PUMP COURT

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Family Finance Update

Tara Lyons & Richard Hall

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Litigation Funding

LS v PS v Q [2021] EWHC 3508 (Fam) – Roberts J

- Q (Level) applied to intervene in FR proceedings on 18th February 2021 (granted that day) as had lent W £1m and W was not paying
- FR proceedings previously concluded after contested hearing in 2016 before Parker J. in which W received £3m intended to meet housing and income needs and liabilities (H's assets £9m)
- H appealed that Order (and also subsequent Children Act applications resulting in 'live' with' order to H)
- W applied to Q (Level) for funding for these later FR proceedings and owed £630k plus interest accruing.
- Following private FDR in February 2021 settlement reached (both parties represented with H paying for W's as funding limit had been reached, but W then became a LIP due to conflict arising).

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Litigation Funding

LS v PS v Q [2021] EWHC 3508 (Fam) – Roberts J

- Agreement provided that FMH was to be transferred to H
- H was to provide W with £1m for housing but on a life interest
- W's income claims dismissed.

- When Q found out about terms in February 2021, it contacted ct and H's solicitors stating that it was applying to be joined.
- On that same day, H's legal team contacted the allocated s9 judge via Chambers and clerk with draft consent order.
- Nothing sent through the Court and judge not told that Q objected to making of Order and nor were Q told that draft had been sent to judge

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Litigation Funding

LS v PS v Q [2021] EWHC 3508 (Fam) – Roberts J

- On 2nd March judge e-mailed his clerk that order approved and could be lodged.
- Order then arrived at Court office and sealed on 16th March 2021.
- Q (Level) only found out when H sought to have their joinder set aside
- On 17th March 2021, a temporary stay on the terms of the Order granted and freezing injunction on parties.
- Q (Level) alleged that failure to inform the judge of their involvement and joinder and its objection to finalising of the Order was deliberate and a breach of duty of disclosure to an existing party to proceedings

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Litigation Funding

LS v PS v Q [2021] EWHC 3508 (Fam) – Roberts J

- Q (Level) alleged that as a legitimate creditor it was bypassed and W (with H's knowledge and support) was left with no means to meet the debt to them
- Q (Level) sought disclosure of privileged material that had been produced for private FDR and they wished to use that material in the substantive set aside application and in their claims under the Insolvency Act against W.
- Roberts J. in considering that application ruled privileged material should remain subject to the FDR privilege (PD9A para 6.2).
- Roberts J. also commented that it would be artificial to distinguish such between Court FDR and Private FDR

PUMP COURT
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Litigation Funding

LS v PS v Q [2021] EWHC 3508 (Fam) – Roberts J

- Roberts J. also commented that the FPR may need to be reconsidered in this regard in light of the importance of litigation funding and the issues raised in this case
- PD9A r6.2 provides:
- *"….evidence of anything said or of any admission made in the course of an FDR appointment will not be admissible in evidence, except at the trial of a person for an offence committed at the appointment or in the very exceptional circumstances indicated in Re: D [1993] Fam 231."*

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PUMP COURT
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Litigation Funding

Simon v Simon [2022] EWFC 29 & 35 – Nicholas Cusworth QC (DHCJ)

- By this stage, H's application to set aside consent order had been conceded by H and he suggested as no dispute between H and W then Q (Level) could pursue civil remedies against W and no nexus between Level's claims against W and the FR proceedings and therefore joinder not applicable.
- Level argued that parties had colluded so as to effectively make their claim unenforceable.
- Nicholas Cusworth QC granted Level's application for joinder and highlighted the two key principles in considering joinder:

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Litigation Funding

Simon v Simon [2022] EWFC 29 & 35 – Nicholas Cusworth QC (DHCJ)

1. The overriding objective; and

2. Enabling parties to be heard if their rights may be affected by a decision

- Nicholas Cusworth QC observed that FPR r9.26B was similar to CPR r19.2(2) and therefore required similar interpretation.
- Level's rights were unquestionably capable of being affected by the terms of the consent order
- In addition, a third party who is directly affected by an order may have it set aside or varied (CPR r40.9)

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Litigation Funding

Simon v Simon [2022] EWFC 29 & 35 – Nicholas Cusworth QC (DHCJ)

- Nicholas Cusworth declined to re-seal the consent order without considering the consequences on Level and whether these were intended by W and H
- Level's civil claim transferred to the Family Court and to be determined after the FR application
- Further updating disclosure was required to enable the Court to discharge its duty
- Level would be entitled to disclosure within the proceedings but subject to an implied undertaking not to use the documents for any collateral purpose.
- If at conclusion of the FR proceedings, the civil proceedings cannot be disposed of then availability of documents for any civil proceedings may become an issue. **<>**

PUMP COURT
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Litigation Funding

Xanthopoulos v Rakshina [2022] EWFC 30 – Mostyn J.

- Two elements to this:
  - H sought a LSPO; and
  - W sought release from u/t to preserve sums held by her in a bank account (c£11m).
- Previously H had applied for and granted a LSPO for £750k intended to take him to hearing to determine jurisdiction in Children Act proceedings and the divorce and mediation
- The day before this hearing H's solicitors had come off the record
- H sought an order to meet his solicitors o/s costs (c£250k) & to cover future costs (c£673k) for appeal in Children Act proceedings and to conclusion of first appointment in Part III MFPA 1984 proceedings

PUMP COURT
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Litigation Funding

Xanthopoulos v Rakshina [2022] EWFC 30 – Mostyn J.

- Mostyn J. observed that H had significantly overspent the award intended to take him to end of first appointment
- Generally a LSPO should only be made in respect of o/s costs to solicitors where without that payment those solicitors would likely cease to act.
- Since H's solicitors had come off the record the court could not make any award in respect of their costs
- Even if H's solicitors had stayed on the record, he doubted whether any substantive award in respect of o/s costs would have been made.

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Litigation Funding

Xanthopoulos v Rakshina [2022] EWFC 30 – Mostyn J.

