PUMP COURT

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FAMILY FINANCE UPDATE

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La Carte

- Hors d'Oeuvres
  - Juicy FPR amendments
- Les plats
  - Meaty case law
- Desserts
  - A delicious clarification of what is a non-marriage

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FPR amendments

Key amendments to FPR took effect from 6th July 2020

1. Costs estimates - r9.27
2. Open proposals after FDR - r9.27A
3. No unilateral communications with the court – r5.7

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(1) FPR - costs

1. Costs estimates r 9.27

- Not less than one day before every hearing (save for final hearing) parties must file and serve estimate of:
  - costs incurred up to date of that hearing; and
  - At first appointment estimate of costs to FDR
  - At FDR estimate of costs to final hearing

- Not less than 14 days before FH each party must file and serve a statement giving full particulars of all costs incurred or expected to be incurred - to enable Court to take account of parties' liabilities for costs when deciding what FR order to make

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- Costs schedule must be accompanied by statement of truth – signed by solicitor
- Must include confirmation they have been ‘discussed’ with client

- Each party must bring copies of costs schedules to court for each hearing
- Orders must have recital recording each party’s estimate of future costs
- If a party fails to provide costs schedules - that must be recorded on Order and the Court must direct that such be filed and served within 3 days (or such other period as court directs)

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(2) FPR - open proposals

2. Open proposals after FDR - new r 9.27A

Duty to make open proposals within 21 days of unsuccessful FDR

9.27A-(1) Where at an FDR appointment the court does not make an appropriate consent order or direct a further FDR appointment, each party must file with the court and serve on each other party an open proposal for settlement-

(a) by such date as the court directs, or

(b) Where no direction is given under subparagraph (a), within 21 days after the date of the FDR appointment.

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Duty to make open proposals …… where there has been no FDR

9.27A-(2) Where no FDR appointment takes place, each party must file with the court and serve on each other party an open proposal for settlement-

(a) by such date as the court directs, or

(b) Where no direction is given under subparagraph (a), not less than 42 days before the date fixed for the final hearing.

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PD28A para 4.4 (with effect from 27th May 2019)

- Consider including this at the beginning of open offer letters -

"…The court will take a broad view of conduct for the purposes of this rule and will generally conclude that to refuse openly to negotiate reasonably and responsibly will amount to conduct in respect of which the court will consider making an order for costs.

This includes in a 'needs' case where the applicant litigates unreasonably resulting in the costs incurred by each party becoming disproportionate to the award made by the court.

Where an order for costs is made at an interim stage the court will not usually allow any resulting liability to be reckoned as a debt in the computation of the assets."

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FPR changes in practice

MB v EB [2019] EWHC 1649 – preliminary issues

(no.2) [2019] EWHC 3676 – whether H had outstanding needs claim

both Cohen J

- June 2019 determined preliminary issues. Answer - no grounds for agreement to be vitiated save for potential argument that did not meet needs.
- Case adjourned to consider 'needs' claim of H

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- December 2019 hearing - H's needs assessed at £25k pa (he had sought £30k). Award of £325k lump sum to meet income needs & a further £10k for a new car

- H sought costs

- Cohen J took into account W's open offers:
  - June 2018 - W had offered £300k; No response by H
  - September 2019 - W then increased offer to £336k; No response by H until week before the hearing

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- H's offer week before the hearing was:
  - W transfer H the flat she owned above his; worth £400k
  - W pay H lump sum £527k
  - W forgo charge in her favour of £236k (W had provided sum by way of LSPO to assist with H's costs)

  Total *c.£1.3 million*

- H's offer '*was about as far wide of the mark as can be imagined'*
- Case should have been 'very easy to settle' - as Duxbury fund easy to calculate. H criticised for failing to 'come back with any form of constructive offer'
- Reason not settled 'is because of the way that the husband has chosen to run his case'

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- H's had spent £650k on legal costs
  - £236k funded by W; £36k paid by H and £380k outstanding (inc. interest)
- 'Wholly disproportionate' costs - should have been a straightforward needs case
- Cohen J quoted PD28A para 4.4
- Concluded W's first open offer was 'light' but was a good starting point for negotiations – unlike H's belated and 'massively overcooked' open offer only a week before the hearing
- W's liability for H's costs capped at £150k
- Left H owing his solicitors 'a substantial sum' unpaid costs; 'That is a matter between him and them': Cohen J!

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OG v AG [2020] EWFC 52 – Mostyn J

'…Loud and clear: if, once the financial landscape is clear, you do not openly negotiate reasonably, then you will likely suffer a penalty in costs.

