DESERT ISLAND CASES: EIGHT KEY CASES TO KNOW IN MATRIMONIAL FINANCE

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Part I: Victoria Wilson

First, familiarise yourself with section 25 …

Before you retire to your desert island, familiarise yourself with section 25 of the Matrimonial Causes Act 1973 ("the MCA 1973"): it contains the matters to which the court is to have regard in deciding how to exercise its powers under the Act.

Sections 25(1) and 25(2) are particularly important: they underpin everything you do in financial remedy proceedings. I set them out below for ease of reference:

25. Matters to which court is to have regard in deciding how to exercise its powers under ss 23, 24, 24A, 24B and 24E

(1) It shall be the duty of the court in deciding whether to exercise its powers under section 23, 24, 24A, 24B or 24E above and, if so, in what manner, to have regard to all the circumstances of the case, first consideration being given to the welfare while a minor of any child of the family who has not attained the age of eighteen.

(2) As regards the exercise of the powers of the court under section 23(1)(a), (b) or (c), 24, 24A, 24B or 24E above in relation to a party to the marriage, the court shall in particular have regard to the following matters—

(a) the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future, including in the case of earning capacity any increase in that capacity which it would in the opinion of the court be reasonable to expect a party to the marriage to take steps to acquire;

(b) the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future;

(c) the standard of living enjoyed by the family before the breakdown of the marriage;

(d) the age of each party to the marriage and the duration of the marriage;

(e) any physical or mental disability of either of the parties to the marriage;

(f) the contributions which each of the parties has made or is likely in the foreseeable future to make to the welfare of the family, including any contribution by looking after the home or caring for the family;

(g) the conduct of each of the parties, if that conduct is such that it would in the opinion of the court be inequitable to disregard it;

(h) in the case of proceedings for divorce or nullity of marriage, the value to each of the parties to the marriage of any benefit which, by reason of the dissolution or annulment of the marriage, that party will lose the chance of acquiring.

Key Case 1 – The Very Important One

White v White [2000] 2 FLR 981
House of Lords
26 October 2000

BAILII link: https://www.bailii.org/uk/cases/UKHL/2000/54.html

This was the first occasion when the House of Lords considered the principles which judges should apply when hearing applications under the MCA 1973.

A "big money" case, where the assets available exceeded the parties' financial needs. The husband and wife had been married for over 30 years. They had had three children: one had died in an air crash, the other two were now adults and independent. The parties both came from farming families, and throughout their marriage they carried on a successful dairy farming business in partnership. They bought a farm, and the husband's father made an initial contribution to its purchase by way of an interest-free loan and some working capital. Over time they bought further land, substantially increasing the size of the farm. Throughout, the farm and all the land were held by the two of them jointly. Another farm was inherited by the husband as his share of his father's estate. It was held in his sole name, not in joint names, and it was not treated as belonging to the partnership.

The overall net worth of the parties' assets was £4.6 million. Holman J reasoned that it was unwise and unjustifiable to break up the existing, established farming enterprise so that the wife could embark, much more speculatively, on another. He awarded the wife a lump sum of £800,000 in addition to her keeping her sole assets. On being paid the lump sum, the wife was to transfer all the jointly-owned assets to the husband. The result was that she was to receive slightly over one-fifth of the parties' total assets. The award was based on her reasonable requirements for housing, stabling for her horses, and income.

The wife appealed to the Court of Appeal. Her appeal was successful and the amount of her payment was increased from £800,000 to £1.5 million. After deducting the parties' costs, this meant that the wife's share of the total assets would be increased to about two-fifths, with the farming partnership being regarded as a dominant feature in the case. The husband would still be able to continue to farm, even if on a reduced scale.

The husband appealed to the House of Lords seeking the restoration of the trial judge's order. The wife cross-appealed seeking an order giving her an equal share in all the assets.

Lord Nicholls of Birkenhead noted the equality of contribution made by the parties over their married life.

