly unmeritorious claims being pursued so as to oppress or blackmail a former spouse. Whilst he did not wish to cast any doubt on the guidance in *Agbaje* that the word "*substantial*" means "*solid*", Lord Leggatt concluded that overall the comment of Lord Collins did require some further clarification. He said that the threshold was higher than merely satisfying the court that the claim was not totally without merit or abusive. The closest analogy, he said, was with other contexts in which the court had to decide whether a claim should be allowed to proceed to a full hearing, or should be dismissed summarily, or whether to set aside a judgment entered in default. In each of these analogous examples, the test was whether the claim has a "real prospect of success." He concluded that:

> *'[92] Applying this approach to applications for leave under section 13, the judge will need to consider whether, on the factual basis alleged unless it is clearly without substance, there is substantial (in the sense of solid) basis for saying that in all the circumstances of the case, and having regard in particular to the matters specific in section 16(2), it would be appropriate for an order for financial relied to be made by a court in England and Wales...'*

Galbraith-Marten v De Renée [2023] EWFC 253 is the next instalment in this long running litigation. Cobb J had to determine the quantum of child PPs for the longer term. F argued that the PPs should be determined according to Mostyn J's AFM from *James v Seymour*. Cobb J noted the benefits of a formula, but also set out reasons for caution [21] and acknowledged areas where the formula will not be appropriate at all [22]. Formula or no formula, it

there is no requirement under FPR r.18.11 to set aside leave for a party to demonstrate a '*knock-out blow*' or a compelling reason why the court should set aside the order, nor that it was materially misled.

is incumbent on the court to review the statutory criteria in the context of '*all the circumstances of the case*'. Cobb J considered the CSSP of £1,957.18 provided not only an appropriate '*starting point*' but a reasonable overall result. He said at [29] '*This case, I hope, to some extent demonstrates the inherent reliability of the AFM set out in James v Seymour, and underlines its potential value in cases of this kind. There is a great deal to be said for promoting higher degrees of consistency in judicial decision-making to applications under Schedule 1 CA 1989; I endorse without reservation the ambition of Mostyn J, Moor J, and others in seeking to reduce uncertainty and unpredictability of outcome for the very large numbers of unrepresented litigants who populate our Financial Remedy courts, and the very many who seek solutions away from the courts.*'

The cleverly anonymised HO v TL [2023] EWFC 215 concerned parties who had co-founded a hotel group. In 2017 the business was placed in one of H's family trusts (X). W was added as a beneficiary. Through the trust structure H & W owned 90.25% and W's family member 9.75%. Peel J valued the business at £9,597,541.

There were two other family trusts benefitting H: Y and Z. Peel J had to consider accessibility of H's trust interests. Trust Y was a discretionary trust. Following the letter of wishes, a notional 50% allocation to H would be £1.125m. Trust Z was a discretionary trust. Following the letter of wishes, a 38% notional allocation to H would be £10.26m. Peel J was satisfied these should be treated as accessible resources and to frame an order in such a way as to require H to realise sums, potentially from the

trusts, would not cross the boundary into improper pressure.

There was no doubt that the bedrock of the parties' wealth was laid by H's greater pre-marital wealth and extra-marital capital injections from his family. Though originally non-marital, those funds largely went into the family business and properties and the court had to consider to what extent they had become marital and subject to the sharing principle. The business and several properties were found to be matrimonial and subject to equal sharing, giving W £5,765,533 plus the proceeds of her property (£476,859) and her pensions (£206,127). Her total entitlement under the sharing principle was therefore £6,448,519. Her needs were determined to be £7.75m. She had assets of £1,077,842 in her name so H was required to pay the remainder. H would retain the balance of £14.7m.

The costs decision followed in *HO v TL (Costs)* [2023] EWFC 21. Even though W's award was needs based, she was ordered to pay £100k towards H's costs. Peel J noted that the £7.75m was arrived at after payment of all of W's debts, meaning H had, in effect, paid the litigation bill for both parties. This was not insignificant as total costs were c.£1.55m. Peel J warned: '*Litigation is expensive and personally demanding for lay clients. I see no reason why the court should not visit a costs order if one party makes unreasonable open offers. The authorities make plain that a costs order may be made even if it reduces the needs as found by the court. These comments apply particularly to big money cases, although I take the view that in smaller value cases the court should also be willing, in the right case, to make an award for costs, even if only in a modest amount, to register condemnation of the party whose open proposals are far removed from the eventual outcome. The message must get across that although the starting point is no order as to costs, the courts are increasingly willing to depart from that so as to do justice to the party who has been put to unnecessary costs by the other party's overstated proposals*' [12].

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Interestingly, one of the particularly relevant considerations regarding how W approached the case was that, though she did not formally pursue conduct, her documents included personal criticisms of H. This is something that practitioners will be familiar with. Peel J said: '*This practice of making pejorative comments about the other party which have absolutely no relevance to the outcome of the financial remedy proceedings and are probably hurtful, must cease. Apart from anything else, it is unfair to the party who has refrained from making personal criticism to be met with a litany of complaints about their own personal behaviour. The court's function is not to pick over the bones of the marriage and attribute moral blame. I doubt this in fact added significantly to the costs, but it is not appropriate to make unnecessary allegations, and ordinarily this too might justify a costs order*' [7].