- As solicitors had come off the record, H would have to instruct new solicitors and make a fresh application but in any event, it would be unlikely to make any award for future costs for H.
- Ct accepted that there it may be possible to seek a payment where basis of previous award had been undermined by a change of circumstances but only if scrutinised carefully.
- Ct also accepted it may be possible to make an order to fund an appeal but it would be exercised extremely cautiously particularly where permission to appeal had not yet been granted
- Any application for further funding would always be considered against the consequences of previous overspending and such could lead to a refusal

PUMP COURT
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Litigation Funding

Xanthopoulos v Rakshina [2022] EWFC 30 – Mostyn J.

- Mostyn J, was clear that funding the defence of a claim by previous solicitors was an interim lump sum (and not a LSPO) and therefore could not be ordered

PUMP COURT
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Litigation Funding

Xanthopoulos v Rakshina [2022] EWFC 30 – Mostyn J.

- As to release of W from her u/t, he concluded that the war in Ukraine was a significant change of circumstances (Birch v Birch) and that the current u/t was too restrictive and so released her from u/t to allow her to discharge her own legal costs without having to seek H's consent or court order.
- Injunction would remain to prohibit her from dealing with account save for above **<>**

PUMP COURT
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Litigation Funding

E v B [2021] EWFC 90 – Recorder Chandler [QC].

- W applied for interim maintenance & A v A costs allowance
- Application under MFPA 1984 Part III
- Evidence produced by W from 2 banks refusing to offer personal loans
- W also produced letter from mortgage company stating that it would not be possible to source a residential mortgage in her sole name
- W's family had assisted with her with loans for legal costs
- W co-owned 4 properties with her mother

PUMP COURT
CHAMBERS

Litigation Funding

E v B [2021] EWFC 90 – Recorder Chandler [QC].

- W produced 2 litigation loan providers refusing funding but judge attached little weight as had been produced after W's *'self serving assertion'* that she could not sell the co-owned properties without her mother's consent (which ignored Ct's powers under TOLATA)
- Key points to remember:
  - Ensure that the evidential requirements are satisfied (Currey v Currey) or MCA s22ZA &PD
  - Ensure correct time estimate for hearing (in this case estimate of 2-2.5hrs was considered '*wildly optimistic'*) or at risk of hearing being adjourned and costs sanctions

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PUMP COURT
CHAMBERS

Capacity

Richardson-Ruhan v Ruhan & Others) [2021] EWFC 6 – Mostyn J

- Long running saga whereby H stated *inter alia* he had been defrauded as to £200m and therefore had -£2m; W contended H had significantly more
- In proceedings in 2017, Mostyn J determined the computative stage and adjourned for distributive stage.

  See [2017] EWHC 2739
- Thereafter applications made by both W & H including:
  - joinder of a third party, set aside of a findings of Mostyn J, interim provision and legal services order
- Pre-trial review directed

PUMP COURT
CHAMBERS

Capacity

Richardson-Ruhan v Ruhan & Others) [2021] EWFC 6 – Mostyn J

- In December 2020, X, an accountant & friend of W made an application on W's behalf to defer PTR and final hearing as W's solicitors stopped acting as without payment of fees & thereafter W acting in person
- In statement in support by X, stated that W was far from well and that FMH was in process of being sold & new legal team in process of being engaged
- At a hearing in January 2021, X was invited to obtain & file report as to W's capacity and details of person he proposed should be litigation friend if W lacked capacity.
- X later confirmed that as a result of having to give u/t as to costs, he would not act and could not identify anyone else to act

PUMP COURT
CHAMBERS

Capacity

Richardson-Ruhan v Ruhan & Others) [2021] EWFC 6 – Mostyn J

- In December 2021, PTR held and X acted as McKenzie friend and stated W was suffering mental illness and was being treated by a psychiatrist.
- Issue for court:
  - If W lacked capacity then notwithstanding McKenzie friend, she was required to have litigation friend and proceedings had to be stopped until that issue determined and if capacity lost then appointment of litigation friend had to be made
- Expert evidence before the Ct was that W would have capacity only if she had benefit of legal advice and representation.

PUMP COURT
CHAMBERS

Capacity

Richardson-Ruhan v Ruhan & Others) [2021] EWFC 6 – Mostyn J

Three stage analysis (Court of Protection Practice 2020 para1.340):

- Was the person unable to make decision? If yes
- Was there an impairment or disturbance in the functioning of the person's mind or brain? If yes
- Was the person's inability to make the decision because of the identified impairment or disturbance?

PUMP COURT
CHAMBERS

Capacity

Richardson-Ruhan v Ruhan & Others) [2021] EWFC 6 – Mostyn J

Test to be applied:

- Whether party to legal proceedings was capable of understanding, with the assistance of such proper explanation from legal advisers and experts in other disciplines as the case may require, the issues on which consent or decision was necessary

PUMP COURT
CHAMBERS

Capacity

Richardson-Ruhan v Ruhan & Others) [2021] EWFC 6 – Mostyn J

- If person had capacity to understand that which needed to be understood, there would be no reason for litigation friend.

Circular argument

- If interpreted literally then it would suggest that in the absence of legal advice and representation, then party would be legally incapacitated and court then obliged to appoint litigation friend.
- If litigation friend then appointed representation, party would then have capacity, in which case litigation friend would then be unnecessary.
- In addition, if capacity depended on representation then quantum and quality of such would be difficult to investigate

PUMP COURT
CHAMBERS

Capacity

Richardson-Ruhan v Ruhan & Others) [2021] EWFC 6 – Mostyn J

- In the instant case, worrying scenario of incapacitated W representing herself alone.
- Such could be addressed by granting an adjournment for representation to be secured.
- The capacity to conduct litigation could not depend on whether the party received no legal advice, good legal advice or bad legal advice
- If party capable of making decision with advice, then that person had capacity whether she had that advice or not.
- Issue of capacity ended at first stage- W had capacity

PUMP COURT
CHAMBERS

Capacity

Richardson-Ruhan v Ruhan & Others) [2021] EWFC 6 – Mostyn J

Guidelines on adjournment for medical reasons:

- Settled law that evidential requirements which should be met for adjournment to be advanced are:
  - The medical adviser should identify themselves and provide details of their familiarity with the party's medical condition (detailing all recent consultations)
  - Should identify with particularity what the medical condition was and the features of that condition which (in their opinion) prevented participation in the proceedings
  - Should include reasoned prognosis
  - Should give the Court some confidence that what was being expressed was an independent opinion after a proper examination

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PUMP COURT
CHAMBERS

Capacity

ND V LD (Financial Remedy: Needs) [2022] EWFC B15 – DDJ Arshad

- H (52) & W (51) cohab. 1990, married 1992, separated 2019.

