PUMP COURT

CHAMBERS

The Oxford Union Society
31 October 2019
FINANCIAL REMEDIES UPDATE
Edward Boydell

75 years

Waggott v Waggott [2018] EWCA Civ 727 (Income needs / earning capacity)

12 year marriage 1 child. H 53, W 47.

Just under £20m assets. H's annual income £3m.

First instance judge awarded W £9.76m in capital assets which represented about 50%.

Deducting housing and other capital needs, the judge calculated that W would have £3.5m of free capital. Applying a discount rate of 1.76%, she would receive a net return of £60,000 pa. He assessed her ongoing income needs at £175,000 requiring continuing PPs to meet the shortfall.

The judge found, therefore, that W could not adjust without undue hardship to the termination of maintenance.

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Waggott v Waggott [2018] EWCA Civ 727
(Income needs / earning capacity)

W appealed submitting that H's earning capacity was a matrimonial asset in which she was entitled to a share as with any other asset, since it had been built up during the marriage and was therefore the product of marital endeavour.

H appealed on the basis that the judge had failed to give appropriate weight to the clean break principle.

W's appeal was dismissed and H's allowed.

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Waggott v Waggott [2018] EWCA Civ 727 (Income needs / earning capacity)

CA held that an earning capacity was not capable of being a matrimonial asset to which the sharing principle applied.

If it was, then theoretically this could apply to every case in which one party's earnings were greater than the other, regardless of need.

The sharing principle applied only to 'the property of the parties' (Charman) and an earning capacity was not property.

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Waggott v Waggott [2018] EWCA Civ 727 (Income needs / earning capacity)

W's argument that her capital should be preserved and not used to meet her housing need was rejected.

If that argument was right, then this would conflict with the statutory steer towards a clean break because absent other income, a spouse would always have a claim for an additional award to meet income need.

As a matter of principle, the Court would apply the need principle when determining whether the sharing award was sufficient to meet that party's future needs.

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Waggott v Waggott [2018] EWCA Civ 727 (Income needs / earning capacity)

It could not be argued that the compensation principle was relevant to the situation where, as here, a party had obtained a financial advantage by reason of the marriage rather than a disadvantage.

That did not mean that earning capacity was irrelevant, it could be relevant to the fair distribution of assets pursuant to the sharing principle.

It could also be relevant when the court was deciding whether capital should be amortised in full, in part or not at all and when deciding what assumed rate of return to apply.

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Waggott v Waggott [2018] EWCA Civ 727 (Income needs / earning capacity)

Given the range of options from full amortisation to an assumed rate of return and the range of potential circumstances, including all the s.25 factors, it was difficult to see how a definitive outcome could be mandated for all cases.

However, the judge's approach here had been too narrow. He should have considered the situation more broadly by considering whether it would be fair for W to deploy part of her capital to meet her income needs. That was required so as to properly address the question of undue hardship and give proper weight to the clean break principle.

Waggott v Waggott [2018] EWCA Civ 727 (Income needs / earning capacity)

CA felt it had sufficient information to substitute its decision for that of the trial judge.

Applying a rate of 2.25% W's free capital would provide her with just over £100,000 a year. From age 60 (2028) W would, in addition, be able to draw a pension of £76,000 gross pa. Very broadly the two would produce £150,000 net pa. Additionally W would receive her state pension in due course.

W's income needs had, however, been determined at the sum of £175,000 pa. The Duxbury sum required to produce an annual income of £25,000 from age 60 would be £360,000.

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Waggott v Waggott [2018] EWCA Civ 727 (Income needs / earning capacity)

H was seeking a clean break in 2021. There would therefore be a shortfall for W between 2021 and 2028 of £75,000 pa (until her pension paid out, aged 60). Taking a simple arithmetical approach this would lead to shortfall of just under £600,000.

The total shortfall would, therefore, be in the region of £950,000. This would represent approximately 21% of her free capital or 10% of the total award.