***ES v SS* [2023] EWFC 177** saw Cohen J consider an unusual non-matrimonial argument as well as disputed post-separation endeavours. Whilst it was relatively straight forward to determine what H's wealth was at the time of the parties' marriage (£2.2m plus two properties with net equity of c.£500k and £727k respectively), the parties marriage coincided with H ceasing to work for private equity firm ABC. After leaving that firm in 2005, H did not receive any income until 2014 (when he began to draw an income from his new venture). Instead, during this period the family lived on receipts from the distributions arising from

carry in private equity funds that H had earned prior to the marriage (an entitlement of £9.7m). Tranches totalling £6m of this had been transferred into W's name. H's unchallenged evidence was that this was for tax purposes and was on the understanding that W was to return the funds to H if requested. The court bore in mind that W's tax status had enhanced what H had brought into the marriage by way of distributions. A sum of £1.5m had also been spent on family expenses and on the parties' family properties. These factors persuaded the court that the credit H should receive for his pre-marital accrual should be less than 50%. The court concluded that the appropriate figure to be ringfenced as non-marital was 35% (i.e. £4.375m).

Post-separation endeavour was considered by Recorder Nicholas Allen KC in ***FT v JT* [2023] EWFC 250 (B)**. The parties married in 2008 and had three children aged between 12 and 3. The parties disagreed as to their date of separation, a dispute the outcome of which correlated to subsequent arguments regarding the extent of W's post-separation endeavours in respect of her business JP. The court broadly accepted W's position that separation occurred closer to the date of physical separation rather than the later date of the divorce petition March 2021 as argued by H. It was concluded that permanent separation occurred by the end of August 2020 or soon thereafter. Recorder Allen KC observed that the case law on what constitutes separation is spare in comparison to that in respect of what amount to cohabitation. However he noted that in many senses what amounts to separation may be considered as the obverse of cohabitation. The judgment provides a useful summary of the relevant case law on the question of separation.

> The court ultimately agreed with the approach taken by Moylan J and Roberts J in previous authorities in preference to that stated by Mostyn J in E v L which would, if correct, effectively remove from existence any post-separation accrual unless there had been undue delay

W's company JP was incorporated in 2013. It was a payment platform that facilitated business payments to and from frontier markets. W held shares and options in JP Headco, the company which sat at the top of the group structure. W held 3,000,001 of the 80,273,988 shares issued. She also held 8,944,404 vested options. These were only exercisable on the occurring of specific events and provided that W retain remained employed with the company and in good standing. W therefore held 5.157% of the businesses and 14.8658% if her options were fully exercised.

W argued that in January 2021 the Central Bank of Xenda issued a directive that required remittances into Xenda were to be paid in US Dollars only. This effectively banned the use of the local currency, the Xendan Peso, for local payments. This was the central function of the services offered by JP. This meant that JP had $1.5m worth of Xendan Peso '*frozen*' and was unable to make any remittance payments into Xenda in that currency. W said this severely impacted the business, citing a fall in JP's revenue from $2.1m in December 2020 to just $100,000 by February 2021. W argued that this required her to move the business away from Xenda and clients based there, and that she had subsequently remodelled the business entirely in order to remain afloat. She argued further work had to be done again when B Group (who had offered to purchase JP) collapsed in November 2022. H accepted that the Xenda rule change had had a significant impact on JP in January 2021, and that if W had not restructured at this time post-separation then the business may have collapsed. He argued however that this was just one of many instances when W needed to react to keep the business on track as she had done previously during the marriage. In essence, the work W had done in other countries was seeded during the marriage, and all W then had to do in

January 2021 was "*turn the lights on*."

Given that the parties were found to have separated in August 2020, the court concluded that the marital element was relatively small, ultimately determining that it was to be treated 35% matrimonial and 65% non-marital in nature. In addition to disagreeing as to the correct percentage of wells sharing, the parties disagreed as to whether H's share (not determined by the court to be 17.5%) should be subject to a cap. Recorder Allen KC observed that the question of a cap was not an easy issue to determine in this case. Whilst on the one hand a sharing entitlement would apply to the matrimonial element, and W would be trading with H's share in the meantime. On the other, if that marital share had an ascertainable value at the present time then it might be argued that H's entitlement should be capped to this figure with W benefitting from any subsequent growth. It was held that the imposition of a cap would not be fair in the circumstances of this case. It was accepted that the business was in part the product of marital endeavour through which H supported W, and W's ability to pivot JP in January 2021 was in part a result of work that had been done during the marriage.

Further analysis on the same theme was undertaken by Stephen Trowell KC sitting as a Deputy High Court Judge in ***GA v EL* [2023] EWFC 206**. The parties were in broad agreement save for one significant issue between them. The point of dispute was how the sale proceeds of the business '*X Ltd*' should be divided. The dispute arose from disagreement as to how far those sale proceeds should be seen as non-matrimonial due to post-separation endeavour on the part of the husband.