Held – dismissing both appeals –

1. **The objective of s 25 MCA 1973 must be to achieve a fair outcome. The powers must always be exercised with this objective in view, giving first consideration to the welfare of the children.**

2. Fairness requires the court to take into account all the circumstances of the case. In seeking to achieve a fair outcome, there is no place for discrimination between husband and wife and their respective roles. If, in their different spheres, each contributed equally to the family, then in principle it matters not which of them earned the money and built up the assets. There should be no bias in favour of the money-earner and against the home-maker and the child-carer. A judge would always be well advised to check his tentative views against the yardstick of equality of division. As a general guide, equality should be departed from if, and only to the extent that, there is good reason for doing so. The need to consider and articulate reasons for departing from equality would help the parties and the court to focus on the need to ensure the absence of discrimination. This is not to introduce a presumption of equal division under another guise: a presumption of equal division would be an impermissible judicial gloss on the statutory provision.

3. Section 25(2) does not rank the matters listed in that subsection in any kind of hierarchy. The assessment of financial needs is only one of the several factors to which the court is to have particular regard. In deciding what would be a fair outcome the court must also have regard to other factors such as the available resources and the parties' contributions.

4. A parent's wish to be in a position to leave money to his or her children would not normally be treated as a financial need, but in a case where resources exceed needs, that wish could be included as a relevant factor and given appropriate weight.

5. The judge should take inherited property into account and decide how important it is in the particular case. The nature and value of the property, and the time when and circumstances in which the property was acquired, are among the relevant matters to be considered. However, in the ordinary course, this factor can be expected to carry little weight, if any, in a case where the claimant's financial needs cannot be met without recourse to this property.

6. The section 25 exercise does not call for a detailed investigation of the parties' proprietorial interests.

7. There is no reason to discontinue the use of net values in this situation: in the present case the use of net values produced the fairer comparison.

8. Holman J misdirected himself in taking reasonable requirements as the determinative factor. Accordingly, the Court of Appeal was entitled to exercise afresh the statutory discretionary powers. It had in mind all the available assets, that the contribution made by the husband's father was significant, and that the wife had a dual role as business partner and wife and mother. It also had in mind the overall goal of fairness, a consideration specifically mentioned by Thorpe LJ. The amount of the award was well within the ambit of the discretion which the Court of Appeal was exercising afresh, accordingly there was no ground entitling the House of Lords to interfere with the Court of Appeal's exercise of discretion.

Key Case 2 – The "Self-Help" One

Hildebrand v Hildebrand [1992] 1 FLR 244
Family Division
21 December 1990

Spoiler alert: do not get too attached to this case, there is a reason why I have not given you a link to study it in more detail …

The court refused to compel the wife to answer the husband's questionnaire designed, at least in part, to obtain disclosure of information of which he was already aware. The husband had obtained and copied documents contained in the wife's personal box file. Waite J refused to order the wife to answer the questionnaire on two grounds: first, that and to allow him the additional weapon of disclosure would be to condone his conduct; second, that the questionnaire was not a genuine attempt to obtain information of which he was ignorant.

But Waite J refused to resolve what he described as "deep questions" as to the propriety of the husband's conduct on the brink of the breakdown of the marriage; he left them to those who frame rules of professional etiquette or to a case where it was necessary to make a ruling. He ordered disclosure by the husband of the copies.

This case came to be synonymous with "self-help" in matrimonial proceedings, i.e. clients being encouraged to access documents belonging to the other spouse, whether they were confidential or not, provided force was not used. Once access to such documents or information had been gained, the spouse could retain and use copies, though not the originals, but those copies should be disclosed when a questionnaire was served, or earlier if either party made a standard request.

Key Case 3 – The "Self-Help" is Not Good One

Imerman v Tchenguiz and Others [2010] 2 FLR 814
Court of Appeal
29 July 2010

BAILII link: https://www.bailii.org/ew/cases/EWCA/Civ/2010/908.html

A game-changer after Hildebrand.

The husband shared an office and computer facilities with the wife's property tycoon brothers and had his own password-protected computer. The wife petitioned for divorce on 30 December 2008. On about nine occasions between January and February 2009 one of the wife's brothers accessed the server and made electronic copies of emails and other documents stored by the husband on his computer, and hence on the server. He then took further copies of this material on various digital storage media. The extent of the material involved was vast, the equivalent of between 250,000 and 2.5m pages. The other brother was aware of what was going on. The main reason which the brothers advanced for accessing the husband's records was their concern for their sister's interests. The husband was said to have stated that the Tchenguiz family or the wife would "never be able to find my money", because it was "well hidden".