"… *looking specifically at s.25A(2), it is plain to me that the wife would be able 'to adjust without undue hardship' to the termination of maintenance*" Per Moylan LJ.

Clean break ordered from 2021.

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O'Dwyer v O'Dwyer [2019] EWHC 1838 (Fam)

Francis J: on appeal from HHJ O'Dwyer at the CFC.

H is 62 y. W is 60 y. 28 year marriage and 4 adult children. c£6m assets shared equally.

At first instance judge awarded W PPs of £150,000 pa saying:

"*Why after divorce should only Mr O'Dwyer continue to live well upon [the income] when clearly it is the product of matrimonial endeavour?*"

Francis J allowed appeal and reduced PPs to £68,000 pa.

O'Dwyer v O'Dwyer [2019] EWHC 1838 (Fam)

Francis J follows *Waggott:*

The question of sharing an income stream is now settled:

[22] *"An award of periodical payments….must be based on properly analysed arithmetic reflecting need, albeit that the judge is still left with a significant margin of discretion as to how generously the concept of need should be interpreted"*

O'Dwyer v O'Dwyer [2019] EWHC 1838 (Fam)

And as to the use of capital to meet future income needs:

[35] *"It is clear that, in selecting the figure of £150,000 per annum by way of periodical payments, the judge intended that the wife should preserve her own capital during the period of the term order. I accept that to the wife there may seem to be an unfairness in the fact that she has to start living on her capital straightaway (whether or not amortised), whereas the husband does not. That, it seems to me, is the inevitable and direct consequence of the fact that an earning capacity is not subject to the sharing principle."*

O'Dwyer v O'Dwyer [2019] EWHC 1838 (Fam)

….and as to process:

[36] *"a judge is not entitled simply to take a round number without reference to any arithmetic, and in particular (a) the recipient's needs; (b) the income that the recipient's capital will generate and (c) whether or not the recipient's capital should be amortised; and, if so (d) from what date the recipient's capital should be amortised. Parties who conduct these cases up and down the land, often without the benefit of legal advice, need to know how judges alight upon a particular figure for periodical payments. Otherwise, discretion gives way to a risk of disorder or even chaos with people not knowing how or whether to settle."*

Brack v Brack [2018] EWCA Civ 2862
(Pre-Nuptial Agreement)

H and W were Swedish by birth and nationality. They married in 2000. They had 2 children. Latterly they had lived in the UK.

H was a racing driver. The assets in his sole name totalled £11m.

W was the homemaker following the birth of the parties' children. W had no assets save for a 50% share in the FMH worth c£900,000.

The parties had signed 3 PNAs. In summary they provided:

(1) Each party was to retain the property that each acquired independently prior to, or during, the marriage.
(2) There was to be no maintenance payable following separation.
(3) The City Court of Stockholm, Sweden, had jurisdiction to resolve any disputes arising out of their separation.

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Brack v Brack [2018] EWCA Civ 2862 (Pre-Nuptial Agreement)

At first instance Francis J decided:

(a) The PNAs were valid.
(b) On an analysis of the PNAs, there was a valid maintenance prorogation clause such that the issue of maintenance was the exclusive jurisdiction of the Swedish courts.
(c) The Court's jurisdiction was therefore confined to 'rights in property arising out of a matrimonial relationship'. He decided that this excluded any claim for needs but would include a sharing claim.
(d) However, the valid PNAs also excluded any sharing claim.
(e) Thus the judge had very limited jurisdiction to make any financial remedy orders and was driven to make orders under Sch 1.

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W appealed.

Brack v Brack [2018] EWCA Civ 2862 (Pre-Nuptial Agreement)

CA allowed W's appeal.

King LJ found on the facts that there was no valid maintenance prorogation clause. The English Court therefore had jurisdiction to make orders relating to W's maintenance.

