PUMP COURT

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Headline cases of 2021 and what to watch out for in 2022

Oliver Peirson

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Covid-19

Background

***Cornick v Cornick* [1994] 2 FLR 530**

Hale J.

Distinguished between:

- Situations where an asset changes value within a short period of time owing to natural processes of price fluctuations = not a *Barder* event; and
- Where something unforeseen and unforeseeable happened since the hearing which has altered value of assets so dramatically as to bring about substantial change in balance of assets brought about by the order – may fall within *Barder.*

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2008 financial crash:

Example of one attempted *Barder* appeal:

***Myerson v Myerson (No 2)* [2009] EWCA Civ 282**

- Dramatic fall in value of H's shares meant W received over 100% of assets.
- Not *Barder* event.
- CoA confirmed that natural processes of asset value fluctuations, however dramatic, do not satisfy *Barder* criteria.

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***FRB v DRC (No 3)* [2020] 3696 (Fam)**

- Cohen J. - 21.12.20
- Final hearing Feb 2020
- Draft judgment circulated on 28.2.20
- Known marital acquest = £128m to be shared equally.
- W's £64m to comprise FMH at £15m plus lump sum of £49m by instalments.
- Hearing to hand down on 27.3.20 - 4 days after 1st lockdown.
- H counsel asked Cohen J to defer handing down on 27.3.20 on basis that economic effects of Covid-19 were likely to fundamentally undermine the basis of the order.
- Cohen J refused
- In judgment, Cohen J. had expressed concern about lack of evidence on H's liquidity –and raised possibility of H paying part of lump sum by asset transfer.
- H refused and elected to pay a lump sum by instalments
- H's proposed payment schedule accepted.

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***FRB v DRC (No 3)* [2020] 3696 (Fam)**

- £30m within 6 months
- £19m within 18 months
- 2 days before 1st instalment due H applied:
  - To vary quantum and timing of lump sum by instalments;
  - To set aside lump order under *FPR r9.9A / Barder*

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***FRB v DRC (No 3)* [2020] 3696 (Fam)**

- Application was never going to succeed – based on macro-economic situation rather than specific to his circumstances.
- Failure to provide even prima facie evidence that there had been fundamental change in H's worth was fatal to his case.

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Covid-19

***FRB v DRC (No 3) [2020]* 3696 (Fam)**

But, of more general application, per Cohen J.

- In respect of the two limbs to the application, "it would be exceptional for the court to vary the quantum of the lump sum in circumstances markedly different to those that would justify a *Barder* variation".
- Note the assumption that there is power to vary quantum under s31.
- It is essential in such applications to take a "long term view".
- Financial crashes are generally followed by recovery.
- By time of hearing the stock market indices had rebounded to above pre-Covid levels
- Most commentators believe that at some stage within next couple of years the world economy will be back where it was.
- H may have had an argument that timing of payment ought to be re-calibrated.

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Covid-19

HW v WW [2021] EWFC B20

HHJ Kloss

26.03.21

Para 1: "Is the Covid 19 pandemic and its impact upon the value of a key asset a sufficient ground to set aside a FR consent order?"

- FDR 12.3.20 – Settled. Order approved 13.3.20
- Series of lump sums totalling £1m.
- First lump sum £750,000 by 10.6.20.

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Covid-19

HW v WW [2021] EWFC B20

- On 5.6.20 H applied to 'stay' the lump sum for a period of 12 months with a review in 9 months on basis of "the catastrophic impact Covid-19 has had upon HW's ability to raise the series of lump sums".
- On 10.6.20 H did not pay £750k due.
- On 20.10.20 W applied to enforce payment of lump sum
- On 2.11.20 – H applied to set-aside the entire order on basis that:
  - circumstances that were unforeseen and unforeseeable have significantly changed the assumptions upon which the order was made; and
  - H could not now meet the terms of the order.
- H estimated value of company had fallen from £3.5m to £1,265,000.

