

# Desert Island Cases: Eight Key Cases to Know in Matrimonial Finance

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# First, read s. 25 of the MCA 1973

- ▶ 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 in a financial remedy case.
- ▶ **Sections 25(1) and 25(2) are particularly important.**



# And here they are!

**Section 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.**

# s.25(2) MCA

- (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;

## s.25(2) MCA - Continued

- (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

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

# Background (White v White)

- ▶ A “big money” case, where the assets available exceeded the parties’ financial needs. The overall net worth of the parties’ assets was £4.6 million.
- ▶ H and W had been married for over 30 years. Their children 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.

# Court proceedings (White v White)

- ▶ At first instance Holman J awarded W 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.
- ▶ W appealed to the Court of Appeal. Her appeal was successful and her share of the total assets was increased to about two-fifths, with the farming partnership being regarded as a dominant feature in the case.
- ▶ H appealed to the House of Lords seeking the restoration of the trial judge's order. W cross-appealed seeking an order giving her an equal share in all the assets. Both appeals were dismissed.



# Some key points from Lord Nicholls' judgment (*White v White*)

- ▶ 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.
- ▶ Fairness requires the court to take into account all the circumstances of the case. 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.
- ▶ 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.

# Some key points from Lord Nicholls' judgment (White v White) - Continued

- ▶ 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.
- ▶ 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.
- ▶ 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!**

# What is its relevance? (Hildebrand)

- ▶ H had taken discovery improperly into his own hands: he had obtained and copied documents contained in W's personal box file.
- ▶ **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

Immerman v Tchenguiz and Others [2010] 2 FLR 814  
Court of Appeal

29 July 2010

A game-changer after Hildebrand.

# Background (Immerman v. Tchenguiz)

- ▶ H shared an office and computer facilities with W's brothers and had his own password-protected computer. After W petitioned for divorce, one of W's brothers accessed the server and made electronic copies of emails and other documents stored by H on his computer. 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 H's records was their concern for their sister's interests. H was said to have stated that the Tchenguiz family or W would "never be able to find my money", because it was "well hidden".

# Court proceedings (Imerman v. Tchenguiz)

- ▶ 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 documents should be handed back to H for the purpose of enabling him to remove any material for which he claimed privilege, but that H would then have to return the remainder of the seven files to W for use by her in connection with the matrimonial proceedings.
- ▶ H appealed against that decision. W cross-appealed against the decision, seeking (a) more control over the process by which H could assert privilege, and (b) a reversal of Moylan J's refusal to restrain H from disposing of certain memory sticks.

# The Judgment (Immerman v. Tchenguiz)

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



# So what's the position now? (Immerman)

- ▶ 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.
- ▶ Communications which are concerned with an individual's private life, including their personal finances, personal business dealings, and (possibly) other business dealings are confidential.
- ▶ It is simply unacceptable to countenance a party taking the law into their own hands so as to obtain a premature advantage.

# Then what? (Imberman)

- ▶ 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.

## Top tip (Imerman)

- ▶ 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**

**An agreement may be binding if the broad heads are clear.**

# Background (Xydhias v Xydhias)

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

# Court proceedings (Xydhias v Xydhias)

- ▶ H's appeal dismissed.
- ▶ 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.

# Meshner v Meshner

- ▶ Meshner Order
- ▶ Martin Order
- ▶ Charge Back Order

# Principles of a Deferred Sale

- ▶ Statutory Provisions
- ▶ Matrimonial Causes Act 1973 and TOLATA 1996
- ▶ S24(1)(b) MCA 1973 – Order for Settlement of Property
- ▶ S24(1)(c) MCA 1973 – Variation of Settlement
- ▶ S24A MCA 1973 and s14 TOLATA 1996 – Orders for Sale



# A well drafted Meshner Order

- ▶ The Details of Ownership
- ▶ Who Occupies the Property
- ▶ Who Pays the Mortgage
- ▶ Who Pays For Any Repairs
- ▶ Who Benefits From Any Improvements
- ▶ Who has Conduct of the Sale
- ▶ The Trigger Events
- ▶ The Question of the Variation of Terms
- ▶ Contingencies
- ▶ The Management or Restraint of Borrowing