By the time of the appeal hearing there was agreement that where a judge found there to be no vitiating features in relation to a PNA, he is entitled when applying the s.25 factors in his search for a fair outcome, to take into account needs, compensation and sharing. In other words, the fact of a valid PNA does not necessarily (but may) lead inexorably to a solely needs-based outcome.

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Brack v Brack [2018] EWCA Civ 2862 (Pre-Nuptial Agreement)

CA held that insofar as the judge felt he was in a 'straitjacket' and was driven to conclude he only had power to make a needs based order, he was wrong and had fallen into error:

Per King LJ:

"*… In my judgment, in the ordinary course of events, where there is a valid prenuptial agreement, the terms of which amount to the wife having contracted out of a division of the assets based on sharing, a court is likely to regard fairness as demanding that she receives a settlement that is limited to that which provides for her needs. But whilst such an outcome may be considered to be more likely than not, that does not prescribe the outcome in every case.*"

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Brack v Brack [2018] EWCA Civ 2862 (Pre-Nuptial Agreement)

"Even where there is an effective prenuptial agreement, the court remains under an obligation to take into account all the factors found in s.25(2) MCA, together with a proper consideration of all of the circumstances, the first consideration being the welfare of any children. Such an approach may, albeit unusually, lead the court in its search for a fair outcome, to make an order which, contrary to the terms of an agreement, provides a settlement for the wife in excess of her needs. It should also be recognised that even in a case where the court considers a needs-based approach to be fair, the court will as in KA v MA, retain a degree of latitude when it comes to deciding on the level of generosity or frugality which should appropriately be brought to the assessment of those needs."

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Versteegh v Versteegh [2018] EWCA Civ 1050 (Swedish Pre-Nup / Valuation of Business / *Wells* Order)

H and W both born and raised in Sweden. On the day before their wedding in Sweden W signed a PNA which set out a separation of property regime. W received no independent legal advice. After the marriage the parties moved to London.

H came from an affluent family and came to the marriage with substantial inherited and business assets.

At first instance W awarded approximately half of non-business assets (£51.4m) together with a 23.42% interest in a business called H Holdings, which had been created and run by H under a trust structure.

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Versteegh v Versteegh [2018] EWCA Civ 1050 (Swedish Pre-Nup / Valuation of Business / *Wells* Order)

W appealed arguing:

- No relevance to PNA as she had not had legal advice
- Judge wrong to find he was unable to determine the value or future liquidity of H's business
- Judge's erred in deciding to make a *Wells* order so that she received her interest in specie in the form of ordinary shares.

CA dismissed appeal.

Desirability of legal advice formed part of the miscellany of factors which a judge considered before concluding that a party did or did not have a full appreciation of the implications of the PNA.

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Versteegh v Versteegh [2018] EWCA Civ 1050 (Swedish Pre-Nup / Valuation of Business / *Wells* Order)

In the present case, the judge was fully aware that W had not received legal advice but, having seen her give evidence, made the clear finding that W knew '*full well*' the effect of the agreement.

When an English court was presented with a PNA, such as the present one, signed in a country where they were commonplace, simply drafted and generally signed without legal advice or disclosure, it could not be right to add a gloss to the principles established in *Radmacher* to the effect that such a spouse would be regarded as having lacked the necessary appreciation of the consequences absent legal advice to the effect that some countries in which they choose to live may operate a discretionary system.

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Versteegh v Versteegh [2018] EWCA Civ 1050 (Swedish Pre-Nup / Valuation of Business / *Wells* Order)

The case was a sharing case, but that did not '*catapult*' a court to the conclusion that the only fair distribution of assets was now an equal division, subject only to an appropriate adjustment to reflect H's pre-marital assets.

An effective PNA was another example of a case where, under s.25(1) MCA, a court could conclude that the assets should be divided unequally.