A significant quantity of this material, consisting of those documents which were thought to be of particular relevance to the wife in any ancillary relief proceedings, were printed out and a barrister instructed to examine the eleven lever arch files and remove any documents in respect of which it appeared that the husband could claim privilege. The remaining documents were collated in seven lever arch files, which were copied and passed on to the wife's solicitors, who eventually sent copies to the husband's solicitors.

There were parallel proceedings in the Queen's Bench Division and the Family Division regarding the use of those documents, resulting in conflicting orders. Moylan J decided that the seven files should be handed back to the husband for the purpose of enabling him to remove any material for which he claimed privilege, but that the husband would then have to return the remainder of the seven files to the wife for use by her in connection with the matrimonial proceedings. H appealed against that decision. The wife cross-appealed against the decision, seeking (a) more control over the process by which the husband could assert privilege, and (b) a reversal of Moylan J's refusal to restrain the husband from disposing of certain memory sticks.

Held – upholding the order made in the Queen's Bench Division and varying the order made in the Family Division – the wife ordered to hand over the seven files (together with any copies) to the husband's solicitors, on terms that, unless the wife's solicitors agreed in writing, they were not to part with any of those documents without the permission of the court; the wife restrained from using any of the information obtained through reading the seven files.

1. **There is no basis for any special "self-help" rules in family proceedings. There are no rules which dispense with the requirement that a spouse obeys the law.**

2. **Communications which are concerned with an individual's private life, including their personal finances, personal business dealings, and (possibly) other business dealings are confidential.**

3. **At the time the information was taken unlawfully, the husband was under no obligation whatever to disclose his assets, still less to disclose private documents relating to those assets. The rules required him only to give full disclosure under Form E. Only thereafter might he be ordered to disclose further documents should the court think it necessary. Accordingly, since the rules specifically exclude any such obligation, it is not possible, it is simply unacceptable, to countenance the wife taking the law into her own hands so as to obtain a premature advantage.**

4. **An important and relevant remedy is the court's power to grant search and seize, freezing, preservation, and other similar orders, to ensure that assets are not wrongly concealed or dissipated, and that evidence is not wrongly destroyed or concealed. Such applications should be seriously considered where there are substantial reasons for believing that a party is concealing or dissipating assets, or intending to conceal or destroy documents. In such a case, subject of course to any other factors which are relevant, such as whether an order, and if so what order, is proportionate, a peremptory order to protect the other party's rights would often be justified.**

Standard practice these days: if you receive Imerman documents, return them unread in a sealed envelope, without taking copies. Ask the other side's solicitor to keep them on file, and suggest they consider whether all/ any of them should be disclosed.

Key Case 4 – The Unspellable One

Xydhias v Xydhias [1999] 1 FLR 683
Court of Appeal
21 December 1998

BAILII link: https://www.bailii.org/ew/cases/EWCA/Civ/1998/1966.html

Following lengthy negotiations in financial proceedings and shortly before the trial, counsel for the wife agreed the terms of a fourth draft of the consent order which had been drafted by counsel for the husband. The court was notified that the case had settled and the hearing was vacated. The husband then attempted to vary the agreed timetable for paying the lump sum; the husband's solicitor subsequently stated in instructions that the husband had withdrawn all offers and that the case would be fully fought. At the hearing, the wife argued as a preliminary issue that agreement had been reached; the District Judge agreed. The husband appealed.

Held – dismissing the husband's appeal –

An agreement may be binding if the broad heads are clear: there are sound policy reasons supporting the conclusion that the judge is entitled to exercise a broad discretion to determine whether the parties have agreed to settle. The court has a clear interest in curbing excessive adversariality and in excluding from trial lists unnecessary litigation. Ordinarily heads of agreement signed by the parties or a clear exchange of solicitors' letters will establish the consensus.

Part II: Melissa Millin

Key Case 5 - Mesher v Mesher and Hall [1980] 1 All ER 126

The Deferral of Sale Case

This was a case argued in 1973 but not reported until 1980. The parties were married in May 1956 and they had one daughter who was nine years old and who lived with the mother. The house was their third home, it had been in joint names in 1966.