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Covid-19

HW v WW [2021] EWFC B20

- Judge rejected W's argument that Covid pandemic was no more than the natural processes of price fluctuation so fell within first category in *Cornick* and the case of *Myerson.*
- "The Covid 19 pandemic is an extraordinary event, different in nature and scale, to any similar world event in the lifetime of the parties. This is not an issue of market volatility which is periodically experienced, neither is it a national issue with predictable localised causes. It is akin to a war, with tentacles spreading across the world. I therefore find that in principle, the Covid 19 pandemic can open the door to a successful Barder claim. **Myerson** can therefore be distinguished and this case, in principle, could fall within the third category in **Cornick"**

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Covid-19

HW v WW [2021] EWFC B20

- The 'event' was the Covid-19 pandemic and the consequential impact on the value and liquidity of the company.
- H had to prove that the event was unforeseen and unforeseeable.
- H failed to do so
- At the date of the FDR on 12.3.20 H could reasonably have foreseen that the pandemic might have had a significant impact on the trading position of his company.
- By 12.3.20, businesses were preparing for disruption, the stock market was declining dramatically and emergency economic measures being taken all over the world.
- Rejected H's argument that he would have to be reasonably able to foresee a risk of the full extent of the pandemic and the impact thereof.
- It was foreseeable that the pandemic would have an impact on the value and liquidity of the company. The fact that the full extent of the impact was not foreseeable did not matter.

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Covid-19

***BT v CU* [2021] EWFC 87**

Mostyn J.

1.11.21

- Final order – 10.10.19 DDJ Hudd
- Pre-Covid
- Assets £4.75m
- Divided 58% to H; 42% to W.
- H's share included his business – provided school meals.
- H to was to pay W £950,000 in a series of lump sums.
- Departure from equality justified on grounds:
  - Non-matrimonial element to business;
  - Shares had an element of risk and were not comparable to cash.
- Feb 2020 – Covid-19 pandemic reached UK
- March 2020 – all school closed
- 27 April 2021 – H applied under FPR r9.9A to set aside parts of order.
- H contented that arrival of the pandemic was both unforeseen and unforeseeable and its impact had devastating financial a consequences on him.

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Covid-19

BT v CU [2021] EWFC 87

- Preliminary issues for Mostyn J:
  1. Is Covid capable of being a *Barder* event?
  2. Had H established sufficient grounds to set aside the order?

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Covid-19

BT v CU [2021] EWFC 87

Answer to first question – Is Covid capable of being a *Barder* event?

"Probably not"

But, as always, it depends on the specific facts of the case.

Compare to HHJ Kloss' view in HW v WW.

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Covid-19

***BT v CU* [2021] EWFC 87**

- When assessing whether a new event was unforeseeable, the court should principally focus on the economic impact of the event rather than its cause or nature.
- A once-in-a-century global pandemic might not have been foreseeable but a business being devastated by an economic downturn, however caused, is foreseeable.
- Impact of Covid related economic downturn is essentially the same as the 2008 financial crash.
- In *Myerson* shares in husband's business were worth £2.17 each at time of final order. By time of appeal after 2008 crash they were just 72p. Yet application refused.

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Covid-19

***BT v CU* [2021] EWFC 87**

- Mostyn J. also considered whether the order could be varied because it was still executory – applying *Thwaite v Thwaite* [1982] Fam 1.
- In 4 recent cases it had been held that the court not only had power to stay the enforcement of an executory order, but to re-write such an order to provide for something completely different, with lower hurdle than set-aside applications.
- Mostyn J. did not agree with these decisions.
- There is nothing in s31 of MCA 1973 to suggest that its strict curtailment of the power of variation and discharge is confined only to which have been performed.
- Most *Barder* cases concern executory orders, including *Barder*. If *Thwaite* route were available then those cases were unnecessarily determined applying a set of principles far more rigorous than those required under the executory order doctrine.

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BT v CU [2021] EWFC 87

- Finally, considered whether quantum of lump sum could be varied under s31.
- Order was expressed as a series of lump sums
- But "objectively, and notwithstanding the camouflaging language, this was a lump sum payable by instalments".
- Listed many cases where it had been held that a lump sum by instalment was variable as to timing and quantum – including Cohen J. *(obiter)* in *FRB v DRC (No 3)*
- They were all wrong.