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Versteegh v Versteegh [2018] EWCA Civ 1050 (Swedish Pre-Nup / Valuation of Business / *Wells* Order)

When the Court was considering pre marital assets, the CA said there two different schools of thought:

(a) On the one hand, the "*arithmetical approach*" per Wilson LJ (as he then was) *Jones v Jones* [2011]

(b) On the other, the "*impressionistic approach*" preferred by Moylan LJ in *Hart v Hart* [2017], where the court considers nature and quality of the non-matrimonial wealth and in the exercise of discretion, makes a fair allowance for the introduction into the marriage of that wealth.

CA concluded Judge had been entitled, and really had no option, but to give weight to the non-matrimonial assets in a more general way, as part of the totality of his discretionary exercise, as opposed to the arithmetical or scientific approach.

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Versteegh v Versteegh [2018] EWCA Civ 1050 (Swedish Pre-Nup / Valuation of Business / *Wells* Order)

The application of this '*impressionistic*' approach was preferable in the circumstances of the present case. This involved consideration of not only the non-matrimonial assets, but the PNA and all the circumstances of the case before the judge reached the conclusion that W should receive 50% of the non-business assets and 23.5% of the business assets.

Notwithstanding that a total of £2m had been spent on experts, judge was justified in coming to the conclusion that he was unable to make even a conservative estimate as to the value of H Holdings.

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Versteegh v Versteegh [2018] EWCA Civ 1050 (Swedish Pre-Nup / Valuation of Business / *Wells* Order)

Per King LJ

"It is undoubtedly far more satisfactory for all concerned if a court can, with sufficient confidence, settle on a valuation of a business to the necessary standard of proof, that is to say the balance of probabilities. Not to do so is unsatisfactory for the applicant (still often the wife) and is often equally frustrating for the respondent (husband) particularly if the result is, as in this case, the making of a Wells order.

Notwithstanding the disadvantages of the present situation, considerable unfairness can be caused to either, or both, parties if the approach is to be that in a sharing case, there is an absolute requirement on the court to settle on a valuation (come what may) and that, if the variables render such a valuation to be particularly friable, the court should simply adopt a conservative figure".

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Versteegh v Versteegh [2018] EWCA Civ 1050 (Swedish Pre-Nup / Valuation of Business / *Wells* Order)

Unattractive as a *Wells* order was, as an outcome for both W and H, it was hard to know what else the judge could have done given the impossibility of valuing the shares or estimating future liquidity.

Valuations of shares in private companies are amongst the most fragile that can be obtained, given especially their want of exposure to the real market.

PUMP COURT
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Martin v Martin [2018] EWCA Civ 2866
(Valuation of Business)

Parties married in 1989. 2 Children. H owned a company he had started in 1978 and the couple owned several homes.

At first instance, Mostyn J ([2018] 1 FLR 313) determined that the current value of the company was £221m. Taking a '*straight line*' apportionment approach, he decided that 20% of the company's value was non-marital. This led to a net marital wealth of £146m. He ordered H to pay W a lump sum of £73m, £20m of which was to be paid in 2 years.

He held that a valuation of an asset was the estimate of what it would sell for now. If it was perceived as being hard to realise, then its value would be discounted to reflect that difficulty. To use discounted figures and then to move away from equality was to take into account realisation difficulties twice.

Martin v Martin [2018] EWCA Civ 2866 (Valuation of Business)

W appealed the judge's determination of what part of the parties' current wealth was properly to be defined as non-marital.

H appealed the gross valuation of £221m of the business.

Per Moylan LJ: Valuations of private companies could be fragile and had to be treated with caution. In practice the broad choices were (a) 'fix' a value, (b) order the asset to be sold; or (c) divide the asset in specie.

Miller & McFarlane per Lord Nicholls "*valuations are often a matter of opinion on which experts differ. A thorough investigation into these differences can be extremely expensive and of doubtful utility*".