The wife petitioned for a divorce on the basis of husband's adultery with Mrs. Hall (the second Respondent). Decree nisi was pronounced in August and it was clear that the husband proposed to marry Mrs. Hall when the decree was made absolute. The wife also proposed to marry a Mr. Jones who was at the time obliged to support his former wife and their two children.

There was an appeal by the husband of an order made by Lately J at Winchester on 4 October 1972 upon the wife's application for ancillary relief. The judge had ordered that upon accepting an undertaking from the wife not to take any action to recover any arrears due to her on any existing order, that the former matrimonial home be transferred to the wife and

that the husband should pay £4 a week for the benefit of the child of the marriage. The question of periodical payments for the wife was adjourned.

At the time of the appeal it was known that both the husband and the wife planned to remarry. The new partners both had children by previous marriages. Before the court was the situation where there were two family units had very similar resources. The calculations leading to that conclusion are carefully rehearsed in the judgement of Davies LJ.

On appeal, the husband complained that in the circumstances it was both unfair and unreasonable to deprive him of the whole interest in the former matrimonial home and proposed that the asset be divided equally. The wife relied on the husband's conduct and that her imminent remarriage allowed and the husband only to be responsible maintenance of the child and not herself.

Held - Allowing the husband's appeal

The sale of the home was deferred and the Husband maintained his interest and the wife her occupation. The court took the view that what was wanted here was to see that the wife and daughter, together no doubt in the near future with Mr Jones, should have a home in which to live rather than she should have a large sum of the available capital. With that end in view, the court came to the conclusion that counsel's submission for the husband is right and it would be wrong to strip the husband entirely of any interest in house.

Accordingly, Mesher Order is one way to govern what will happen to the family home after divorce and in particular, allows the sale of the family home to be deferred. The deferral can be for a specified period of time or triggered by a specific event. This order allows the management of the deferral on occasions where an immediate sale or transfer of equity to one party is not a practical solution. Practitioners will be familiar with the companion Martin Order, which again facilitate deferral of sale but are relevant to situations where there are no children of the family to consider.

Common trigger events might be when the party living in the family home enters a new relationship and decides to co-habit or re-marry, when children conclude their full-time education or upon a set date agreed by the parties.

Under the terms of the Mesher Order the property remains in the joint names of the divorcing couple, on trust for sale, until the point of the first trigger event. Upon the occurrence of the trigger the property can be sold and the proceeds divided.

As noted above the Mesher Order, a childless cousin called a "Martin Order" and another companion cousin where the property can be transferred to the party occupying and the non-occupying party has a charge against the property often known as a 'chargeback'. This version is rare these days but allows the court to prioritise the interests of the children over creditors.

The Mesher Order flows from two provisions within the Matrimonial Causes Act 1973 Section 24(1)(b) (order for settlement of property) or section 24(1)(c) (variation of settlement) depending on whether the property is held in joint or sole names but on a

practical level this distinction is usually assumed rather than being recorded in the order. There is scope for bringing forward the relevant dates of sale. This is done upon application, either under s24A of the MCA or s14 of TOLATA but the draft of the order should clarify the rational of the order.

A well-drafted Mesher Order will make clear who is to occupy the property, who pays the mortgage, whether there is an indemnity, who pays for repairs, any credit for improvements made, who will have conduct of the sale, whether the terms are open to variation, specifies contingencies (particular those driven by the care of the children) and a prohibition to prevent borrowing that affects a party's interest.

Key Case 6 - Duxbury v Duxbury [1990] 2 All ER 77

The Calculation Case

This was a 22-year marriage. Before it broke down the parties had enjoyed a very comfortable lifestyle. The Husband left the family home and went to live with his mistress. The wife remained in the family home and she lived with her much younger lover (14 years her junior and with only a modest income) whom she had absolutely no intention of marrying.