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Covid-19

BT v CU [2021] EWFC 87

- Overall quantum of a lump sum by instalments cannot be varied.
- Quantum can only be set aside or altered under the *Barder* doctrine.
- MCA s31 variation can only be re-calibration of the payment schedule.

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BT v CU [2021] EWFC 87

Post-script

" it should be clearly understood that my default position from now on will be to publish financial remedy judgments in full without anonymisation, save that any children will continue to be granted anonymity. Derogation from this principle will need to be distinctly justified by reference to specific facts, rather than by reliance on generalisations."

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Covid-19

***AJC v PJP* [2021] EWFC B25**

- DDJ David Hodson – CFC
- 9.1.21
- "Under what circumstances should a long-term nominal spousal maintenance order be activated, become a substantive order?"
- "Specifically should this be as a consequence of the financial difficulties arising from the lockdown"
- DDJ Hodson on nominal pps: "I consider it is an order which hasn't kept up with changes in clean break requirements. I believe it is an order which has had little examination over the years as to its merits and appropriateness".
- Little authority on conversion of nominal order into substantive pps.
- Anecdotal practice is that "only if there is a major and dramatic change in circumstances of childcare and ability of one parent to look after the children……Not provision to protect a spouse for many years in their own right".

PUMP COURT
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Covid-19

***AJC v PJP* [2021] EWFC B25**

- Consent order 2012 with nominal pps.
- Children now aged 17 and 14.
- Wife had been a pilot earning £65k
- Lost job at start of pandemic.
- Hoped to be working again once planes flying again.
- Application was for a short-term remedy.
- Receiving UC, child benefit and child support totalling £2,000 pm.
- Income need £3,500 pm

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Covid-19

AJC v PJP [2021] EWFC B25

- H's pre-pandemic income £7,900 pm net, which had reduced owing to pandemic
- Paid child support of £900 pm and school fees of £1,900 pm.
- Wife's case was the application should be treated as if it was an ordinary variation application.
- Judge disagreed – whereas substantive orders are always in a "state of flux" – can go up or down as circumstances change, applications to vary nominal orders should only be granted if there was a significant change in circumstances.

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Covid-19

***AJC v PJP* [2021] EWFC B25**

- Where:
  - the youngest child was 14;
  - the wife had been fully self-sufficient at time of the divorce and subsequently;
  - The change in circumstance was the economic impact of the pandemic which had effected billions

  It was not appropriate or reasonable to convert the order.
- Where misfortune or unexpected developments had nothing to do with having been married a decade before then it it is in 2021 no longer part of the policy and practice of our family law that one spouse should be responsible for the other.
- Losing a job through the consequences of the virus cannot be ascribed to a relationship generated disadvantage or even a loose causal connection.
- Application was determined at the first hearing under r9.20(1)

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Duty to Openly Negotiate Reasonably

FPR PD 28A – Costs in Financial Remedy Proceedings

Amended from May 2019 - Para 4.4

…..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..

FPR r9.27A – After unsuccessful FDR each party must file and serve an open proposal within 21 days of the FDR or by such date as the court directs.

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Duty to Openly Negotiate Reasonably

OG v AG [2020] EWFC 52

Mostyn J.

29.07.20

- £16m total assets
- Over £1m in costs – of which large part referable to H's litigation misconduct
- Sustained non-disclosure and altered an e-mail.
- H ordered to pay indemnity costs in respect of much of W's costs.
- Reduced by £50,000 because of W's failure to negotiate reasonably since PTR on 12.6.20, when the financial landscape was sufficiently clear.
- W was negotiating openly but not reasonably – sought a "penal" outcome.

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Duty to Openly Negotiate Reasonably

OG v AG [2020] EWFC 52

Para 31:

“It is important that I enunciate this principle loud and clear: if, once the financial landscape is clear, you do not openly negotiate reasonably, then you will likely suffer a penalty in costs. This applies whether the case is big or small, or whether it is being decided by reference to needs or sharing. ”

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Duty to Openly Negotiate Reasonably

***LM v DM (Costs Judgment)* [2021] EWFC 28**

12.03.21

Mostyn J.