X Ltd was started and incorporated during the marriage in 2008. The business used software which had been developed by H, which enabled companies using call systems to analyse time spent on the telephone and the success of their current call systems. By virtue of restructuring in 2018, the 50% share in X Ltd became held through holding company Y Ltd. The shares of the holding company were held 70% by H and 30% by W. The parties separated on 25 November 2019. The SJE report assessing the value of X Ltd at this time produced two different figures: £28.1m was produced in the original report, with a subsequent figure of £39.2m produced in response to questions raised by W. The company was sold for £70m on 6 February 2022. W argued that the sale proceeds of X Ltd should be divided 50%:50% between the parties. She claimed it was a marital asset and what occurred after the separation was the matrimonial business being brought to the market for sale. H proposed that W receive 27.5% of the sale proceeds. He argued that a significant component of the sale value was due to his post-separation labour. This element was therefore non-matrimonial and should not be subject to the sharing principle.

The Judge undertook extensive analysis of the previous authorities. He considered in particular, the dichotomy between the approach of Mostyn J in *E v L* (paragraph 73) and Robert's J's assessment in *Cooper-Hohn*, (paragraph 187). The court ultimately agreed with the approach taken by Moylan J and Roberts J in previous authorities in preference to that stated by Mostyn J in *E v L* which would, if correct, effectively remove from existence any post-separation accrual unless there had been undue delay. He concluded that these words, (driven by Mostyn's analysis of the Court of Appeal decision in *Cowan*), are right in that assets must be assessed at the date of trial. However this did not preclude the court from considering whether they are marital in nature or not. There may be cases where fairness does require a consideration of assets accrued by virtue of post-separation labour. Whilst the *Cowan* point regarding '*trading wife the wife's unascertained share*' was important, the point was made in relation to investment, rather than where assets have been created by the labour of one party post-separation. Mr Trowell KC summarised the factors to consider from his case law analysis as follows:

i. Post-separation non-matrimonial assets can exist at the date of the trial even

when there has been no undue delay;

ii. In assessing post-separation non-marital assets the court must guard against counting in the product of passive growth;

iii. The court should be mindful of the extent to which a party claiming post-separation assets is benefitting from investing the unallocated funds of the other spouse;

iv. The court should not lose sight of the domestic contribution which may be taking place by the other spouse;

v. Whilst a formulaic approach may be preferable then a '*by and large*' approach the court will have to make the best assessment it can with the facts before it.

When considering the SJE valuation, the court preferred the figure provided in the original report as opposed to that given in response to questions raised by W. This figure of £28.1m was roughly rounded up to £30m. This was on the basis that the limitations of the original report meant that the figure was a reasonable one rather than a reliable one, and that if there was any error with that figure it was likely to be on the low side. Upon the sale the parties received pre-tax cash payments of £24.9m. In addition they received £10m of loan notes, £5m of preference shares, and equity in the company Topco. Comparison of sale offers demonstrated a post-separation value of £30m was to be compared to a cash sale price equivalent of £60m. The court determined that the sale proceeds should be divided 42.5% of W and 57.5% to H. Factors relevant to that determination included: (i) the unreliability of the accountancy evidence; (ii) significant increase in the metrics of the business; (iii) the post-separation work of H; (iv) growth from the software which was created during the marriage, meaning that a sizeable portion of the growth would be passive; (v) market changes; (vi) some weight to be attached to the domestic contribution of W.

***BL v OR* [2023] EWFC 229** continues a notable trend observed in previous editions of this article as to the volume of post-nuptial agreement ('*PNA*') cases coming becoming before the court. The parties were both in their sixties. Their marriage had been the second for both parties. Both parties had grown up children. W had two adult daughters. The parties married in 2012, three weeks after a PNA was signed, both parties having received legal advice on the same and recording the absence of any undue influence. The PNA provided for W to receive a total of £738,341 when the marriage was between 7-10 years in duration. H had already paid this sum to W by the time this matter was adjudicated by the court. H's total assets were £48m, made up primarily of business assets. W had assets of £2.2m, however £1.36m of this sum was the value of her flat in St John's Wood. A further £545k was a costs order owed to be paid to her by her former husband. At the time of trial this had not been paid despite a decade of chasing by W. In 2013 W's former husband died suddenly, W explained this prompted her to consider future inheritance planning. In 2015, W transferred the St John's Wood flat to her daughters as an unconditional gift. The court found that W did not inform H of this transfer until early 2017. The court accepted M's evidence that she did not consider the PNA when making this transfer, she was happily married at that time. W sought a sum of £5.6m, made up of a housing fund of £3-3.5m and a Duxbury award of a further £3m. The total sum was reduced by reference to another asset of W's: a property in Malta. H offered a sum of £4m, this being in additional to the £738,341 already paid.