The husband was the chairman of a public company and wealthy. There were assets of over £2.5 million and the husbands income was about £145,000. The three children were all grown and well provided for. The wife had never worked or brought capital into the marriage but had done all that was necessary as a wife, mother and hostess throughout the marriage. The husband appealed the initial clean break settlement of the transfer of the house and a lump sum of £600,000. The issue was the consideration of the wife's co-habitant benefiting from the settlement. It is indeed interesting how the court explored that but not a matter for consideration today.

The divorce was in 1984 and the outcome is not at all what is relevant to this analysis and can be read in the judgment by those who are concerned to know. What is wholly relevant, however, is the model of iterative computation attributed to Mr. Tim Lawrence of Coopers & Lybrand, who used the model of calculation to calculate the lump sum equivalent of a periodic maintenance payment.

To be clear an iterative computation is a mathematical procedure that uses an initial 'guess' (estimate or assumption may be preferred terms) to generate a sequence of (usually) improving and approximate solutions for a class of problems, in which the n-th approximation is derived from the previous one. The key aspect of what it can do is to calculate the level of income stream necessary to convert into capital and/or determine what capital is needed to generate an appropriate income stream. What this can achieve is make real headway in deadlocked negotiations or support persuasive support to a proposal or proposition.

What is important to understand is the Duxbury Calculation is a 'method' and not a 'guarantee'. Another description is that of a "guide" to a net present value of a "right to receive" at a "target annual rate" over a "period". Often the essential step in determining the appropriate capitalisation of a proposal. All very useful during Enforcment matters.

The basic question the court should be asking itself is, do the proposals as presently provide

a sufficient lump sum, that if paid now, would give the applicant something of equivalent in value to the future maintenance, so that the future maintenance can be capitalised without unfairness to either party at this point in time.

When is a **Duxbury Calculation** useful?

(a) Effecting a partial or total clean break by way of a lump sum payment in lieu of periodic payments.
(b) Effecting a clean break by way of a lump sum payment upon application for variation/capitalisation of periodic payments
(c) Reverse calculating the income generated from retained capital
(d) Reverse calculating to verify that a party's future needs are met by the resources
(e) Calculating the appropriate level of capital security to impose an order for secured periodic payments

Useful as it may be there can be considerable debate as to the relevant assumptions to be used. As a rule of thumb, when considering the proposition in overview, the following Excel formula can assist by engaging PV (Present Value) function. **£x = PV(rate, term, payment)** (where the rate is the discount rate, the term is the term and the payment is the annual maintenance payment).

Those familiar with **"At a Glance" Essential Tables for Financial Remedies** will be familiar with the relevant tabulations. Further those with experience of the calculations will be keenly aware that modest variables in the discount rate will have enormous impact on the outcomes.

There are considerable adjustments and assumption that can be made but the goal is to achieve fairness between the parties. Some obvious anomalies present. A party who has received a calculated capitalised payment who remarries or ironically dies young will gain advantage. Similarly longevity can have the opposite effect diminishing the return.

Key Case 7 - Radmacher v Granatino [2010] UKSC 42

The Pre-Nup Case

The parties were married in London in 1998. The husband was French and had been a successful Banker and the wife German and a wealthy heiress. The parties had two daughters but separated after eight years. Before the marriage the parties both signed a prenuptial contract in Germany. The essence of the agreement was that, in the event of divorce, neither party could claim property belonging to the other and gain.

The central issue for the court was a determination of the significance of the prenuptial agreement upon the husband's claim for a £6.9 settlement arguing that the agreement should play no role in the determination of the case. The wife argued the contrary position, making a considerably lower offer for settlement upon reliance on the terms of the agreement.

Held - Whilst no agreement between the parties of a marriage can override the MCA, s25 equipped the court with a wide discretion to consider all the circumstances of the case. In light of that discretion the court, upon majority (Baroness Hale dissenting)

determined on the facts that the court should give effect to a nuptial agreement that is; freely entered into by each party, with full appreciation of its implications, unless the prevailing circumstances would not be fair to hold the parties to their agreement. There is some interesting Obiter that there was no conceptual difference between Pre and Post Nuptial agreements.

This case does not say that prenuptial agreements are always enforceable.