  3 adult children (29, 25 & 21)
- Issue over H's capacity due to poor mental health & capacity report ordered which reported he had capacity but would be assisted by allowances given
- W represented and H in person although H later sought for one of his adult daughters to be his McKenzie friend (opposed by W).
- Ground rules hearing listed to determine:
  - Appointment of McKenzie friend for H
  - Format of final hearing including any special measures
  - Participation directions
- H's poor mental health including numerous e-mails to ct, risk of harm to H, H attending ct with a knife

PUMP COURT
CHAMBERS

Capacity

ND V LD (Financial Remedy: Needs) [2022] EWFC B15 – DDJ Arshad

Special measures applied included:

- W & H to give evidence remotely
- Ensuring H did not come into face to face contact with W and that H could seat himself away from his camera when W giving evidence
- Requesting W turn her camera off when H addressing ct and giving evidence
- Referring to H as ‘sir’ at his request
- Allowing regular breaks
- Court to put relevant Qs to W as prepared by H
- H allowed to wear a mask covering his eyes during cross examination.

PUMP COURT
CHAMBERS

Small Money Needs Case

ND V LD (Financial Remedy: Needs) [2022] EWFC B15 – DDJ Arshad

Issues in the case:

- Spousal maintenance
  - Level and term
- Appropriate percentage for PSO

Small money needs case

Liabilities- W=c£16k mostly legal fees & H=c£3.5k exceeded modest savings

Pensions (DC)- W=c£141k & H=c£10k (no PODE report)

H on state benefits (inc PIP) of £1,248pm & W employed on £3,600pm

PUMP COURT
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Periodical Payments

ND V LD (Financial Remedy: Needs) [2022] EWFC B15 – DDJ Arshad

In considering periodical payments useful summary:

- Absent any argument about compensation (most exceptional), determined on need alone with no reference to sharing
- In considering earning capacity, ct will consider amongst other things: age, qualifications, work history/experience, role during and after (eg care for children) relationship
- Not usually necessary to have expert evidence as to earning capacity (Buehrlen v Buehrlen) [2017] EWHC 3643 (Fam).
- If evidence that relevant party has unreasonably chosen not to find/take up employment and/or not exploit their earning capacity then ct can make a pps order based on what it reasonable for them to be earning (Joy v Joy-Morancho [2015] EWHC 2507 (Fam)

PUMP COURT
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Periodical Payments

ND V LD (Financial Remedy: Needs) [2022] EWFC B15 – DDJ Arshad

In considering periodical payments useful summary:

- Ct has power to make an award which may go up (or down)
- Common practice to order RPI or CPI if to be in force for some years but less appropriate where payer cannot rely on steady upward growth
- Step down can be considered if payee expected to return to employment or increase earnings
  - See *inter alia,* MF v SF [2015] EWHC 1273 (Fam), D v D [2020] EWHC 857 (Fam)
  - But compare Murphy v Murphy [2014] EWHC 2263 (Fam), Aburn v Aburn [2016] EWCA Civ 72

Observation that support (in W v H) of orthodox view (Martin-Dye) that pensions should be dealt with separately from capital assets with a view to their post retirement income producing qualities

PUMP COURT
CHAMBERS

Periodical Payments

ND V LD (Financial Remedy: Needs) [2022] EWFC B15 – DDJ Arshad

Outcome

- As H would lose benefits if W paid pps and W did not have surplus beyond needs- immediate clean break

BUT in relation to pensions:

- Long marriage, H prioritised W's career and earning potential over his own.
- Whilst H is not entitled to a share of W's future earnings he did not have same opportunity as W to build up pension
- Responsibilities generated during marriage has generated need
- Starting point of equality so 50% PSO of W's CE as at date of separation

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Periodical Payments

A V M [2021] EWFC 89 – Mostyn J

- Married 1994, petition in 2019, 5 children (25, 23, 22, 20 & 12)
- Significant wealth in assets and trusts
- Mostyn J noted that in calculating marital acquest, general view is that unless needless delay in bringing case to trial, should be as at date of trial but possibly different view if completely new asset brought into being between separation and trial
- And he noted that in the current Divorce Bill, matrimonial property is to be calculated at the earlier of DA or date of trial

PUMP COURT
CHAMBERS

Periodical Payments

A V M [2021] EWFC 89 – Mostyn J.

- Observation by Mostyn J that in making findings as to likelihood of future events that in exercising that discretion under MCA 1973, ct should be entitled to take into account not only probability of an event occurring (P) but also the probability of it not occurring (Q)
- In instant case probable H will receive in future c£22m and W will receive c6.5m from investment funds (plus sums from various trusts)
- W sought £225k pa pps on jt lives basis
- Rejected by Mostyn J.

PUMP COURT
CHAMBERS

Periodical Payments

A V M [2021] EWFC 89 – Mostyn J

Helpful commentary:

"It is an elementary principle that a claimant of periodical payments must meet her needs from her own resources, including her non-matrimonial resources, before a call is made on her ex-husband's resources…

It scarcely needs to be stated that her ex-husband's resources will by then be non-marital either because they represent his share of marital assets already divided or because they are post-divorce earnings."