The court observed that W's gifting of her St John's Wood flat was a material factor. hj On the latter point, the court observed it would have been unfair to permit W to give one property away to her daughters, and then leave a further property acquired as a result from H to them on her death without any interest reversion to H. The court awarded W a housing fund of £2.6m, subject to a H receiving a 40% interest in W's future property. It is notable that this was comparable to the valuation of the St John's Wood flat when it was gifted. The court assessed W's income need at £140k per annum, therefore requiring a capitalisation figure of £2.269m.

In ***KG v NB* [2023] EWFC 160**, HHJ Willans considered an application to vary periodical payments due to a supposed change of circumstances. The parties had agreed a consent order in 2019. The 2019 Order included provision for H to make periodical payments to W at £1,500 per month until 2027, at which point it would reduce to £1,250 per month until 2036. Amongst other matters, the 2019 Order stipulated that the FMH would be sold in 2020 and the proceeds used to purchase a replacement property which would then be sold upon a triggering event (the most likely being the younger child completing secondary education in 2026). In 2020, W began a relationship with C, with whom she cohabited in the FMH. By the time this application had been considered by HHJ Willans, W and C were engaged. In 2021, the parties agreed to vary the terms of the 2019 Order detailing that W would remain in the FMH but it would still be sold upon a triggering event as the new property would have been. The 2021 Order maintained periodical payments on the same terms.

In bringing his application, H argued that there had been a change of circumstances, due to W's relationship with C and her improved earning capacity, which warranted a variation of the Order. W disputed any change and sought to argue that the change should be measured from the 2021 Order as H was aware of the cohabitation at this point. HHJ Willans found that H was entitled to argue that there had been a change of circumstances arising out of the cohabitation and this was not limited to the period of time since the 2021 Order. He commented that cohabitation was dynamic and it was 'foolish' to identify a specific point at which cohabitation must be raised. HHJ Willans was invited to consider *Atkinson v Atkinson* [1988] Fam 93 in relation to W's decision not to remarry but this was not found to be an attractive argument. Rather than forming a conduct argument, a cohabitee's role is better understood as a change in resources under S.25(2)(a) MCA 1973. The Court went on to find that W did not have improved earning capacity. The Court concluded that up until the sale of the

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FMH (likely to be in 2026 when the younger child completes secondary education), there would be no change in W's needs and maintenance should not be varied. Whilst global income in the home had increased, it had been offset by increasing costs. However, upon the sale of the FMH, HHJ found that W's relationship with C was likely to endure and it is reasonable to assume that they would pool their resources to purchase a mortgage free property which would reduce W's expenses. Even with W's reduced expenses balanced against reduced CMS payments, the Court found scope for maintenance to be reduced by a single adjustment in 2026.

Simon Colton KC, sitting as a Deputy High Court Judge, determined H's application to vary the date for payment of a lump sum order, of £1.1 million, in ***H v GH* [2023] EWFC 235**. The order was made in 2018 with a payment date of 19 June 2023, secured by way of a mortgage over H's flat. Upon H's non-payment, W applied for a possession order in August 2023. On 03 October 2023, H issued his variation application, seeking an extension to 30 June 2025. On 06 October 2023, DJ Sterlini ordered H to give W possession and made judgement in the sum of £1.1 million. H sought permission to appeal. On 22 November 2023, W applied to strike out H's application to vary on the grounds that the Court lacked jurisdiction to extend the time for a period of 2 years and the application constituted a collateral attack on DJ Sterlini's order.

On the first ground, H argued that the Court has statutory jurisdiction to vary a lump sum under S.31(2)(dd) MCA 1973. H contended that the language of the Act intended to provide examples and demonstrate the breadth of the section. This was rejected by the Court. S.31(2)(dd) was introduced by the Pensions Act 1995 with the intention of covering lump sums which include

as indicated in Masefield v Alexander, and endorsed in Hamilton v Hamilton [2013] EWCA Civ 12 and Birch v Birch [2017] UKSC 53, the Court had an inherent jurisdiction for modest extensions of time, provided that the extension does not 'strike at the heart of the order'. The Court concluded that an extension of 2 years was not slight or modest and would undermine the principle of finality.

pension provision.

However, as indicated in *Masefield v Alexander*, and endorsed in *Hamilton v Hamilton* [2013] EWCA Civ 12 and *Birch v Birch* [2017] UKSC 53, the Court had an inherent jurisdiction for modest extensions of time, provided that the extension does not '*strike at the heart of the order*'. The Court concluded that an extension of 2 years was not slight or modest and would undermine the principle of finality. Therefore, the Court did not have jurisdiction and the application was struck out. For completeness, the application also failed on its merits. Counsel were opposed as to the correct legal test to be applied; the Judge favoured the test put forward by H which considered whether it would be inequitable, in all the circumstances, to grant the extension sought. H argued that one of the Lloyd's syndicates, of which he is a member, had not been able to close its account; H could not withdraw the funds until the closure. However, the Court determined that, having known about the payment since 2018, H could have better managed his commercial risks or procured the funds through the sale of his flat. Further, the lack of finality and ongoing cost to was prejudicial to W. It was therefore inequitable to grant the extension.