There are many reasons that destabilise any prospect of an agreement entered into by the pities influencing the court. If a party claims that the agreement was entered into without full disclosure, or is tainted by fraud or one party to the agreement was made under pressure being obvious obstacles. Most relevant is the risk that if the agreement was upheld that the outcome would be unfair. That unfairness is usually found on the basis that the proposed outcome would be insufficient to meet the needs and adequately provide for the children of the marriage but parties should be cautious because a prenuptial agreement can be upheld even when it provides a party with a limited amount of the assets.

So the message is that the court will seek to uphold the agreement providing it is not tainted by unfairness and what is unfair is not a constant. The extract below may assist.

"The court should give effect to a nuptial agreement that is freely entered into by each party with a full appreciation of its implications unless in the circumstances prevailing it would not be to hold the parties to the agreements".

"The first question will be whether any of the standard vitiating factors: duress, fraud or misrepresentation, is present. Even if the agreement does not have contractual force, those factors negate any effect on the agreement might otherwise have. But unconscionable conduct such as undue pressure (falling short of duress) Will also be likely to eliminate the weight to be attached to the agreement, and other unworthy conduct, such as exploitation of a dominant position to secure an unfair advantage, would reduce or eliminate it."

"The court may take into account a parties and emotional state, and what pressures he or she was under to agree. But that again cannot be considered in isolation from what would've happened had he or she not been under those pressures. The circumstances of the parties of the agreement will be relevant. This will include such matters as their age and maturity whether either or both have been married or been long-term relationships before. For such couples their experiences previous relationships may explain the terms of the agreement, and may also show what they foresaw when they entered into the agreement. What may not be easily foreseeable for less mature couples may well be in the contemplation of more mature couples. Another important factor may well be whether the marriage would have gone ahead without agreement, or without the terms which had been agreed. This may cut either way".

For completeness it is noted that beyond these factors the consequential changes in circumstances arising in consequence of marriage cannot be ignored. Obvious change of circumstance maybe the arrival of children, National or international relocation and the jurisdiction of operation.

It is also relevant that doctrines are emerging ventilation to non-nuptial and post-nuptial

agreement, which is only really dealt with by this case through analogist application. But it remains clear that the court retains the last word, seen as a reflection of the states vested interest, the Institute of marriage and the financial obligations that marriage creates.

Great care should be taken in the preparation of such documents and the features of a well drafted agreement are contained and highlighted within the slides.

Key Case 8 - Prest v Petrodel Resources [2013] UKSC 34

The Corporate Veil Case

This question addressed the knotty issue of piercing the corporate veil through the lease of Family Proceedings. The wife claimed under Part II of the Matrimonial Causes Act and in this instance under sections 23 and 24. Section 23 provides the periodical and lump sum payments in this instance for the benefit of the children of the marriage. Section 24(1)(a) allows that the court may order that a party to the marriage shall transfer to the other party such property this may be so specified, being property to which the first mention party is entitled, either in possession or reversion.

These provisions sit alongside the provisions of section 25 and in particular the considerations focused on section 25(2)(a) being the income, earning capacity, property and other financial resources of each of the parties to the marriage has or is likely to have in the foreseeable future.

The appeal concerned a number of companies belonging to the group known as the Petrodel Group which have been found to be wholly owned and controlled (either directly all through intermediate entities) by the husband. There were originally seven companies involved, all of which were joined as additional respondents and one of which, Petrodel Resources Ltd, Incorporated in the Isle of Man, which was the legal owner of the matrimonial home. There was an uncontroversial earlier finding that the matrimonial home was held within the company for the husband beneficially and at the time of the appeal was in the process of being transferred to the wife. That journey to resolution is a very helpful analysis in and of itself and I would certainly recommend practitioners familiarise themselves fully with the judgment.

Five further residential properties where also in the legal ownership of that same company. Others were owned by Vermont -based company. The question of the appeal was whether and if so how the court had the power to order the transfer of the seven properties to the wife given the consideration that they legally belonged to the company and not the husband. The case journeyed through a number or courts and had the benefit of considerable reasoning being applied to the determinations at every stage.

The judicial observation was clear that the proper exercise of these powers calls for a considerable measure of candour by the parties in disclosing their financial affairs. In this instant the husband had not covered himself in glory with regard to his conduct during the proceedings however it was found, carefully on the facts, that the husband was the sole beneficial owner and importantly the controller of the companies assessed as having net assets of some £37.5 million. In the most simple terms a lump sum order was made in favour of the wife but the validity of the reasoning was tested.