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Martin v Martin [2018] EWCA Civ 2866 (Valuation of Business)

H v H [2008] 2 FLR 2092 Per Moylan J:

"I understand, of course, that the application of the sharing principle can be said to raise powerful forces in support of detailed accounting. Why, a party might ask, should my 'share' be fixed by reference other than to the real values of the assets? However, this is to misinterpret the exercise in which the court is engaged. The court is engaged in a broad analysis in the application of its jurisdiction under the Matrimonial Causes Act, not a detailed accounting exercise."

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Martin v Martin [2018] EWCA Civ 2866 (Valuation of Business)

"… even when the court is able to fix a value this does not mean that that value has the same weight as the value of other assets such as, say, the matrimonial home. The court has to assess the weight which can be placed on the value even when using a fixed value for the purposes of determining what award to make. This applies both to the amount and to the structure of the award… I would also add that the assessment of the weight which can be placed on a valuation is not a mathematical exercise but a broad evaluative exercise to be undertake by the judge."

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Martin v Martin [2018] EWCA Civ 2866 (Valuation of Business)

"*I would also add that this is not, as Mostyn J suggested, to take realisation difficulties into account twice. Nor, as submitted by Mr Pointer, will perceived risk always be reflected in the valuation. The need for this approach derives from the fact that, as said by Lewison LJ, there is a 'difference in quality' between a value attributed to a private company and other assets. This is a relevant factor when the court is determining how to distribute the assets between the parties to achieve a fair outcome*."

If an expert has given a bracket, it might be reasonable to assume that a figure in the middle is likely to give a sufficient *indicative value* for the purposes of a financial remedy application.

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Martin v Martin [2018] EWCA Civ 2866 (Valuation of Business)

W's appeal: Judge had been entitled to take a straight line apportionment approach.

H's appeal: The Judge's determination of the gross value of the business was not wrong, even though the reasons he gave were '*sparse*'. However, he had erred in saying that "*the only difference between (the company) and its cash proceeds is… the sound of the auctioneer's hammer*" and he had failed to consider whether his award achieved a fair division of the copper-bottomed assets and the illiquid and risk laden assets.

His determination that H should pay W £20m within 2 years was flawed. The fairest way of dealing with these errors was to substitute 4 annual instalments of £5m.

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C v C (Post-Separation Accrual: Approach to Quantification of sharing claim where non-matrimonial property) [2018] EWHC 3186

H and W in mid 40s. Married in 2008. 2 children aged 9 and 6. H employed by investment bank in senior position.

Global asset base of £26.2m but significant element of post-separation accrual, calculated at £6.5m.

H proposed a 60:40 division which would leave W with assets of roughly £10.2m.

Roberts J: W's entitlement to claim any part of the post-separation accrual had to be based on a legitimate needs based claim. £10.2m fair, representing as it did 52% of the matrimonial assets.

So no white leopards here…

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Tattersall v Tattersall [2018] EWCA Civ 1978 (Capitalisation of periodical payments)

H and W married in 2000 and separated in 2010. They had one child. Capital had been divided unequally in 2012 to enable W to purchase accommodation for herself and their child. H was ordered to pay global PPs at rate of £1,070 pm until 2020.

H applied in 2014 to vary the PPs order but did not pursue the application.

H failed to comply with the PPs order. A judge gave W permission to enforce all arrears which she determined to be £16,340. Another judge then made an order capitalising the PPs. He determined the sum payable to 2020 would total just over £84,000 but he discounted the sum for early receipt, by reference to the Ogden tables, to just over £74,000.

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Tattersall v Tattersall [2018] EWCA Civ 1978 (Capitalisation of periodical payments)

H argued on appeal that the judges should not have determined either W's enforcement application or her capitalisation application pending determination of his variation application. He also argued that the amount of the order was too high.

CA held the judges had been entitled to determine W's applications. There was no principle which required a judge to adjourn such application pending a variation application. Otherwise the process could be too easily manipulated, if not subverted. It was a matter for the judge to decide how to proceed having regard to the circumstances of the individual case.

Judge should have used Duxbury rather than Ogden but his use of the latter was not an error of law.