- Applications for MPS, interim pps for children and LPSO.
- Not governed by no-order-for-costs general rule in FPR r28.3(5).
- But to a soft costs-follow-the-event-principle.
- Calderbank offers are admissible, but none were made.
- Result was “clearly a win for the applicant (W)”
- Aspects of H’s case were unreasonable
- Starting point was W should should be awarded her standard costs of application.
- The obligation to negotiate clearly applies to these interim proceedings notwithstanding that PD28A para 4.4 does not technically apply.
- W made no serious attempt to negotiate openly and reasonably.
- So, W deprived of 50% of the costs that would otherwise have been awarded.
- “Litigants must learn that they will suffer a costs penalty if they do not negotiate openly and reasonably”.

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Duty to Openly Negotiate Reasonably

***ND v GD* [2021] EWFC 53**

Peel J.

14.06.21

- 23 year marriage
- Assets £2.6
- Bulk of assets inherited by H 5 years before separation.
- 54 year old W diagnosed with Young Onset Alzheimers
- Agreed that it was a needs case in that W's needs exceeded her entitlement to a 50% share of the matrimonial assets of £750,000.
- W sought £1.2m; H proposed £750,000.
- Difference of £450,000 against total costs of £483,000.

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Duty to Openly Negotiate Reasonably

***ND v GD* [2021] EWFC 53**

- W awarded £950,000 – which met her needs after legal costs paid.
- Slightly closer to H's open position than W's.
- H had not negotiated openly and reasonably
- H did not make an open offer until 6 weeks before Final Hearing
- W had made an open offer a year before.
- Peel J. stated that Mostyn J's message in *OG v AG* must be fully taken on board by all those who practice in this field.
- BUT did not make a costs order because the net effect of the final order was to put W in a position where needs are met after repayment of all her costs, so the husband was already paying her costs out of his non-matrimonial assets.

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Duty to Openly Negotiate Reasonably

***A v R* [2021] EWFC B35**

DJ Graham Keating – East London Family Court

24.06.21

- "Bitterly contested" proceedings
- W was litigant in person (with DPA counsel at trial)
- No open offer from W until day before trial and then withdrew it in her counsel's opening note.
- DJ, relying on PD28A para 4.4 and citing Mostyn J. in *OG v AG* made costs order against W, partly attributable to her failure to make an open offer, partly other 'egregious' failures.

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Duty to Openly Negotiate Reasonably

***E v L (No. 2)* [2021] EWFC 63**

Separate Costs Judgment

Mostyn J.

15.7.21

- Settlement stymied because H was not prepared to accept that there should be an equal sharing of marital acquest .
- H "doggedly clung to" the notion that W should be confined to her needs, very conservatively assessed.
- H had refused to negotiate reasonably and sensibly.
- Total costs £900,000.
- W's costs £436,000.
- H ordered to pay £109,000.
- Reduced by £23,400 owing to W's conduct in snooping on H's computer and copying private and privileged correspondence.

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Duty to Openly Negotiate Reasonably

Draft Statement of the Efficient Conduct of Financial Remedy Proceedings in the FRC below High Court Judge Level

Duty to negotiate

28. At all hearings the court will require to be informed of the parties' compliance with the duty to negotiate openly and reasonably pursuant to PD 28A para 4.4. To enable the court to examine the attempts at achieving a negotiated settlement, position statements for each hearing must contain short details of what efforts the parties have made to negotiate openly, reasonably and responsibly. The parties will be warned that, whatever the size of the case, a failure to make reasonable attempts to compromise cases in open negotiation will be met by costs penalties. The bundle for each hearing must contain the parties Forms H and H1 (where applicable).

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Maintenance Pending Suit

Rattan v Kuwad [2021] EWCA Civ 1

Court of Appeal.

