



Albion Chambers MATRIMONIAL FINANCE TEAM NEWSLETTER

Enforcement of financial orders

Does the Limitation Act apply to interest?

The principles of enforcement of financial remedy orders are fairly well-established. As a general rule, where a party seeks to enforce a financial provision

order more than 12 months after any arrears become due, section 32 of the Matrimonial Causes Act 1973 creates a leave stage, where the permission of the court is required in order to commence enforcement proceedings.

Where the issue is maintenance arrears, the general practice of the courts has been to decline to enforce arrears which accrued more than 12 months before enforcement proceedings commenced: *Russell v Russell* [1985]. The rationale for this is that if the complainant has waited a year to seek enforcement, this suggests they did not need the money, or at least had managed well enough without it.

Case law on the exercise of judicial discretion under section 32 is relatively sparse. Until recently there had been little guidance as to how the court should deal with an application for enforcement of a lump sum order and in particular the interest due on the unpaid lump sum. A question arising from this is whether the Limitation Act 1980 applies to the enforcement of financial remedy orders.

The point has recently been decided in the case of *Mann v Mann* [2016] EWHC 314 (Fam). The facts of the case are complex, giving rise to litigation that

spanned 17 years. The wife in that case sought to enforce orders for the payment of lump sums, and additionally sought interest on those sums for the ten-year period since they had become due.

In giving judgment, Mrs Justice Roberts affirmed the principle established in *Lowsley and Another v Forbes* [1999] 1 AC 329. This was that the word 'action' within s24(1) of the Limitation Act 1980 meant a fresh action; and therefore precluded a judgment creditor from bringing a fresh action on the judgment after six years, but did not stop them from seeking to enforce the original judgment. As such, that section of the Limitation Act 1980 does not bar enforcement more than six years after an order is made.

A more difficult question, however, was s24(2) of the same Act, which creates

a bar on the recovery of interest more than six years after the original order. Prior to the judgment in *Mann*, there had been a division of academic opinion over whether the Limitation Act 1980 applied to proceedings under the Matrimonial Causes Act 1973 at all. Indeed, some commentators thought the decision in *Lowsley* seemed to indicate that it might not.

In deciding that s24(2) does apply in matrimonial proceedings, Roberts J held that s32 of the MCA 1973 and s24(2) of the LA 1980 essentially deal with different matters; the former concerns the payment of arrears under a financial provision order whilst the latter deals with the recovery of interest on a crystallised judgment debt. Additionally, she interpreted their Lordships' decision in *Lowsley* as emphasising that all judgments are caught by the words of the 1980 statute, so as to bar execution in respect of arrears of interest after six years.

The result is that where a party seeks to enforce a lump sum order that is more than six years' old, their claim for interest will be limited to six years from the date the sum became due.

Alexander West

Appeals

Life as an ancillary relief practitioner is nothing if not unpredictable: one week you are so busy you forget what your wife looks like, the next she is shooing you out of the house because you've settled all your cases and she's sick of the sight of you.

I would never have predicted the number of appeals coming my way (five in the last six months), and the purpose of this article is to share with you my own personal dos and don'ts.

Do remember the rules.

Until relatively recently ancillary relief appeals could be brought as of right, and it was a matter for the appeal judge whether the hearing would be by way of re-hearing or review and to what extent fresh evidence would be admitted. All of that changed with the decision of *Cordle v Cordle* [2001] EWCA Civ 1791 and the position is now enshrined in FPR Part 30 which provides that:

■ permission to appeal is needed and will only be given where there is a real

prospect of success;

- fresh evidence will not normally be permitted;
- the appeal is limited to a review of the decision of the lower court; and
- the appeal will be allowed only if the decision was wrong or there was a serious procedural irregularity.

Don't appeal on the facts.

Appeals are launched by those who feel aggrieved at the outcome before the District Judge: those who feel most aggrieved are those who lost on the facts, but those most likely to succeed are those who lost on the law.

In the discretionary jurisdiction of section 25 of the Matrimonial Causes Act 1973; an error of law will be found to have occurred only where the District Judge took into matters he should not have, left out of account relevant matters, where there was a serious procedural irregularity, or where the outcome was so unreasonable as to be plainly wrong *G v G* [1985] UKHL 24.

Anybody faced with an appeal founded on assertions that the District Judge "wrongly" preferred the evidence of one party over the other need only call to mind the famous words of Lord Fraser in *Piglowska v Piglowski* [1999] UKHL 27:

"The need for appellate caution in reversing the trial judge's evaluation of the facts is based upon much more solid grounds than professional courtesy. It is because specific findings of fact, even by the most meticulous judge, are inherently an incomplete statement of the impression which was made upon him by the primary evidence. His expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance... of which time and language do not permit exact expression, but which may play an important part in the judge's overall evaluation."