# Meshner Orders the Imperfect Solution

- ▶ Financial Ties Remain
- ▶ Can be Imposed
- ▶ Disadvantages for Both the Remaining and Leaving Party
- ▶ Lack of Control over Day to Day arrangements and Final Sale
- ▶ Capital Tied Up

# Meshner Order – The Stark Reality

- ▶ Perhaps the Only Option Available to meet the Housing needs

# Duxbury v Duxbury

- ▶ Duxbury is a Calculation Method not a Guarantee
- ▶ It is an Iterative Computation
- ▶ A Guide to a Net Present Value of a Targeted Right to Receive
- ▶ An Excellent Tool to Understand and Explain Matters of Settlement

# When is Duxbury most useful?

- ▶ Effecting a partial of total Clean Break in lieu of Periodic Payment
- ▶ Effecting a clean Break on Variation of through Capitalisation
- ▶ Reverse Calculation Income generated from Retained Capital
- ▶ Reverse Calculation to test if resources offered meets future needs
- ▶ Calculating levels of Capital Security to secure Periodic Payment

# Basic Calculations (Duxbury)

- ▶ An Excel PV function Formula
- ▶  $fx = PV(rate, term, payment)$

# Desert Island Luxury Item (Duxbury)

- ▶ "At A Glance – Essential Tables for Financial Remedies"

# Radmacher v Granatino

- ▶ Supreme Court exercised Discretion to Uphold a Pre-Nuptial Agreement
- ▶ Supreme Court did not say that Nuptial Agreement are always enforceable
- ▶ This is an example of the discretion of s25 MCA 1973



# The Key Ingredients (Radamacher)

- ▶ Full Material Disclosure
- ▶ Independent Legal Advice
- ▶ Consideration of timing and overcoming Coercion

# Practical Considerations (Radmacher)

- ▶ Interim Provisions (MPS) preempted and woven into the agreement
- ▶ Agreement that meets needs when entered
- ▶ Review of the agreement to Properly test that the Needs will continue to be met through meaningful review
- ▶ Inheritance Provisions anticipated and incorporated
- ▶ Contingency Options
- ▶ Exit clauses

# Prest v Petrodel Resources

## ► The Corporate Veil

- **Solomon v A Solomon & Co Ltd** [1896] UKHL 1, [1987] AC 22 and the doctrine of corporate personality

# MCA s23, s24 and s25 (Salomon)

- ▶ A clear recognition of the principles of **Salomon** as a '*clear and principled decision, which has stood unimpeached for over a century*' Lord Neuberger
- ▶ A recognition of the creation of subsidiary companies are separate legal entities
- ▶ Piercing being confined to those limited situations when the separate legal entity can be disregarded being the exception to the **Salomon** rule

# The Specific Outcome

- ▶ The Husband was the beneficial owner of the relevant assets
- ▶ The Resulting Trust engaged s24
- ▶ The Discretion under s25 underpinned the consideration
- ▶ Deliberate Evasion of obligation could lead to a legitimate exception arising

# Hadkinson v Hadkinson

- ▶ This is a bonus case in this series (I thought it was a top 10!)

# Contempt and Hadkinson

- ▶ There is an unqualified obligation to comply with an order of the court unless or until that order is discharged.
- ▶ There is a general principle that a person in contempt is not entitled to be heard
- ▶ The continuing and deliberate nature of the contempt
- ▶ Article 6

# Hadkinson and Financial Remedy

- ▶ These are unusual cases
- ▶ Other and alternative enforcement remedies must be considered
- ▶ Disobedience is not in itself a bar
- ▶ The Applicant needs to prove a deliberate and continuing disobedience that impedes the course of justice
- ▶ Upon such proof the court retains the discretion to hear the party or impose conditions



# The Six Key Hadkinson Questions

- ▶ Is the Offending Party in Contempt
- ▶ Is there an impediment to the Course of Justice?
- ▶ Is there any other effective means of securing compliance with the relevant court order?
- ▶ Is the contempt wilful (contumacious and continuing)?
- ▶ Should the court exercise its discretion to impose conditions?
- ▶ If so what conditions are appropriate

# Hadkinson Procedure

- ▶ Family Procedure Rules 2010, Part 18 Procedure
- ▶ Determination of six key questions to the civil standard
- ▶ The retention of discretion

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