PUMP COURT
CHAMBERS

Periodical Payments

A V M [2021] EWFC 89 – Mostyn J

Helpful commentary:

"In my judgment, the practice of leaving a nominal order in place as an insurance policy is contrary to the parliamentary instruction in s25A MCA 1973. Under s25A the court is required to exercise its discretion so as to bring about a termination of financial dependence unless it is satisfied that to do so would lead to the claimant suffering undue hardship…."

PUMP COURT
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Periodical Payments

A V M [2021] EWFC 89 – Mostyn J

Helpful commentary:

"To leave a nominal order in place because events may happen which might lead to the claimant suffering hardship is not consistent with the terms of s25A. The court has to do its familiar work of peering into the future and making factual findings. If it is satisfied it is more likely than not that the claimant will not suffer undue hardship if her claim for periodical payments were dismissed, then the court should have the courage of its convictions and dismiss the claim with a s25A(3) direction. It is contrary to principle to make an order requiring the respondent to act as a potential insurer in respect of remote risks which might eventuate years after the ending of the marriage."

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Periodical Payments

A V M [2021] EWFC 89 – Mostyn J

- Mostyn J referred to AJC v PJP (see below) and commented that he would have discharged the nominal order and commented:

"To my knowledge there has never been a reported case where a nominal order has been successfully enlarged."

"It is never more than a symbolic irritant."

PUMP COURT
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Enlargement of nominal orders

AJC v PJP [2021] WLUK 566 - DDJ Hodson

- Nominal order made in 2012 by consent when children (now aged 14 &17) were living predominantly with W; now broadly equal share since 2015. W received greater share of capital & PSO
- W an airline pilot lost her income as a result of pandemic and sought enlargement of nominal pps order
- Preliminary case management hearing under r.9.20.1
- W's application dismissed
- Losing a job as a result of the virus when when had a job at the time of settlement a decade earlier cannot be described as a relationship generated disadvantage or even a loose causal connection

PUMP COURT
CHAMBERS

Enlargement of nominal orders

AJC v PJP [2021] WLUK 566 - DDJ Hodson

Comprehensive analysis of the history of nominal orders

- More a device than an order
- Not sure it appears in any other jurisdiction
- Creates much ill feeling from the paying party as a sword of Damocles
- Many authorities on substantive orders varied up or down
- Considered by DDJ as an order which hasn't kept up with changes in clean break requirements
- Anecdotally, may be a London and South-East centric order

PUMP COURT
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Enlargement of nominal orders

AJC v PJP [2021] WLUK 566 - DDJ Hodson

In what circumstances would they be made and then generally might they be expected to be converted

- Where children are living primarily with one parent who is able to support themselves but children are relatively young and things may change dramatically during their minority
- Anecdotally, may be a London and South-East centric order
- Rare to exist outside of childcare responsibilities and beyond those years
- Now being made less often
- Also DDJ's view that gender bias and only a few cases where fathers with primary care have nominal order

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Enlargement of nominal orders

AJC v PJP [2021] WLUK 566 - DDJ Hodson

- One case on point was North (2007) EWCA 760 in which nominal order made in 1981 (before 1984 clean break provision introduced) and W applied to enlarge in 2004
- Anecdotally practice is that enlargement only if there is a major and dramatic change in circumstances of childcare and ability to look after children.
- Invariably child centred
- Not, in DDJ's experience a provision to protect a spouse for many years in their own right (*"a clash with the clean break imperative")*
- Strong emphasis in case law now is that variations should be linked to the paying party or at least the marital disadvantage

PUMP COURT
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Enlargement of nominal orders

AJC v PJP [2021] WLUK 566 - DDJ Hodson

- In instant case, W sought, in early 2021, to enlarge an order made in 2012 for a short term until she could again be self sufficient
- Is a nominal order a financial emergency fund to call upon during hard times, perhaps unexpected exceptional hard times?
- Is this the intention in law?

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Enlargement of nominal orders

AJC v PJP [2021] WLUK 566 - DDJ Hodson

- W suggested DDJ should consider application as if ordinary variation application (as if £800pm increased to £900pm)
- DDJ disagreed
- Whilst s31 must be considered, variation of a nominal order has intrinsically a huge difference.
- In a substantive maintenance order case, both parties aware that may go up or down (if payer's income increases or payee's income reduces) which encourages capitalisation in many cases and thus clean break- an expected state of flux
- In variation of nominal order cases, different factors:
  - Could be a significant change
  - It's not budgeted for
  - Nowhere is it specified the circumstances when it may be enlarged, which adds to uncertainty- parties are entitled to know when particular payment requirement will kick in

PUMP COURT
CHAMBERS

Enlargement of nominal orders

AJC v PJP [2021] WLUK 566 - DDJ Hodson

- In instant case, DDJ observed a nominal order made by consent when youngest was aged 6 in circumstances where youngest is now aged 14 and W has been self sufficient for some years and where change in circumstances is the economic impact of the worldwide pandemic is not a appropriate and reasonable justification for enlarging order.
- Misfortune and unexpected developments in life is the nature of life
- Sometimes those factors arise from, are compounded by or accentuated from the foundation or circumstances of a past relationship.
- DDJ observed that in those circumstances, he could see that there might be justification for enlargement.
- Might be an argument if work position of receiving party significantly disadvantaged through relationship and so at higher risk of losing job
- DDJ was asked to dismiss nominal order but declined to do so as order will come to end in four years and unless something very substantial occurs soon then he could not see any basis for enlargement but written judgment produced to be available for the future. **<>**

PUMP COURT
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Termination of Spousal Maintenance

DX v JX [2022] EWFC 19 - Moor J.

- Order for PPs originally made by consent in 2017 in English Court when H high earner in UAE
- Order was for a fixed percentage of H's income
- W was habitually resident in Luxembourg and after H had previously made an (unsuccessful) application in 2019 to vary there, W argued that Luxembourg retained exclusive jurisdiction
- Moor J. accepted he had jurisdiction as H was seeking to vary the original English Order
- H now back working in UK and salary drastically reduced

PUMP COURT
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Termination of Spousal Maintenance

DX v JX [2022] EWFC 19 - Moor J.