In relation to W's second ground, H's motivation for extending the date for payment appeared to be to argue, in the possession proceedings, that the debt secured by the mortgage is not yet due. The Court did not consider this to be improper or illegitimate.

Against the backdrop of longstanding proceedings, Macdonald J found himself determining yet another interim application in ***DH v RH (No 2) (Variation of Interim Arrangements)* [2023] EWFC 210**. In fact, several interim applications were made, primarily by H, the most significant being an application to vary the LSPO and MPS and lift a freezing injunction held against his life insurance policy. W had made an application for enforcement of the LSPO and MPS and an adjournment of the return date for the freezing order. The parties married in 1995 and have two children. They had relocated from the US to the UK in 2005. Both parties had a background in the financial services industry and H had gone on to invest in cryptocurrency. In his previous judgment, Macdonald J provisionally assessed the parties' income, earning capacity, property and other financial resources and made an LSPO and MPS order in W's favour. The LSPO provided for payment of £221,654 up to the PTR and a further £151,000, in two instalments, thereafter. The MPS provision totalled £141,154 per annum in addition to a budget of £7,000 per month for rent. W's need for rental income was predicated on her intention to return to rental accommodation in London. However, W later moved into one of the party's Wyoming properties, living rent free and additionally depriving the parties of rental income.

In his applications, H submitted that his liquid assets were not as the Court had found them to be at the last hearing. He contended that he was unable to meet all liabilities on his current liquid assets. H proposed that, should the freezing order be lifted, he would be able to borrow against the policy and divide the funds equally between the parties. He also proposed to give the parties equal access to the rental income from the Wyoming and New York properties. W argued that H had failed to disclosure key assets and income streams. As such, on the basis that the Court did not have

enough information before it, the hearing should be adjourned. In a similar vein, W contended that as a result of H planning to place assets out of her reach, the freezing injunction should not be lifted. W further sought enforcement of the existing MPS and LSPO orders upon which H had defaulted. Whilst acknowledging that the Court could not perform a 'line by line' analysis of H's expenditure at this interim stage, MacDonald J was satisfied that H's funds had been reduced. In combination with W's residence in one of the Wyoming properties, the Court found that there had been a change of circumstances which warranted variation of the MPS. Consequently, the rental income element of the MPS was removed. However, the LSPO would not be altered as this was required for W to obtain legal services up to the conclusion of the proceedings. Macdonald J concluded that the freezing order should be discharged in order for H to use the policy to satisfy his liabilities. H's remaining applications were dismissed. In refusing W's application for an adjournment on the grounds of insufficient information, Macdonald J reminded the parties that it is not unusual to have an incomplete evidential picture at an interim stage. By virtue of that, however, it is not appropriate to engage in 'complex financial restructuring' so the Court had only made the orders necessary to ensure the parties' positions in the lead up to the Final Hearing.

***Williams v Williams* [2023] EWHC 3098 (Fam)** concerned W's *Hadkinson* application to prevent H playing a part in the litigation unless he complied with the orders that had already been made against him. Moor J said '*I have long taken the view that Hadkinson applications have no place in financial remedy proceedings prior to a final order being obtained.*' He noted that under the MCA 1973 the court must satisfy itself as to H's financial circumstances. It had to make orders on the basis of the circumstances set out in the checklist in s.25(2). It is impossible to do so if a party is forbidden from playing any part in the proceedings. The *Hadkinson* application was dismissed.

Moor J considered W's LSPO application. Despite H's non-disclosure, he was satisfied H could fund it. Exceptionally, Moor J decided it was not a case for payment by instalments because W would have to apply to enforce on each occasion. It was held to be a case where W should be able to have her outstanding costs reimbursed. The costs had been incurred primarily because of the obfuscation and breach of orders by H. £185,423 was ordered for W's legal costs to FDR and £175,000 to pay for foreign lawyers in respect of freezing assets overseas, for example, there was evidence of c.£900m in a bank in Monaco. Further, £102,900 inclusive of VAT was ordered for a business valuation expert and commercial property valuation report.

***RG v TA (Appeal: Legal Services Funding Order: Schedule 1 Children Act 1989)* [2023] EWHC 3155** was an application for permission to appeal against a dismissal of an application for a legal services order in Schedule 1 proceedings. F was successful on ground 2: that the Judge had applied the wrong law in reaching her conclusion that F had failed to prove that he had exhausted all alternative avenues of funding his legal costs. Roberts J considered that the only likely source of funding for either party's ongoing legal costs was a sum of £145,000 which was due to be repaid to M by a third party (PP) and, in light of her observations about the necessity of the ensuring the issues between the parties were litigated on a level playing field, HHJ Ellis then failed to provide adequate reasons for dismissing repayment from the debt from PP as a potential resource from which provision could be made for F's legal costs. Roberts J ordered that to the extent that M recovered any funds from PP, 50% should be paid directly to F's solicitors on account of their ongoing costs (a contingent lump sum).