- ***Second appeal***
- ***At first instance DDJ Morris awarded MPS of £2,850 p.c.m. including school fees***
- ***On appeal to HHJ Oliver, order set aside on basis that DDJ had "failed to apply the law appropriately" in that:***
  - ***She had not undertaken any critical analysis of the wife's needs***
  - ***In particular of which items included by W comprised her "immediate expenditure needs"***
- ***He said MPS "should deal with immediate expenditure needs which have to be critically examined and long-term expenditure needs should be best dealt with at final hearing"***

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Maintenance Pending Suit

Rattan v Kuwad [2021] EWCA Civ 1

CoA – LJJ Moylan, Macur & Asplin

- ***Appeal allowed – DDJ Morris' order re-instated.***
- ***The application did not require any extensive analysis but could be determined justly with a succinct summary and consideration of the relevant factors.***
- ***There was no doubt that DDJ Morris had carried out a sufficient analysis.***
- ***She had not been wrong to include school fees as part of MPS. A separate application is not required.***
- ***Court required to undertake an analysis which was sufficient to be satisfied that award was reasonable.***
- ***Some cases might require a detailed examination of a budget***
- ***In others it would be immediately apparent whether the listed items represent a fair guide to income needs.***
- ***The fact that some items did not recur every month did not mean they should be excluded.***
- ***Inevitably, expenditure is averaged to produce a monthly figure.***
- ***It is not necessary for an applicant to provide a list of income needs distinct from that in Form E.***

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Maintenance Pending Suit

Rattan v Kuwad [2021] EWCA Civ 1

- Court of Appeal have clipped the wings of *TL v ML* [2006] 1 FLR 1263
- In many cases rough and ready approach will be more appropriate than Mostyn's forensic approach in *TL v ML.*

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Short Childless Marriages

***E v L* [2021] EWFC 60**

Mostyn J.

- 5 year marriage
- H age 66 – successful music production manager
- W – age 61 ”housewife”
- W sought half marital acquest
- H argued W should be confined to her very conservatively assessed needs.
- H relied on *Sharp v Sharp* [2017] EWCA Civ 408, per McFarlane LJ:
  - *“the combination of potentially relevant factors (short marriage, no children, dual incomes and separate finances) is sufficient to justify a departure from the equal sharing principle in order to achieve overall fairness between these parties”*
- H’s counsel said “The having of children denotes a completely different category of commitment”.
- Mostyn J. - “I fundamentally disagree with this”

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Short Childless Marriages

***E v L* [2021] EWFC 60**

Mostyn J.

As to childlessness:

- In applying the sharing principle, it is extremely dangerous for the court to attempt an evaluation of the quality of the marriage or the arrangements made within it
- Application of sharing principle should start and almost invariably finish with the proposition that “a marriage is a marriage”.
- For the court to start asking why there are no children, and whether this denotes a lesser extent of commitment is to make windows into people’s souls and should be avoided at all costs.

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Short Childless Marriages

***E v L* [2021] EWFC 60**

Mostyn J.

As to the shortness of the marriage:

- *"there is absolutely no logical reason to draw a distinction between an accrual over a short period and an accrual over a long period. As Lord Nicholls pointed out [in Miller], the statutory factor of the duration of the marriage will be reflected in the nature of things by the fact that in a short marriage the accrual will almost invariably be less than in a longer marriage"*

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Short Childless Marriages

***E v L* [2021] EWFC 60**

Mostyn J.

As to the shortness of the marriage:

- "a case where than can be legitimate non-discriminatory unequal sharing of matrimonial property earned in a short marriage will be as rare as a white leopard"
- "earned" draws distinction between money generated during a marriage and an asset that has been brought into the marriage and "matrimonialised" – eg FMH.

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Short Childless Marriages

***E v L* [2021] EWFC 60**

Mostyn J.

As to the shortness of the marriage:

- "a case where than can be legitimate non-discriminatory unequal sharing of matrimonial property earned in a short marriage will be as rare as a white leopard"
- "earned" draws distinction between money generated during a marriage and an asset that has been brought into the marriage and "matrimonialised" – eg FMH.

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Short Childless Marriages

***E v L* [2021] EWFC 60**

- This case was not a white leopard
- The marital acquest was divided equally - £2m each.