This applies whether the case is big or small, or whether it is being decided by reference to needs or sharing'

- Costs of over £1m. H ordered to pay 45% of W's costs
- H's conduct:
  - Due to H's 'pure bloody-mindedness'
  - H's 'abysmal, and let there be no doubt, dishonest, presentation'
- But W should have made a reasonable open offer once there was sufficient disclosure from H – her open position was unreasonable
- Para 4.4 PD28A 'is extremely important'

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3. No unilateral communications with the court – new r5.7

- Formal requirement to copy in one's opponent/ LIP to all substantive communications with court
- Include declaration - copied to other party
- Failure to comply: court will return to sender without considering contents & may exercise Part 4 case management powers

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Enforcement

HR v DS [2019] EWHC 2425 - Cohen J

- Hadkinson Order applied in novel circumstances –

- £37k Costs order made against H in failed FLA 1996 application. H's daughter sought to exclude W's new husband from the FMH. HHJ Brasse *'seeing H's hand behind the litigation'* of his daughter
- In FR proceedings - H agreed child maintenance order of £5k/pm
- Direct result of the FLA costs order was H stopping W's child maintenance payments
- H appealed dismissal of FLA 1996 application and costs order

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- W sought Hadkinson order - barring H proceeding with FLA costs order appeal until H made good his breach of child maintenance payments
- Cohen J applied test in *Mubarak [2004] 2 FLR 932*
  - Is the party in contempt?
  - Is there an impediment to the course of justice?
  - Is there any other effective means of securing compliance?
  - Should the court exercise discretion and impose conditions having regard to whether contempt is wilful?
  - If so, what conditions would be proportionate?

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- Cohen J concluded Hadkinson order appropriate
  - Agreed with H's counsel Ms Bangay QC that the remedy may be a 'sledgehammer to crack a nut'
  - But H 'is a rich man' (a solicitor) who had chosen not to pay maintenance when he could 'easily' do so
  - Context of: 'some of the least attractive and commercially suicidal litigation that I have seen for a long while'
- Order provided unless H paid child maintenance due, H's FLA appeal (against costs orders) struck out
- First time Hadkinson order used to cover proceedings not identical to those in which breach claimed

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Reminder of Waggott principles

Waggott v Waggott [2018] EWCA Civ 727

- No sharing of post-separation income stream
- Payments ordered to cover need (and possibly, rarely, compensation)
- Capital award (and return therefrom) can be used to meet needs

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O'Dwyer: Application of Waggott

O'Dwyer v O'Dwyer [2019] EWHC 1838–Francis J

"It is now settled law that income cannot be shared"

- Appeal by husband Mr John O'Dwyer against order of HHJ O'Dwyer at the CFC
- Timings did not help HHJ O'Dwyer:
  - O'Dwyer order made in March 2018
  - Court of Appeal handed down *Waggott* judgment mid-April 2018
- HHJ O'Dwyer made SPP order for W having identified H's future business incomes as matrimonial property – Francis J disagreed

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- Confirms *Waggott* cannot be distinguished on the facts (as W sought to do) – ***no sharing of post-separation income*** is a principle that cannot be circumvented

- SPP "should be ordered only to meet needs or, possibly in some very rare cases, compensation"
- "Any remaining doubts as to whether an income stream is an asset which can be shared, save for the purposes of paying for needs or compensation, was clearly dispelled by the judgment of the Court of Appeal in *Waggott*"

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O'Dwyer is also interesting – r.e. **budgets**

- Failure to carry out budgetary analysis makes a decision vulnerable to appeal!
- "a judge is not entitled simply to take a round number without reference to any arithmetic" and without taking account of:
  - recipient's needs; and
  - Income that recipient's capital will generate; &
  - Whether or not the capital should be amortised; & if so
  - From what date capital should be amortised.
- "it is the judicial function to analyse the budgets put forward, albeit that a detailed analysis of every item is not required"

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Non-disclosure

Moher v Moher [2019] EWCA Civ 1482 – Moylan LJ, Rose LJ & King LJ

- Appeal to CA by H against decision of HHJ Wallwork

- Mr Moher had:
  - Failed to provide adequate financial disclosure
  - Ignored court orders
  - Conviction for post-separation assault & harassment of W
  - Obstructed FMH sale by contacting prospective purchasers

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- H appealed decision to award W lump sum £1.4m.
- H argued:
  - Trial judge should have made some attempt to quantify H's assets with either a figure or bracket
  - Evidence did not justify HHJ's finding that H could meet his needs
  - £1.4m was in excess of W's needs and not properly reasoned
  - £1m to meet W's income needs was a wrong determination

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- H argued Mostyn J's judgment in *NG v SG* obliged the court to "quantify the scale of the undisclosed financial resources by either giving a figure or a bracket" – the judge *must* quantify

- Moylan LJ disagreed –

- The court 'should attempt' quantification – but no straightjacket that it 'must' do so 'even when the evidence is not sufficient to support such an exercise'

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The approach the court should take to non-disclosure:

Moylan LJ; paragraphs 63-79 of judgment

N.B. supersedes & modifies previous guidance of Mostyn J in *NG v SG [2011] EWHC 3270*

1. Generally the court should seek to determine the extent of the financial resources of the non-disclosing party
2. The Court will be entitled to draw such adverse inferences that are justified having regard to nature and extent of failure to engage. This does not require the Court to engage in a disproportionate enquiry but nor should the court engage in pure speculation. Inferences must be 'properly drawn & reasonable'

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3. The court is not required to make a specific determination as to a figure or bracket. There will be cases where the manner in which a party has failed to comply with their disclosure obligations means that the court is unable to quantify the extent of the undisclosed assets.
4. The court is entitled, in appropriate cases, to infer that the resources are sufficient or are such that the proposed award does represent a fair outcome. (Moylan LJ did not endorse what Mostyn J said in *NG v SG* on this point.)
5. This approach is necessary to avoid a 'cheat's charter'; to ensure the non-discloser does not obtain a better outcome than that which would have been ordered if disclosure had been provided.

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Lump sum orders and interest

Moher also addresses lump sum payment & interest

- A lump sum order can be made on or after grant of decree nisi but it does not take effect until decree absolute; MCA 1973 s.23, s.24 and s.24B
- Orders for lump sums (and other relevant orders) should make clear it is payable on the stated date or the decree absolute, whichever is later
- Interest on a lump sum can be ordered to run from the date of the *order* - which can be before date of decree absolute

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What FR judgments should contain

Moher thirdly includes summary as to what every financial remedy judgment should contain:

- clearly set out conclusions in respect of each of the relevant s.25 factors as part of the substantive structure and/or by way of summary
- a schedule of the parties' *visible* net assets (even in a non-disclosure case)
- Explanation of how the award has been calculated

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Instruction of Experts

CM v CM [2019] EWFC 16 – Moor J

- First Appointment had been heard by Moor J which included directions for SJE business valuation
- FDA Order had set out the exact issues on which the SJE was to report
- Parties subsequently unable to agree the LOI
- LOI drafting dispute came back before Moor J - to his 'dismay'!

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Moor J's observations:

- High court judges are exceptionally busy
- They do not have time to draft LOIs or to determine disputes as to the wording of such letters
- 'If…there is a genuine issue as to drafting' – recommend IFLA to arbitrate on it
- Applicant ordered to pay Respondent's costs

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Instruction of Experts: tips to remember

- Part 25 applications should include draft LOI
- Include parameters of instruction and any issues to be set out in order itself
- To avoid numerous and time-consuming e-mail/letter exchanges arguing over content, finalise the order and terms (and content of LOIs) whilst at court

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CB v KB [2019] EWFC 78: Hot Tubbing

Mostyn J

- H bass player in well-known band.
- 19 year relationship producing 6 children (H expecting another with his new wife).
- Capital assets a little under £6million
- Principal issue was the value of H's future income streams arising from a multitude of sources.

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Hot Tubbing

H's income:

- Stream 1: royalties for three songs written by him
  - Valuations only £5k apart so split the difference
- Stream 2: equitable remuneration for broadcast of band's songs on radio & TV
- Stream 3: royalties from lead singer, 8.33%. Element of gratuity and based on agreement.
- Streams 1-3 paid to a company
- Stream 4: 1/3 of recording royalties
- Stream 5: share of ticketing and merchandising income for touring

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Hot Tubbing

- Experts gave evidence concurrently: “hot-tubbing”
- Noted by Mostyn J that when considering multipliers there is a need for assessing such for similar type businesses
- Otherwise get to a situation where it is like:

“using the accounts of Tesco to value the village shop”

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Assessment of child maintenance

- Observation by Mostyn J that when considering assessment of child maintenance that:

"in every case where the gross annual income of non-resident parent does not exceed £650k, the starting point should be the result of the formula ignoring the cap on gross annual income of £156k pa"

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Assessment of W's income needs

Mostyn J [53]

- *"struggle to conceive of a case where in assessment of a claimant's needs it could tenably be argued that it was reasonable for her not to have to spend her own money in meeting them...*
- *That is what money is for. The contrary argument would be that it would be reasonable for a respondent to have to fund a claimant's testamentary ambition...*
- *I cannot conceive of a case where that could be said to be reasonable"*

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Role of FDR Judge post hearing

Shokrollah-Babaee v Shokrollah-Babaee [2019] EWHC 2135 – Holman J

- Matter came before Holman J for final hearing of W's enforcement proceedings and H's cross-application to vary substantive order.
- On second day of hearing H (in evidence) revealed Holman J had conducted FDR

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Role of FDR Judge post hearing

- Holman J considered FPR r9.17(2) which states:

The judge hearing the FDR appointment must have no further involvement with the application, other than to conduct any further FDR appointment or a further directions order"

- Since word 'must' was mandatory then no discretion.
- Holman J not persuaded there was scope for a waiver of the rule, leaves door open for Court of Appeal.