It is well established law that subject to some very limited, mostly statutory, exceptions, a company which is a legal entity distinct from shareholders is entitled to rights and liabilities of its own. The management and control of the particular group had always been in the hands of the husband, ostensibly as chief executive under a contract of employment which conferred upon him a complete discretion in the management of the business. It was found that none of the companies within the group have ever had independent directors and all such positions were held nominally, by professionals or by relatives all of him accepted the husband's directions. However the ownership if the respondent companies proved very difficult to establish and was so puzzling that it was difficult for the court to make findings. There were further complexities arising from the husbands declared interests and his personal expenditure which far exceeded what was expected to be available in the circumstances.

Held - the Supreme Court unanimously held that the husband was the beneficial owner of the assets held within the companies under a resulting trust because of his contribution to the purchase price. There was no need to pierce the corporate veil, which could only be done in very limited situations. However, because the husband had been entitled to the assets of his companies under a resulting trust, under s24 of the Matrimonial Causes Act 1973, the court had jurisdiction to transfer half the value of the properties to the wife.

This part of the judgement takes considerable care to define the nature of the piercing of the veil but considers carefully *"the principal that the court may be justified in piercing the corporate veil if a company is separate legal personality is being abused for some relevant wrongdoing is well-established in the authorities … this is because I think that recognition of a limited power to pierce The corporate veil and carefully defined circumstances is necessary if the law is not to be disarmed in the face of abuse."*

In this instance the interest in the properties was initially evaluated and the husband's interest had been so vested long before the marriage broke up. The motivation to the arrangements was wealth protection and tax avoidance and in those circumstances a justification but allowed the piercing of the corporate veil was not available under reference to general principles of law. The structure was not built to disadvantage the wife. Relevant to the matrimonial proceedings today a special or wider principle was not applied by virtue of section 24(1)(a). However, the breadth of inclusion in relation to factors under section 25 meant that in those limited circumstances the relevant spouse's ownership and control of the company and practical ability to extract money all worth from that company were unquestionably relevant to the courts assessment what that parties resources really were. So the power of s25 was tested again.

Returning to the deliberations, having narrowed the issue considerably in the judgement, the question became one of whether the disputed properties belonged beneficially to husband by virtue of the particular circumstances in which the properties became vested. The starting point was that the wife expressly alleged that the husband used corporate defendants to hold legal title to the properties that belong to him beneficially. The judgement was grounded in

the determination of whether the assets, which were legally vested in the company and who, if that was so was the beneficiary but it is to be acknowledged as highly case specific.

Accordingly this authority did not give general guidance going beyond the ordinary principles and presumptions of equity especially those relating to gifts and resulting trusts. Notwithstanding, couched in a tentative framework, in the case of the matrimonial home, the facts were described as being quite likely to justify the inference that the property is held on trust for spouse who owned and controlled the company in very limited circumstances. That chink may be all that is required in the right circumstances and I continue to look for the appropriate case to make that argument.

This analysis was developed on the basis that the occupation of the company's property as the matrimonial home of its controller cannot be easily justified as being in the company's interest, especially if it is, as this was, gratuitous. The intention is that normally the spouse in control of the company intends to retain a degree of control over the matrimonial home which is not consistent with the property being in the companies beneficial ownership.

Whether the terms of acquisition occupation of the matrimonial home are arranged between husband in his personal capacity and the husband in his capacity as the sole effective agent of the company (or someone else acting at his direction), judges exercising family jurisdiction are entitled to be highly sceptical about whether the terms of occupation are really what there set to be, or are simply a sham to conceal the reality of the husband beneficial ownership. This leaves the relevant scope for the relevant challenges in appropriate circumstances. Further this method of consideration should not necessarily be confined to big money cases in family proceedings. I simply consider here where there is accommodation above the shop or a land space unit with residential development potential.

Further it was recognised despite a very limited power to pierce the corporate veil, in this instance it was recognised that where an existing legal obligation was being deliberately evaded an exception could arise. This was in the specific instance where a person was under an existing legal obligation or liability, or was subject to restriction, and had deliberately caused frustration by interposing a company under their control. Fraud and evasion potentially cutting through everything if the occasion arose.