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SR v HR & SC (Trustee in Bankruptcy of HR) [2018] EWHC 606 (Variation of Final Orders / Interim Orders for Sale)

Property adjustment orders had been made by consent between H and W. W appealed an implementation issue and the Judge decided to discharge the original orders and replace them with new orders. H had been made bankrupt a month prior to the new orders. H and trustee in bankruptcy appealed.

Mostyn J allowed the appeal. S.31 MCA contained the powers of variation and discharge. Parliament had been careful to keep those powers tightly confined. The only capital order that could be varied was a lump sum by instalments. An order for sale under s.24A could be varied but not the underlying capital award to which it attached. A '*liberty to apply*' clause did not entitle a court to rewrite non-variable capital awards and make different ones. Equally the fact that dismissal did not take place until there had been full compliance did not entitle a court to replace an executory order with a new one.

SR v HR & SC (Trustee in Bankruptcy of HR) [2018] EWHC 606 (Variation of Final Orders / Interim Orders for Sale)

An additional reason for setting aside the order was that H was bankrupt and therefore all his property vested in his trustee in bankruptcy. He therefore did not have property capable of being taken from him and given to W.

There was a difference of opinion as to whether an interim order for sale could be made under r.20.2(1)(c). Until the issue was resolved by a higher court, applications for interim sale should be made under the MWPA 1882, s.17. Such an application was to be made in short form under the Part 18 FPR procedure.

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LKH v TQA AL Z (Interim Maintenance: Costs Funding [2018] EWHC 1214

W applied for interim maintenance and costs funding in a Part III MFPA 1984 case after a foreign divorce.

Holman J ordered H to pay the sum of £26,000 pm for W and the parties' children.

W had incurred debts amounting to several hundreds of thousands of pounds. These were not debts she was contractually bound to repay at the moment nor were they very pressing. Maintenance was designed to cover current and future liabilities. Were the court to make provision for substantial monthly sums referable to past and existing debts, it would impermissibly be making a form of a capital provision disguised as maintenance.

LKH v TQA AL Z (Interim Maintenance: Costs Funding [2018] EWHC 1214, 2436

W owed her solicitors over £200,000. The Court had been asked to make provision for her to start paying off that indebtedness at the rate of £30,000 pm. That would not be appropriate. Applying the principles in *Rubin,* a LSPO would normally only be applied to the payment of future costs, and not costs already incurred. That was not to say that an order to cover historic costs would not be possible under any circumstances but such an order should only be made very sparingly.

Order made for £40,000 per month to be paid by H to W's solicitors for future legal costs.

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LKH v TQA AL Z (Interim Maintenance: Costs Funding [2018] EWHC 1214, 2436

H did not comply with either order. He sacked his solicitors and paid his new solicitors £95,000 in fees shortly thereafter.

Matter came back before Holman J, who made a "*pound for pound*" LSPO, so that for every pound H pays his solicitors, he must pay the same amount to W's solicitors. It was intolerable and an affront to justice that H had paid £95,000 to his own solicitors at a time when he was already in arrears with W and her solicitors.

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Moher v Moher [2019] EWCA Civ 1482

H was 53 and W was 45. They married in 1995 and separated in 2016. They had three children aged between 10 and 21, all financially dependent.

HHJ Wallwork (sitting as a Deputy High Court Judge) concluded that H had failed provide full and frank financial disclosure. Order that H was to pay W lump sum of £1.4m with interest to accrue at the judgment debt rate if all or any part was unpaid, plus PPs at the rate of £22,000 pa until the later of the grant of a Get or the payment of the lump sum and any interest accrued. H to pay £52,000 costs.

Under s. 10A, H was also prohibited from applying for DA until a declaration had been filed by parties that they had taken steps to require the dissolution of the marriage by a Get.