- Moor J. concluded that:
- *"the simple fact is that the goose that laid the golden egg is no more, with significant financial consequences for both parties"*
- He concluded that W had sufficient resources to meet her needs (her income had increased and H's had decreased such that their incomes were not dissimilar) and that W had sufficient resources and that she could adjust without undue hardship to a termination of spousal support.

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PUMP COURT
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Cohabitation

VV v VV [2022] EWFC 41- Peel J

- H and W 57. Met in March 2018. Dispute as to when they started cohabitation- W said Nov 2018, H Dec 2019 when parties moved into together in house in London. They became engaged in March 2019 and married January 2020 and marriage ended June 2020.
- Final hearing before Peel J. H offered lump sum of £400k (nil taking into account sums advanced for legal fees). W sought 50% of proceeds of sale of H's units in AB company ie £6m.
- A central issue was whether the units in AB were matrimonial and the length of cohabitation.

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Cohabitation

- Dealing with Cohabitation: The judge considered the law on cohabitation ***GW v RW* [2003] EWHC 611**; ***IX v IY* [2018] EWHC 3053**; ***McCartney v Mills McCartney* [2008] EWHC 401**, ***E v L* [2021] EWFC 60** adding that *"the court should also look at the parties' respective intentions when inquiring into cohabitation. Where one or both parties do not think they are in a quasi-marital arrangement, or are equivocal about it, that may weaken the cohabitation case. Where, by contrast, they both consider themselves to be in a quasi-marital arrangement, that is likely to strengthen the cohabitation case…. The essential inquiry is whether the pre-marital relationship is of such a nature as to be treated as akin to marriage."* [45-46].

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Cohabitation

- Whilst cohabitation did not require every night together, the couple only spent 164 nights together, 59 of which were on holiday.
- Parties had kept their finances separate.
- H's financial support to W and paying for holidays were acts of generosity.
- Whilst engagement might be indicator of strength of commitment it was not a separate event giving rise to sharing entitlement.

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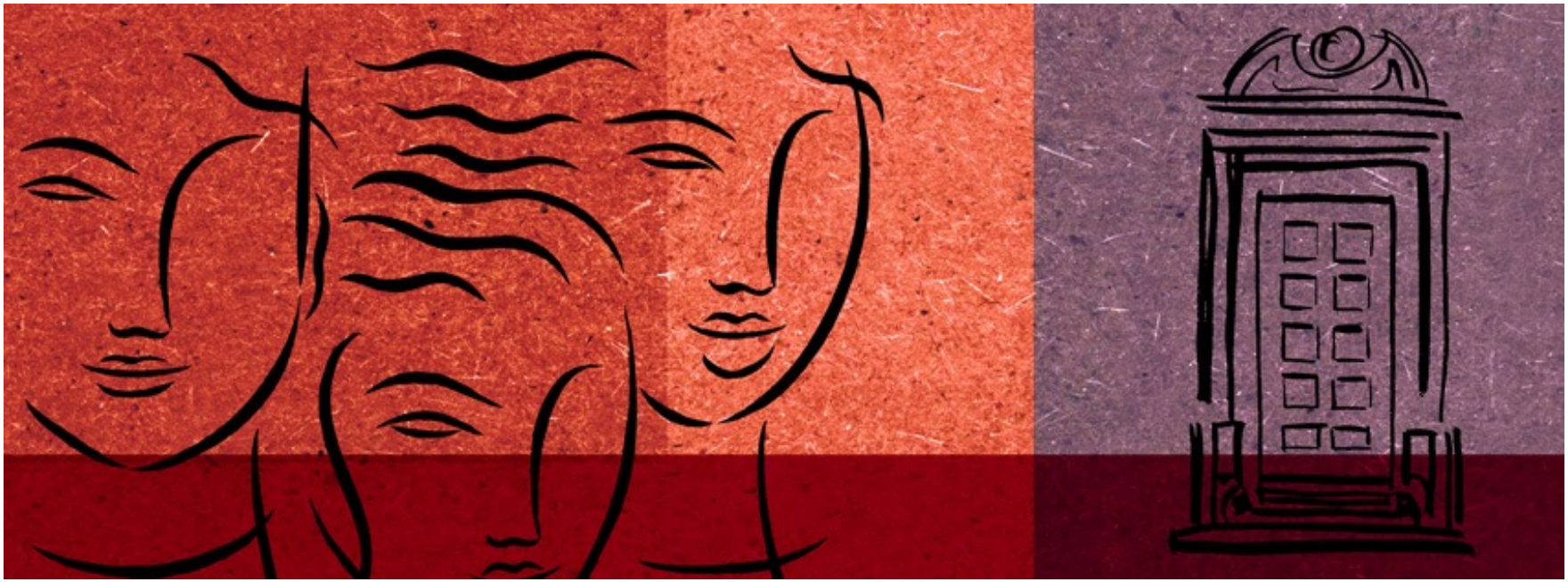

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Soft Loans & Hard Debts

P v Q [2022] Lexis Citation 14 – HHJ Hess

- 4 day contested final hearing
- 14/15 year relationship producing 2 children (11 & 10)
- Both parties held shares (H=c£2m net & W=c£2.1m net) in jtly owned company but shares illiquid at current time.
- Issues over ‘debt’ and ‘repaid debt’ to family

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Soft Loans & Hard Debts

P v Q [2022] Lexis Citation 14 – HHJ Hess

H's 'debt'

- H's (rich) mother advanced £150k to each of her three children in 2010 (during relationship) to assist with housing- no loan documents but evidence (to ct) from M that were loans expected that would be available to support her/be repaid to her. Confirmed in oral evidence that would not pursue through litigation to recover but would adjust her will to reflect it
- Without demand from M, H paid her £150k just prior to proceedings

W's 'debt'

- In 2004 (prior to relationship) W received €30k to assist W with study.
- Contemporaneous document records as *'interest free loan…W will pay back at her discretion'.* W forgot about it until lead up to final hearing

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Soft Loans & Hard Debts

P v Q [2022] Lexis Citation 14 – HHJ Hess

Summary of principles from case law:

- Once a judge decides that a contractually binding obligation ct can properly go on to consider whether hard obligation or loan (and appear on computation schedule) or soft obligation or loan (which may, at judge's discretion be left out of schedule)
- No hard and fast rules as to whether one category or another
- Common feature is whether, in reality, obligation will be enforced

PUMP COURT
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Soft Loans & Hard Debts

P v Q [2022] Lexis Citation 14 – HHJ Hess

Factors which on their own or in combination may take the case to one side or the other include (not exhaustive):

Hard

- Whether obligation to a finance company
- Terms of obligation have the feel of a normal commercial agreement
- Obligation arises out of a written agreement
- Whether there is a written demand for payment, threat of (or actual) litigation or actual or consequent intervention in FR
- There has not been a delay in enforcing the obligation
- Amount is such that it would be less likely creditor would waive

PUMP COURT
CHAMBERS

Soft Loans & Hard Debts

P v Q [2022] Lexis Citation 14 – HHJ Hess

Factors which on their own or in combination may take the case to one side or the other include (not exhaustive):

Soft

- Obligation to a friend or family member with whom debtor remains on good terms
- Obligation arose informally and terms do not have feel of commercial arrangement
- No written demand for payment despite due date having passed
- Delay in enforcing obligation
- Amount of money is such that more likely for creditor to waive (albeit there are examples of large sums being treated as soft obligations)

PUMP COURT
CHAMBERS

Soft Loans & Hard Debts

P v Q [2022] Lexis Citation 14 – HHJ Hess

Conclusions

- Debt owed by W is soft and most unlikely that required to be repaid notwithstanding contemporaneous loan document
- H's debt to mother falls into same category (and ct satisfied that H & M would be content to regard as an advance on inheritance)
- £150k paid to M would be added back to H's assets
- Not right for ct to raise H's debt to hard debt status simply because repaid as to do so would be to reward and encourage manipulative behaviour

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PUMP COURT
CHAMBERS

Modest Assets, Need & Life Impairment

ND v GD [2021] EWFC 53 - Peel J

- H (59) & W (54). Married 1995, separated 2018. 2 children (22 & 21) at university
- Combined annual income during marriage not >£50k pa
- H inherited a property portfolio 5years prior to separation
- W diagnosed with Young Onset Alzheimer's with reduced life expectancy to 5-10 years.
- Total assets £2.6m incl FMH and inherited property portfolio
- H's income not >£15k pa and W on state benefits
- H offered £750k & W sought £1.2m
- £450k difference and £483k costs expended!!
- Costs represented 18% of assets

PUMP COURT CHAMBERS

Modest Assets, Need & Life Impairment

ND v GD [2021] EWFC 53 - Peel J

- Three factors of particular relevance
  - 23 year marriage
  - Bulk of assets were non matrimonial
  - W's diagnosis would have significant effect on her life expectancy and medical needs during remaining years
- Needs are an elastic concept
- S.25(2)(e) does not limit consideration of a health condition to that which is causally linked to marriage and diagnosed prior to separation [NB *cf* SS v NS *per* Mostyn J re spousal support]
- When capitalising income needs, there has to be a very good reason for departing from Duxbury (albeit tool not a rule)

PUMP COURT CHAMBERS

Modest Assets, Need & Life Impairment

ND v GD [2021] EWFC 53 - Peel J

- In this case three experts had reported:
  - Occupational therapist to report on cost of care options
  - Consultant old age psychiatrist to report on life expectancy
  - Financial adviser to provide bespoke calculations on sum required to meet W's needs. [Producing 5 reports, 3 replies to Qs and evidence extending to 450 pages!!)
- Peel J considered that exercise of instructing financial adviser had been of negligible value
- Highly critical of costs of case (£483k in total)
- Reminder of need (now enshrined in new procedure) of agreeing schedules etc

PUMP COURT
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Modest Assets, Need & Life Impairment

ND v GD [2021] EWFC 53 - Peel J

- Peel J critical of H and his failure to negotiate openly in a reasonable matter and at risk of costs

BUT

- Since W's costs had been taken into account in award, there would be no order

OBSERVATION

- Had H negotiated reasonably and matter resolved then there would have been more left in pot for him to retain.

NB: Excellent summary of relevant FR cases and their application at paras 38-56.

PUMP COURT
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Modest Assets, Need & Life Impairment

ND v GD [2021] EWFC 53 - Peel J

Outcome:

- W received £950k representing £650k for housing and £300k for income needs fund
- W to u/t not to alter current will which provided for her estate to be left to the children.

PUMP COURT
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Modest Assets

X v C [2022] HHJ Farquhar

- Modest asset case published as part of commitment to publish judgments at all levels. 7 year rshp. Assets comprised FMH, H's sole name (£250k), house owned by W which former H lived in (£85k), woods (£45k), W's pension (£250k), W had debts of £70k.
- On family home, court refused to to ringfence £80k deposit paid by H which he argued was pre-marital as "needs case".
- Costs order made against H for litigation misconduct.
- Application to lift anonymity refused- risk of harm to child, existence of concurrent CAO proceedings, risk H would publish judgment to cause anguish to W. <>

PUMP COURT
CHAMBERS

Covid-19/Barder

BT v CU [2021] EWFC 87 - Mostyn J

- Final FR Order dividing assets as to £4.75m (58%) to H and balance to W
- H to pay W £950k in series of 5 lump sums 2019 to 2023
- Departure was as a result of business started by H prior to the marriage and element of risk (with H retaining).
- Business provided school meals and then Covid came along
- H applied to set aside under FPR r9.9A on basis Covid was a Barder event.

PUMP COURT
CHAMBERS

Covid-19/Barder

BT v CU [2021] EWFC 87 - Mostyn J

Barder conditions:

- New events occurred since making of order invalidating basis or fundamental assumption upon which order made
- New events occurred within a relatively short time

  [NB comments in other authorities <one year]
- Application to set aside should be made reasonably promptly in the circumstances.
- The application should not prejudice third parties

PUMP COURT
CHAMBERS

Covid-19/Barder

BT v CU [2021] EWFC 87 - Mostyn J

Mostyn J added further consideration:

- Applicant must demonstrate that no alternative mainstream relief available which broadly remedies the unfairness caused by the event.