After the draft judgment was circulated, M's counsel informed the court that PP had repaid the debt with interest (£190,917) before F had had issued his notice of appeal. £42,000 had been spent on legal fees and M had used the rest to reduce debt, for ongoing living expenses, paying the mortgage, and meeting the children's educational costs. This

had not been disclosed at the appeal hearing. Roberts J confirmed her decision was that to the extent W received any repayment of the loan from PP, 50% would go to H's solicitors and W would retain 50% and the interest on the whole amount.

***TK v AC (Re Matrimonial Causes Act 1973)* [2023] EWHC 2958** was H's appeal against an interim order that he pay £1,010pcm to W increasing to £3,510pcm from October 2023 (to meet rental payments). H was also to pay LSPO of £4,000pcm for 4 months. At the time of that hearing, H's debts were c£1.7m. His net income had been calculated as averaging about £200-£250k and that roughly equalled the cost of servicing and repaying the HMRC and commercial loans. H had said, unchallenged, that he had received no income since January 2023, and there was none visible in the pipeline. Thus, if his income were to be as calculated, then payment of his commercial liabilities would swallow it all; and if income did not arrive then his situation would become more dire. The ground on which permission was granted related to whether an order should be made in circumstances where the payer has no assets and no income and is very heavily indebted, so that any payment made would be from borrowed funds which would add to an already unsustainable level of debt.

Cohen J did not accept that it was wrong in principle to order PPs which can only be paid by increasing debt and gave a non-exhaustive list of circumstances when it might be appropriate [22]. However, this was not one of those cases. The LSPO needed to be discharged as W no longer had solicitors. W also no longer had a home, so the increased order from October 2023 to meet rental payments was no longer relevant. Sir Jonathan Cohen was left considering the payment of £1,010pcm. W's needs were obvious but he could not see how it could be right to make an order for PPs in circumstances where there was no source of funds, the director's loan account could not be extended, there was no commercial lender identified, no one was willing to advance funds to H as there was no

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security and the payments would increase the huge indebtedness already there. Therefore, the appeal was allowed, and orders discharged.

***Y v Z* [2023] EWFC 205** was a decision of HHJ Hess in financial remedy proceedings. W lacked capacity and Dr X acted as her litigation friend. He signed an undertaking in relation to the payment of costs. Dr X had been made aware in April and June that W's counsel was unavailable on the dates the final hearing was listed but did not make arrangements for alternative counsel to attend. W then sought an adjournment. H sought for the hearing to go ahead – it had been 4 years since his application was made. HHJ Hess decided to deal with it as an interim hearing only. He considered H's costs application against Dr X. His clear view was that a fair and just outcome was to make an order for Dr X to pay the whole of the costs wasted by the hearing not being dealt with as a full final hearing, assessed as £42,128.79, saying 'He willingly took on the role of litigation friend and his performance has been wholly inadequate. I accept that he has not been well, but this fact does not adequately excuse or explain his conduct and he should not escape the consequences of what has happened.'

O v O **[2023] EWFC 161** was a decision of Recorder Moys after a 3-day final hearing. H had participated in a tax avoidance scheme and had a personal tax liability to HMRC of just under £500k. He had taken £950k from a business without paying the right tax and used the money to buy the FMH and a lease for W's franchise. W sought for the court to add-back H's net losses of c.£340,000 on a spread betting account and for him to be responsible for failing

to deal with the HMRC debt properly, resulting in unnecessary penalties. H had withdrawn £150,000 from a company bank account in breach of his fiduciary duties to use in the spread betting account. W was not to share in the risk of repayment. £287,000 of what was spent was matrimonial, and £157,000 of that was lost. Recorder Moys had to decide whether these funds should be 'added back'. She decided it would be inequitable to disregard the £40k invested after separation when H had already incurred significant losses as this was 'reckless in the extreme'. A reminder for practitioners that conduct allegations need to be properly pleaded at the earliest opportunity [60].

In ***BR v BR* [2024] EWFC 11** H estimated that business assets were worth £163m. W thought they might be more. Evidence was necessary to consider value, tax and liquidity. The parties agreed that they would each instruct an expert. Peel J considered if this should be permitted or if he should make an order for the instruction of an SJE. He concluded that the default position is that, wherever possible, an SJE should be instructed and the bar for departing from the default position is set high. At [18] he set out a non-exhaustive list of reasons to support the default position.

***Xanthopoulos v Rakshina (Costs)* [2024] EWCA Civ 100** was the Court of Appeal's decision on costs after H's successful appeal. Unusually, W applied for costs even though she had not been successful in resisting the appeal and had made no offer to settle in advance. Her application was dismissed. H also applied for costs. He had succeeded on a number of grounds and lost on others, he had achieved a significant increase in percentage terms in the quantum of the award, even though it was significantly more limited than the overall award he sought, but the only offer he made was to settle for over £12m. The court had made findings of litigation misconduct against him which included having to increase the time estimate for the appeal hearing by half a day. An order for costs was appropriate but with a significant discount to reflect those matters. H had received £175,000 by way of LSPO. That was the sum that Peel J felt to be adequate to run a proportionate appeal. This was equal to approximately 60% of H's total costs of £267,657.30. The costs of the LSPO application were £17,378. W was ordered to pay £192,378.