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Moher v Moher [2019] EWCA Civ 1482

H appealed, submitting the judgment failed to sufficiently evaluate his financial resources and that a judge must provide a figure or bracket of figures for undisclosed resources, citing Mostyn J's comments in *NG v SG (Appeal: Non-Disclosure) [2012] 1 FLR 1211*.

CA (Moylan LJ): Disagreed with Mostyn J.
There is no requirement to provide a figure or bracket for undisclosed resources (*Behzadi v Behzadi [2008] EWCA Civ 1070*). To impose this requirement in all non-disclosure cases would be contrary to the overriding objective and may impede achieving a fair outcome.

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Moher v Moher [2019] EWCA Civ 1482

The court should seek to ensure the non-discloser does not obtain a better outcome than that which would have been ordered had they provided disclosure. Guidance:

- Seek to determine the extent of the non-disclosing party's financial resources, as required by s 25 MCA.

- Draw such adverse inferences as justified, having regard to the nature and extent of the party's failure to engage with the proceedings. Does not extend to conducting a disproportionate enquiry or pure speculation (*Petrodel Resources Ltd v Prest [2013] UKSC 34*).

- Where appropriate, infer that the true extent of resources means that the proposed award is fair (*Al-Khatib v Masry [2002] EWHC 108 (Fam); Ben Hashem v Ali Shayif [2008] EWHC 2380 (Fam)*).

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Moher v Moher [2019] EWCA Civ 1482

General guidance in relation to judgments in FR cases (par. 114):

(i) Every financial remedy judgment should clearly set out the judge's conclusions in respect of each of the relevant section 25 factors as part of the substantive structure of the judgment and/or by way of a summary.

(ii) This includes by providing, even in a non-disclosure case, a schedule "of the parties' visible net assets”; and

(iii) Every financial remedy judgment should clearly set out how the award has been calculated.

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Shokrollah-Babaee v Shokrollah-Babaee
[2019] EWHC 2135 (Fam)

Final hearing before Holman J of enforcement proceedings by W, with a cross-application by H to vary the substantive order. W was LIP, H represented by counsel not previously involved.

There had been at least 15 hearings, and the parties had spent over £2.2m on costs.

On day 2 of the hearing, H revealed in his evidence in chief that Holman J had conducted the FDR in December 2017. Holman J immediately stopped the proceedings to consider the issue.

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Shokrollah-Babaee v Shokrollah-Babaee
[2019] EWHC 2135 (Fam)

Holman J was clear that whilst he had no recollection of the FDR, had he been aware he conducted the FDR he would not have commenced the hearing.

Both parties urged Holman J to continue the hearing, despite rule 9.17(2) of the FPR, which states that, '*The judge hearing the FDR appointment must have no further involvement with the application, other than to conduct any further FDR appointment or to make a consent order or a further directions order.*'

The Husband argued that the overriding objective enabled rule 9.17(2) of the FPR to be interpreted to permit this, given that both parties sought for Holman J to continue, the hearing was well under way, and costs had been incurred.

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Shokrollah-Babaee v Shokrollah-Babaee
[2019] EWHC 2135 (Fam)

Held: the word *'must'* in rule 9.17(2) meant that it was mandatory and excluded discretion.

'Application' was not defined in rule 9.17(2), but rule 9.1 stated that *'The rules in this Part apply to an application for a financial remedy'*. Financial remedy was defined in rule 2.3 as including a 'financial order' which included a variation order.

A judge who heard privileged matters at an FDR could not therefore hear subsequent applications in the case, including enforcement applications.

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Shokrollah-Babaee v Shokrollah-Babaee
[2019] EWHC 2135 (Fam)

Holman J further considered *Myerson v Myerson* [2008] EWCA Civ 1376. Whilst there had been some discussion of waiver in *Myerson* (see LJ Lawrence Collins' judgment), to the effect the policy behind the rule would not be undermined by allowing the parties to waive the requirement, that was obiter. If there were to be any suggestion that waiver be permitted, it should be written into the FPR.

Holman J ordered the matter be listed afresh before another judge for hearing.

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