PUMP COURT
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Covid-19/Barder

BT v CU [2021] EWFC 87 - Mostyn J

Change in value of an asset:

- Ct will principally focus on the economic impact of the event rather than its cause or nature
- Authorities demonstrate that change in value will rarely satisfy conditions

PUMP COURT
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Covid-19/Barder

BT v CU [2021] EWFC 87 - Mostyn J

- Even if all conditions satisfied, burden still lies with applicant to establish sufficient grounds to justify a set aside;
- Even then, discretion of Ct as to whether set aside will be permitted.

PUMP COURT
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Covid-19/Barder

BT v CU [2021] EWFC 87 - Mostyn J

- On facts of instant case, although business hit hard, furlough and loan schemes assisted and net assets and cash had increased and return to school in Autumn 2021

PUMP COURT
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Covid-19/Barder

BT v CU [2021] EWFC 87 - Mostyn J

As to Mostyn J's fifth condition (alternative relief available)

- Possibility of application to vary or stay the executory order but concerns raised by Mostyn J as to such
- Thwaite does not support proposition that there is an equitable power not merely to refuse to enforce an executory order but to make a completely different order.
- Any application should be approached extremely cautiously and conservatively.

PUMP COURT
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Variation of orders

BT v CU [2021] EWFC 87 - Mostyn J

Observation by Mostyn J.:

- Power to extend time to comply with an executory order or to stay its execution for a limited short period.
- No power to vary capital awards as to overall quantum and thus no power to award a permanent stay let alone power to replace lump sum order with alternative provision.
- On facts of instant case, in light of uncertainty of Thwaite relief being available, then not something open to H

PUMP COURT
CHAMBERS

Variation of Capital awards

BT v CU [2021] EWFC 87 - Mostyn J

Observation by Mostyn J.:

- Even though specified as a series of lump sums, it would be open to H to vary such on the basis that in reality it was a lump sum by instalments!!
- Recommendation by Law Commission in 1969 was that the variation of a lump sum order by instalments could not alter its overall quantum
- Thus in Mostyn J's view, only open to vary timing and size of instalments and not overall quantum.
- The cases that suggest otherwise have misread the statutory provisions. [NB in cases cited by Mostyn J. there was no actual variation of the overall quantum payable- save for one]

PUMP COURT
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Variation of Capital awards

BT v CU [2021] EWFC 87 - Mostyn J

- Thus Mostyn J's view that only way to substantively vary lump sum orders, whether by way of series or instalments (save as to timing and size of instalment), is by way of a Barder application

- NB Watch developments on this..

PUMP COURT
CHAMBERS

Transparency

BT v CU [2021] EWFC 87 - Mostyn J

Additional observation by Mostyn J.:

"I no longer hold the view that financial remedy proceedings are a special class of civil litigation justifying a veil of secrecy being thrown over the details of the case in the court's judgment…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 reliance on generalisations."

PUMP COURT
CHAMBERS

Transparency

BT v CU [2021] EWFC 87 - Mostyn J

- Following on from this case, Mostyn J did grant anonymity in the case (as he also did in A v M (above)) as parties had a reasonable expectation that the hearing would preserve their anonymity and it would have been unfair to spring such a change of practice on them without forewarning.
- Mostyn J's future default position will be to publish FR judgments in full without anonymisation (save for identity of children) & derogations from such will have to be distinctly justified.

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PUMP COURT
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Anonymity

Xanthopolous v Rakshina [2022] EWFC 30

- W's application for anonymity considered at length.
- Mostyn J considered the statute, procedural rules and authority and concluded that financial remedies cases do not attract anonymity. A focused Re S exercise of the various rights protected by articles 6, 8 and 10 leads to conclusion privacy right should overreach principle of open justice.
- The current anonymity rubric which was systematically attached, as a default condition, to all financial remedy judgments, was likely to be completely ineffective, save in relation to judgments about child maintenance. In the court's opinion the standard rubric should be changed to provide: "*This judgment was delivered in private. The judge hereby gives permission – if permission is needed – for it to be published.*" <>

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Anonymity

Gallagher v Gallagher [2022] EWFC 52

- Application for a reporting restriction order and anonymity.
- Reference to proceedings "in private" in FPR 27.10 and 27.11 does not impose secrecy as to facts of case, rather prevents most members of public physically attending.
- **Re S** exercise justified limited RRO to prevent naming children or means of identifying them.
- Threats of blackmail into settling the case, indirect identification of the children and distress to the parties not good reasons to ordain anonymity generally.
- Thus the interim anonymity/ RRO granted in **XZ v YZ [2022] EWFC 49** in advance of the final hearing did not remain in place. <>

PUMP COURT
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Pensions

T v T [2021] EWFC B67 - HHJ Hess

- H sought to vary a PSO order made in 2015 from 40% to 17%
- Order was eventually perfected in May 2016 after a contested hearing
- After that hearing the pension administrators asked that Box F of the annex was completed to specify an external transfer as scheme did not permit internal transfers; W's solicitor duly complied
- In December 2016 the scheme announced that it was reducing CEs for external transfers meaning that the PSO would produce less than anticipated if transferred externally.