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Behbehani: Capital Orders and third parties

Behbehani v Behbehani [2019] EWCA Civ 2301

- 2008 - H ordered to pay £20million to W but failed to pay anything by backstop date of 16.12.2018, nor any SPPs
- H had been found in 2008 to be beneficial owner of 99.14% of shares in Spanish Company (through structures)
- 2017 - A without notice order had been made (on W's application) appointing receivers of shares
- 2018 - Receivership order set aside on application by other parties.
- W appealed the set aside order.

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Capital Orders and third parties

Guidance

- If a transfer of an asset is sought and it is asserted that belongs to a third party, then usually appropriate to join third party for ownership to be determined.
- If another form of relief (such as lump sum) based on value of the paying party's wealth which is disputed on basis that assets attributed belong to third party, then disproportionate to join third party.
- May be cases when appropriate but it should not be the rule.

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Capital Orders and third parties

- In enforcement proceedings, where a claimant seeks to enforce a lump sum order against assets held by a third party which claimant asserts are owned by the other spouse, the third party should be joined.
- A third party can assert their rights when they become directly affected by an application to enforce an order against assets they claim as theirs.

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Adjourning Capital Claims

Joy v Joy [2019] EWHC Civ 2152 –Cohen J

- Same litigants as Joy v Joy-Morancho in 2015
- Original final hearing in 2015. SPPs @ £120k pa and capital claims adjourned
- Judge took view H's exclusion from the trust was a device.
- Shortly after, H applies to vary SPPs but dismissed in July 2017.
- December 2017 - W's capital claims back before the court. H in arrears and W in dire straits

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Adjourning Capital Claims

Joy v Joy [2019] EWHC Civ 2152 –Cohen J.

- H sought dismissal of W's capital claims.
- Cohen J after reviewing many authorities did adjourn further until 31st July 2022 and if not restored by then shall be dismissed
- H ordered to provide information annually as to any changes in his financial position and to (initially in first year) disclose list of assets.
- Also to provide annually disclosure as to real property he has use of.

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Adjourning Capital Claims

Cases referred to:

- MT v MT – H did all he can to avoid W frustrate W's claims so Bracewell J had adjourned W's capital claims until death of H's 83year old father
- Quan v Bray – Very poor conduct by H and Mostyn J had found that it is foreseeable that at some stage in the future H will have accumulated sufficient sums to make a proper clean break capital settlement on W
  - Adjourned without limitation of time

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Adjourning Capital Claims

Joy v Joy [2019] EWHC Civ 2152 –Cohen J

- On review of cases they are either:
  - Where there is an expectation of inheritance; or
  - Expectation of bonus or gratuity
- Poor conduct particularly in MT v MT and Quan v Bray
- Haskell v Haskell [2019] EWHC 3434 (Fam) – Mostyn J finds the middleground
- And AW v AH [2020] EWFC 22 (Roberts J) – fairly indeterminate adjournment

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Adjourning Capital Claims

Summary

- Exception rather than the rule
- Generally need a specific circumstance or a foreseeability of such which would, once it occurs, allow resources to become available to effect a fair capital outcome
- Ongoing spousal provision orders and the availability of capitalisation of such is not the same as adjourning (separate) capital claims
- the first is limited to capitalisation of the income order only and the latter is wider

Pensions: *W v H*

- HHJ Hess confirms approach to pensions set out in PAG report July 2019
- £2.35m of pensions still a needs case
- Income rather than capital sharing
- Ring-fencing an uphill struggle
- 2 subsequent appeal decisions:
  - KM v CV [2020] EWFC B22
  - RH v SV [2020] EWFC B23

Compensation: *RC v JC*

- Nothing strictly new, application of Miller/ McFarlane
- Remains unusual to find that relationship generated disadvantage leads to compensation claim
- "*Litigants should think long and hard before launching a claim for relationship generated disadvantage and they should not take this judgment as any sort of "green light" to do so unless the circumstances are truly exceptional.*"

Nullity or non-marriage: *Akhter v Khan*

- Williams J at 1st instance: "marriage entered into in disregard of certain requirements" so void, not non-marriage
- Decision of Williams J overturned on appeal by the Attorney General – Williams J stretched too far in trying to achieve fair result for petitioner.
- Law Commission due to report next year on law reform for marriage ceremonies

Last Orders: *TT v CDS*

- Appeal to EWCA from decision of Cohen J
- Litigation "destructive" and Cohen J took into account H's litigation misconduct when making award. H appealed, partly on basis it was unclear whether judge was relying on conduct.
- EWCA: litigation conduct can come under s.25(2)(g)
- EWCA: Conduct can reduce award below needs

Thank you for listening!

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