***AXA v BYB (QLR: Financial Remedies)* [2023] EWFC 251 (B)** was the first financial remedies case at the CFC involving a QLR. Recorder Taylor sets out a summary of the QLR provisions and the limited role of a court-appointed QLR [72-89]. The Recorder was unimpressed with how H had conducted himself. He had, for example, destroyed photographs of W and their child and refused to return jewellery to W. There was the potential he might destroy, hide or refuse to return chattels or damage the FMH, so W's lump sum and pension claims would not be dismissed until H had complied with the order. H had hidden assets from the court and a costs order was justified. The Recorder took the unusual step, on the particular facts of the case, to make a pension sharing order in lieu of a costs order, as there was a limited amount of obvious capital within the jurisdiction against which W could enforce a costs order.

In ***PF v QF* [2024] EWFC 10 (B)**, HHJ Reardon considered an application by QF, for an order that PF be debarred from pursuing a financial remedies claim under MCA 1973. The basis of QF's claim was that PF had still been married to her first husband when the parties married in 2001 and, consequently their marriage was *void ab initio*. PF and QF were married in December 2001. The Decree Absolute for PF's first marriage was not pronounced until June 2002. The parties spent over 18 years presenting as a married couple, having two children together, before they separated in August 2020. A flurry of applications followed: QF issued an undefended petition for nullity; PF issued an application for a financial remedy order; QF then issued the present application before the court. HHJ Reardon considered that the issues for determination were as follows:

i. What did each party know about the status

The Court commented, more widely, that Whiston is not merely authority that bigamy operates as a bar to a financial remedy claim, but that a 'criminal offence of sufficient gravity' may. HHJ Reardon stated that the gravity of the offence is a necessary ingredient of the principle but the operation is actually triggered by the existence of a causal link between the offence and the claimed benefit.

of PF's first marriage?

ii. Whether the power to debar a bigamous applicant from pursuing a financial remedy claim still existed?

iii. If so, should the power be exercised in this case?

On the first issue, the Court found that both parties were fully aware that PF was not yet divorced at the time of their marriage.

As to the second question, QF sought to rely on *Whiston v Whiston* [1995] Fam 198 as authority that a spouse that had committed bigamy should not be entitled for financial relief. It was PF's position that *Whiston* had been overruled by the Supreme Court in *Wyatt v Vince* [2015] 2 All ER 755 in that the Court's power to strike out claims is now strictly limited and does not extend to the situation in this case. The Court considered that the common law rule that a person should not profit from their crime has been widely applied in case law. As to the conflict between *Whiston and Wyatt*, HHJ Reardon did not accept that *Wyatt v Vince* overturns a principle which is embedded in law. The Court reconciled *Whiston and Wyatt* in stating that a claim in contravention of a rule of law on public policy grounds is capable of being an abuse of process. Ultimately, '*the rule in Whiston survives Wyatt v Vince, provided that the application falls within the scope of FPR r.4.4(1)*' [90]. The Court commented, more widely, that *Whiston* is not merely authority that bigamy operates as a bar to a financial remedy claim, but that a '*criminal offence of sufficient gravity*' may. HHJ Reardon stated that the gravity of the offence is a necessary ingredient of the principle but the operation is actually triggered by the existence of a causal link between the offence and the claimed benefit. The Court emphasised that there is no general rule that a very serious offence will debar an application for a financial remedy.

Finally as to the third issue, the Court did not find PF's claim to be an abuse of process which would warrant a strike out pursuant to FPR r4.4(1). PF could not be characterised as a bigamist attempting to enrich herself through a fraudulent act. Rather, both parties were committed to the relationship and there were clear public policy reasons for allowing a fair division of assets. Therefore, QF's application was refused.

***Mahtani v Mahtani* [2023] EWHC 2988 (Fam)** was an application by W for an order that the court refuse to recognise the divorce obtained by H in Indonesia. H did not participate in the English proceedings. There were various documents provided to show he had been served, including emails to his various email addresses and to his lawyers in Indonesia. The Judge was satisfied that all reasonable steps had been taken by W to bring the proceedings to H's attention. The parties lived in Indonesia until 2016. W travelled to the UK with the children in May 2016 for a holiday but decided to leave H permanently. On 4 July 2017 H commenced divorce proceedings in Jakarta. W did not attend the hearing. It was clear from the court's decision to accept jurisdiction that H's case was that the last known residence of W was in Jakarta and he did not know her current whereabouts. W's case was that H knew her exact address in London as she had sent him an NHS letter which included her name and address. The decision also said that

W had received notice. W assumed the summonses had been sent to the property she had left in 2016. The Indonesian divorce was pronounced on 14 November 2017. W said H procured the divorce by dishonestly representing that he did not know W's whereabouts when he did.