PUMP COURT
CHAMBERS

Pensions

T v T [2021] EWFC B67 - HHJ Hess

- As W (wrongly) believed that her only option was an external transfer, she made an application for a declaration that she was entitled to 40% of the unreduced CE and she applied for DA
- H applied for a stay on the DA and a variation of the PSO
- In April 2018, the scheme ended its policy of reducing CEs but this was not disclosed to W until March 2021 and so W then invited the Court to endorse the original PSO
- H pursued his application for a variation of PSO from 40% to 17% arguing that as trial judge, in offsetting, intended to give W a precise amount and as CE had increased significantly, that would necessarily reduce the required percentage

PUMP COURT
CHAMBERS

Pensions

T v T [2021] EWFC B67 - HHJ Hess

- Pension administrators also confirmed that during period when they reduced CEs, internal transfers were offered to avoid prejudice to former spouses
- HHJ Hess observed that there is power to vary a PSO but such should be used sparingly; he noted in this case
  - Nothing remarkable had happened since 2015/16 save CE has increased
  - There were three main reasons why the change in CE did not justify any variation

PUMP COURT
CHAMBERS

Pensions

T v T [2021] EWFC B67 - HHJ Hess

- There was a fundamental misunderstanding of what a CE in a defined benefit scheme represents (the price of providing the underlying benefits);and
- If the increase were to viewed as a windfall, then H had benefitted more as he had 60%; and
- It was predominantly H's actions which prevented PSO taking effect and he had not applied for DA (and actually delayed it)

- H was the author of his own misfortune and he allowed the 'moving target syndrome' to remain

PUMP COURT
CHAMBERS

Pensions

T v T [2021] EWFC B67 - HHJ Hess

- HHJ Hess highlighted that if a PSO takes effect whilst a scheme is adopting reduced CEs there is a regulatory lacuna and pension administrators might implement an external transfer.
- To avoid this practitioners should not tick the external transfer box
- PAG have recommended that this paragraph be removed from the Form P1
- In this case there was at the heart a lack of understanding that where a scheme is underfunded, the administrators cannot insist on an external transfer but must also offer an internal transfer on an unreduced basis

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Pensions Offsetting

A v R [2021] EWFC B102 - DDJ Davies

- H sought equal division of liquid capital, 36.91% PSO to equalise income in retirement and £40k capitalised PPs
- H had pension just received of £225k lump sum and £70k pa
- W sought FMH to her with reduced PSO of 26.703% using offsetting (but on tax reduced calculation only using PAG method)
- Key issue for court was how to achieve equality of pension

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Pensions Offsetting

A v R [2021] EWFC B102 - DDJ Davies

- Ct had to decide what discount should apply for offsetting
- PAG report suggests deduction for tax may be between 15%-30% depending on status of tax payer
- PAG report suggests deduction for utility may be between 0%-25%
- PODE can report on tax but adjustment for utility is a matter for the Court applying the s.25 discretion

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Pensions Offsetting

A v R [2021] EWFC B102 - DDJ Davies

Reminder of PAG report when considering 'utility'

- With pensions freedoms arguable utility adjustment had lost usefulness (in DC schemes and in part DB if transferred to DC) In needs cases less justification for utility adjustment
- If assets larger and non-pension holder has income and/or capital surplus to needs then utility adjustment may apply
- If claimant requires present capital to meet basic housing need then may weigh against utility adjustment
- Conversely if pension holder subject to offset may lose owner-occupied housing the utility adjustment may be applicable
- Closer parties are to retirement utility adjustment diminishes

NB PAG report suggests that anecdotal evidence is that pensions may have been excessively adjusted for utility

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Pensions Offsetting

A v R [2021] EWFC B102 - DDJ Davies

In the instant case, DDJ observed that:

- This is one of minority of cases in which offsetting other than by consent is appropriate
- In cases in which a partial offset is potentially sought by either party, the PODE should routinely provide a sliding scale of percentages to achieve adjustment of 0% through 40% (and perhaps beyond) in order that Ct once it has undertaken adjustment exercise may adjust the PSO percentage accordingly
- 18% PSO to W ordered with her retaining FMH

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Changes in procedure

Whole raft of new rules and guidance, including:

- HHJ Hess and (now) Peel J (replacing Mostyn J)
- FRC Primary Principles Guidance (11th January 2022)
- Efficient Conduct statement (11th January 2022)
  - Including limit on length of notes
  - Questionnaires
- Allocation Q's filed with application
- ES1 (Agreed composite case summary)
- ES2 (Agreed asset template)
- Guidance on Electronic Bundles
- Witness statements (President's Guidance- 10th November 2021)
- New D81

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Disregard of Procedure

WC v HC [2022] EWFC 22 - Peel J.

- W's s25 statement had "crossed the line and descended into a number of personal and prejudicial matters" against H which were not relevant to the issue being dealt with
- Peel J. observed that it is erroneous to thing think that it will assist one's case to paint an unfavourable picture of the other party describing them in pejorative terms
- S.25 statements should not be used as an opportunity for one party to personally attack the other; they should contain evidence
- Court orders, PDs and statements of efficient conduct are there to be complied with

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Disregard of Procedure

WC v HC [2022] EWFC 22 - Peel J.

- W's statement was 27 pages compressed into 20
- H's eleventh hour spreadsheet which showed an analysis of family expenditure during the marriage and since separation had been collated from disclosure that had been available for some months.
- If such an exercise was to be relied upon, it should be provided well in advance of the final hearing (ideally before the final directions hearing) to enable proper case management

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Disregard of Procedure

Xanthopoulos v Rakshina [2022] EWFC 30 - Mostyn J.

- Mostyn J. described the preparation for the hearing as *"shocking"*
- Criticism by Mostyn J. of failure to comply
  - Both parties' advocates skeleton arguments exceeded the 10 page limit
  - H's statement filed late (dated 1 day later than required and served 2 days later)
  - Both parties' position statements exceeded a 16 page limit
  - Bundle ran to 1,878 pages rather than the 350 page prescribed limit

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Disregard of Procedure

Xanthopoulos v Rakshina [2022] EWFC 30 - Mostyn J.

"This utter disregard for the relevant guidance, procedure and indeed orders is totally unacceptable. I struggle to understand the mentality of litigants and their advisers who still seem to think that guidance, procedure and orders can be blithely ignored…..

It should be understood that the deliberate flouting of orders, guidance and procedure is a form of forensic cheating and should be treated as such. Advisers should clearly understand that such non-compliance may well be regarded by the court as professional misconduct leading to a report to their regulatory body."

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Watch this space

- Changes to CGT on separation
- Updated PAG report
- Law commission to review law on contempt

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