The only basis that the Supreme Court permitted the transfer of ownership of this disputed properties on the facts was vested in the clear finding that the properties were beneficially owned by the husband. Those familiar with this area will also be familiar with the relevant considerations of the restriction of the diversion of resources through a share transfer or through restraint of the abuse at an interlocutory stage and still those options remain forceful tools available but this was a very interesting analysis of how the arguments are developing.

Key Case 9 - Hadkinson v Hadkinson [1952] 2 All ER 567

The Bonus Case

Have this as a bonus as I thought it was a top 10 between us and Prest by anyone's standards is a tough chew.

This is the case grew out of the custody hearing but the authority is one acutely applicable to financial proceedings.

During the divorce the wife was given custody of the only child of the marriage. It was directed that that child should not be removed from the jurisdiction without permission. The

mother remarried and removed the child to relocate with her in Australia. The Mother was ordered to return. The mother appealed the order to return. In response to the appeal by the Mother of the order to return the Father took the preliminary objection that the appeal should not be heard because the mother had been at all times, and still was, in contempt of court

Held - There remains an unqualified obligation to comply with an order of the court unless or until that order is discharged. This mother had not brought herself within any of the exceptions to the general rule of being debarred as a person in contempt from being heard by the court whose order had been disobeyed. The contempt was continuing because the child remained outside the jurisdiction. Accordingly her appeal could not be heard until she had taken her first essential step towards purging her contempt and returning the child to the jurisdiction.

It was observed the fact the party to a cause disobeyed a court order was not in and of itself a bar to the party but when this disobedience was such, that so long as it continued, it impeded the course of justice. The enduring and deliberate contempt made it more difficult for the court to ascertain the truth or to enforce the orders, make directions and accordingly the court was entitled to exercise its discretion not to hear that party until the impediment to justice was removed. This is the purpose of Hadkinson.

The relevance to financial remedy proceedings is very clear. The aim is to prevent a party from taking future court action before compliance with an earlier order is secured. For example, where a party wilfully, and without adequate reason, fails to pay maintenance or lump sums due. In this instance, for example, where the offending party seeks to vary or appeal a maintenance order, or has failed to pay maintenance pending suit without adequate reason, the granting of the Hadkinson Order will prevent the offending party being heard in pursuit of their own application for variation or appeal unless or until certain conditions are complied with.

Applications for a Hadkinson Order should be made under the Family Procedure Rules 2010, Part 18 procedure. In determining the application six key questions need to be considered and determined upon the civil standard.

i. is the offending party in contempt?
ii. Is there an impediment to the course of justice?
iii. Is there any other effective means of securing compliance with the court order?
iv. Should the court exercise its discretion to impose conditions having regard to the question?
v. Is the contempt wilful (contumacious and continuing)? (vi)If so what conditions would be appropriate?

Notwithstanding, court remains required to exercise great caution with regard to exercising this power, particularly in the context article 6 which makes it clear *'The limitations applied must not restrict to reduce the access left of the individual in such a way or to such an extent that the very essence of the right is impaired [and] a limitation will not be compatible with Article 6(1) if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved"*

A recent example of the application is where the non-payment of a maintenance order was found not an insuperable impediment to justice but the non-payment of a legal services order was. The astute will recognise immediately that access to ordinary enforcement proceedings and response in this instance to the Husbands appeal was underpinned by access to legal advice for this wife. Whilst the decision makes clear the distinction and application of decision making regarding what is and is not an impediment there remains some concern relation to the jurisdiction to have made the legal services order in the first place if the

If the Husbands appeal ultimately succeeded but that is perhaps a discussion for another day. In the meanwhile when the usual mechanisms of enforcement evade and access to justice is compromised by a deliberate and continuing act, this authority is a little diamond and well worth its place on the desert island reading list.

This note is for general information only and is not intended to constitute legal advice on any general or specific legal matter. For legal advice on divorce or other family law matters, please contact Alex Nunn: a.nunn@goldsmithchambers.com to discuss instructing Counsel.

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