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An Exercise in Self-Destruction -Costs in Needs Cases

***Azarmi-Movafagh v Bassiti-Dezfouli* [2021] EWCA Civ 1184**

CoA – LJJ King, Moylan, Newey

- ”the degree of acrimony on both sides has been such that the parties embarked on a course of litigation which became an exercise in self-destruction”.

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An Exercise in Self-Destruction -Costs in Needs Cases

***Azarmi-Movafagh v Bassiti-Dezfouli* [2021] EWCA Civ 1184**

- 10 year marriage – one child
- W was breadwinner - worked as a barrister; H looked after child
- Assets - £2,347,000 all owned by W
- W debt - £300,000
- H debt - £257,000 – mostly for costs. FR, CA and criminal proceedings.
- Net assets: £1,781,389
- H's income was Univ

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An Exercise in Self-Destruction -Costs in Needs Cases

***Azarmi-Movafagh v Bassiti-Dezfouli* [2021] EWCA Civ 1184**

- HHJ Robinson concluded that it was a needs case.
- H needed £400k for house plus £25k costs of purchase and a car.
- Awarded lump sum of £625,000 to include £200,000 of his costs related debt.
- Clean break

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An Exercise in Self-Destruction -Costs in Needs Cases

***Azarmi-Movafagh v Bassiti-Dezfouli* [2021] EWCA Civ 1184**

First appeal – Judd J.

- Allowed to extent that £200,000 referable to H's costs should form charge on his property as %age of purchase price – repayable on death, remarriage or permanent cohabitation.
- Rationale – the order made by HHJ Robinson allowed H to recover the lion's share of his costs for proceedings where there had been no basis for a costs order.
- Neither party had proposed a charge nor made submissions on it.

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An Exercise in Self-Destruction -Costs in Needs Cases

***Azarmi-Movafagh v Bassiti-Dezfouli* [2021] EWCA Civ 1184**

Second Appeal – CoA

- The court has a wide discretion to order a lump sum to meet costs in a needs case.
- Where this is sought, the court should:
  - Consider whether in any event the case is one in which consideration should be given as to the making of an order for costs under FPR r28 and PD28 para 4.4.
  - Whilst not carrying out a full costs analysis, the judge should consider what the costs lump sum would represent if expressed as a costs order, to cross-check its fairness.
- In this case, without the costs order H would have to deplete his housing fund to pay outstanding costs.
- Although the lump sum approached the level of an indemnity costs order, which would not have been made, this did not fetter the court's discretion to make the order.

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An Exercise in Self-Destruction -Costs in Needs Cases

***Azarmi-Movafagh v Bassiti-Dezfouli* [2021] EWCA Civ 1184**

- Judge should not have imposed a charge without inviting focused submissions on it.
- A deferred charge is rarely appropriate.
- Although it remains a useful tool in limited circumstances, only rarely will the advantages outweigh the disadvantages of making an order designed to maintain the tie between the parties long after divorce

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What to look out for in 2022

PROCEDURE, PROCEDURE, PROCEDURE

- 20.10.21 - Farquhar Report on:
  1) The Financial Remedies Court – The Way Forward / Practice and Procedure
  2) The future use of Remote Hearings

- 20.10.21 – Draft Statement on the Efficient Conduct of Financial Remedy Hearings Proceeding in the FRC below High Court Judge Level

- 01.12.21 – Practice Message to all those practitioners and litigants appearing at the London FRC at the CFC.

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What to look out for in 2022

Hasan v Ul-Hasan

Supreme Court?

- Application under Part III of Matrimonial and Family Proceedings Act 1984.
- Decision of Mostyn J. **[2021] EWHC 1791 (Fam)**
- W given leave to bring application in August 2017.
- H died in January 2021, before Part III application determined.
- Core question is whether the unadjudicated claim survives death of H and can be continued against his estate.
- W argued that authorities under Part II of MCA 1973 and IA 1975 no binding because under different statutes. Question never considered under Part III – so blank canvas.
- Mostyn J. disagreed. Part II jurisprudence applied and he was bound it.
- Held that unadjudicated Part III claim can't be pursued against H's estate.
- **Sugden [1957] P 120** was wrongly decided, but both he and CoA bound by it.
- Gave permission for leapfrog appeal to Supreme Court.