The Judge found that H had not taken such steps as '*should reasonably have been taken*' to give notice of the proceedings to W. He found that H was aware W was living in London. The Judge found that H should reasonably have informed the Indonesian court of W's address, email address and/or UK mobile number. The information was deliberately hidden from the court by H. Had he given the court this information, then the court would have taken the proper steps to attempt to contact W via diplomatic channels. Therefore, the conditions of s51(3) of the Family Law Act 1986 were made out and the Judge went on to exercise his discretion not to recognise the Indonesian divorce, having set out the points '*for*' and '*against*' recognition [76-79].

***LT v ZU* [2023] EWFC 179** provides the substantive judgment determining the applicant father's challenge to an arbitral award. The arbitrator's award provided for the applicant father to purchase with the respondent mother a three bedroom property for her and the two children (aged 7 and 4) during the children's minority with a housing fund of £1.1-1.13m. This would require F to enter into a joint mortgage with M to the sum of £870,500. F would contribute £240,000 towards the deposit and M between £3,000-£20,000. F was to pay the mortgage instalments. The property to revert to the parties in proportion to their respective contributions upon a triggering event. F argued that neither a court nor the arbitrator has the power to require a parent to settle property under Paragraph (2)(d), Schedule 1, CA 1989, unless the parent is entitled to that property either in possession or reversion. Secondly, F argued that the award was generally wrong and/or unfair by its failure to consider his own needs or ability to pay. Further and in any event, there had since been such a significant change of circumstances that it would be wrong to make the arbitration award a court order.

HHJ Evans-Gordon allowed F's challenge on both counts. She held that an order requiring a parent to borrow money for the purposes of settlement cannot be made as a settlement and may only be ordered of property to either the parent is entitled in either possession or reversion. By its nature, making a settlement is either constituting oneself a trustee of an existing property, or giving an existing property to trustees to hold for that particular purpose. Without specified property there is no settlement. She went on to conclude that: '*[26] The respondent's argument seems to be that the court is not usually directing the settlement of monies but of the property that is eventually bought with a lump sum. It seems to be said that, absent an existing property, the court starts with an order for the provision of a lump sum and then orders the settlement of the property eventually purchased with that lump sum albeit that those steps are often rolled up. That cannot be right as a matter of construction. If the respondent is saying that the settlement does not arise until a particular property is acquired, as opposed to a settlement of the money for such a property, then I disagree.*'

***Y v Z* [2024] EWFC 4** was a Schedule 1 case before Peel J. A useful summary of the relevant principles and approach to Schedule 1 claims is at [35]. F was a member of a Middle Eastern Royal Family and put forward the millionaire's defence. Peel J considered that even so, it was customary for some disclosure to be provided to enable the claimant and court to have some understanding of the scale of the wealth and how it is structured, to enable thought to be given to the structure and enforceability of any award and because the extent of wealth "may still inform the reasonableness of the budgetary claims". Peel J suggested that the approach he used would be useful in other cases: he had required F to file a Form E but removed the obligation to provide documents in support. F had to provide an explanation of non-standard assets such as trusts and businesses.

***RN v DA (Divorce – Rescission of Decree Nisi)* [2023] EWFC 255 (B)** – *decree nisi* had been granted but neither party applied for decree absolute. W said it was because they never really separated until 2020. H said their marriage did effectively come to an end with the making of *decree nisi* in September 2012. W applied for *decree nisi* to be rescinded, or dismissed for want of prosecution. H applied for it to be made absolute. W petitioned for divorce and made an application for financial remedies.

The main reason for the dispute over the date of divorce was that H had become exceptionally wealthy since 2012. The parties had focussed their submissions on the question of whether or not the parties reconciled but HHJ Vincent did not find that specific question to help her [50-51]:

> *'So while it is relevant for me to consider whether or not the parties have reconciled since the making of the decree nisi, I determine the application by applying the framework provided to me by the Family Procedure Rules (and see paragraph 39 Cazalet). I must consider the explanation for why the application was not made earlier, consider whether or not the husband and wife have lived together, and if so when, and then decide how to exercise my discretion.*
>
> *In determining both applications (for rescission and making of decree absolute) I must consider whether the conditions for making decree nisi are still met. Is the evaluative exercise carried out upon granting the decree nisi which led to the conclusion that the husband could not reasonably be expected to live with the wife, and that the marriage had irretrievably broken down still valid? (Cazalet, per King LJ, at paragraph 54).'*

HHJ Vincent found that the parties were reconciled, living together and sharing a common life between August 2012 - March 2013. This constituted a material change of circumstances which invalidates the fundamental assumption upon which the *decree nisi* was made. The conditions to grant *decree absolute* were not met – it could not be said that the marriage had broken down irretrievably, nor that it was unreasonable to

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expect the petitioner to live with the respondent. This established a ground for recission and was a magnetic weight in the court's consideration of the application for decree absolute. From April 2013 and until February 2020 they did not live together, but they did share a common life. Again, their conduct towards one another throughout this period constituted a material change of circumstances which invalidated the fundamental assumption upon which the decree was made. Even though the parties did not live together, the circumstances were also sufficient to lead the judge to exercise her discretion by refusing to make the *decree absolute* and to rescind the *decree nisi*.