Do apply to admit fresh evidence if appropriate.

It is the nature of appeals that the factual matrix as found by the District Judge may well have changed in the intervening time. So if, for instance, the District Judge made an order for periodical payments at a time when the receiving party was not working, but now he or she is, that is evidence which would have made a significant difference to the outcome, which is apparently credible and which could not reasonably have been obtained at the date of the trial: in other words it is likely to pass the test in *Ladd v Marshall* [1954] EWCA Civ 1.

In those circumstances, it is highly likely that such evidence would be admitted

on the appeal, after all, if not admitted the Respondent would simply make an immediate application to vary the order, thus sparking a fresh round of litigation, which neither side is likely to welcome. Do therefore apply properly for its admission, in either the Notice of Appeal, or the Respondent's Notice.

Do remember the appeal is against the order not the judgment.

Unless the judgment reveals a flaw in the District Judge's reasoning, it serves only as an explanation for the order which he or she made, and picking holes in it, whilst no doubt great fun, will achieve little. Lord Fraser again:

"The exigencies of daily court room life are such that reasons for the judgment will always be capable of having been better expressed. This is particularly true of an unreserved judgment..."

Do seek clarification (but only if you need to).

PD 30A paragraph 4.6 stipulates that where a party believes that the judgment contains a material omission, rather than launching straight into an appeal, that party should first seek clarification from the trial judge and should do so before the order is drawn. If you choose not to do so you are likely to get short shrift if you later criticise the judgment on appeal.

On the other hand, most trial judges take such requests rather personally and respond in rather terse terms. Requests should therefore be made only where genuinely needed and not used instead as a means to have a go at a Judge who you think has got it wrong. This experience may be one shared by those who have the temerity to seek clarification from Mostyn J - see *JL v SL (no 3)* [2015] EWHC 555 for a good example of how not to seek clarification.

Do apply for a stay.

Remember that an appeal does not operate as an automatic stay on the order, and so unless you apply for one, compliance with the order is required. Stays will be granted on the balance of convenience and if granted should prevent penal interest running on any lump sum.

Don't plead every ground of appeal you can think of.

Most appeals are likely to have one or two good grounds (if any) and these can get lost if you are tempted to get too clever and plead seven or eight. Moreover, there is a risk on costs if some succeed but others fail, as the appeal judge might choose to

apportion costs between those points which succeeded and those which failed. Stick to your best points.

Do serve a Respondent's Notice.

Save in particular circumstances, the Rules do not require the Respondent to serve a Respondent's Notice. As a result, there is a small risk that the costs of doing so may be disallowed.

In practice, however, it is almost always a sensible step, for two reasons. First, it fires a shot across the bows of anyone who has launched an appeal thinking that it is likely to succeed or settle. A well-drafted Notice is a means of emphasising that the Respondent feels there is no merit in the appeal, that he or she intends to fight it, and if they win they will seek their costs. The second reason for the Notice is that once it is on file the Court knows both sides of the appeal when considering which directions to make, thus lessening the risk of the Court making inappropriate directions (probably in the absence of the parties).

Do make an early Calderbank offer.

Not only does the usual no order rule on costs not apply, but Calderbank offers are admissible (*WD v HD* [2015] EWHC 1547). This enables the crafty to ramp up the pressure on the other side at the outset of the appeal, for instance by seeking to uphold the District Judge's order in their open position, but making a Calderbank offer which concedes the merit of the main thrust of the appeal. In this way, many successful appeals can become rather pyrrhic, once the gain of the win is offset against the loss on costs.

Do consider the likely outcome.

If the District Judge's judgment is so completely hopeless that it leaves the Circuit Judge without a sustainable factual matrix into which to substitute his or her own order, the only possible outcome to the appeal might be an expensive re-hearing. Consider whether time and money could be saved by the Circuit Judge reserving the re-hearing to himself and making directions for the re-hearing at the conclusion of the appeal.

If both sides are advised by experienced practitioners and can see the flaws in the judgment of the District Judge, a round-table meeting might produce an outcome acceptable to all.

Don't take anything for granted.

Most District Judges hear ancillary relief cases regularly, most Circuit Judges do not; and whereas the experience and interests of the Circuit Bench vary widely, some are more confident in ancillary relief than

others, and appeals which look hopeless to experienced practitioners may look beguiling to inexperienced Circuit Judges. Never assume that a Circuit Judge you do not know, or who does not deal regularly with ancillary relief, will be up to speed for your appeal, no matter what the nature of their practise before they were elevated to the Bench. Always go armed with the basic authorities.

Do make appropriate concessions.

Appeal hearings lend themselves to more dispassionate advocacy: there will probably be no oral evidence and submissions are likely to amount to a running dialogue with the appeal judge. Most Circuit Judges are fairly easy to read

and encourage advocates to concede weaker points in order to concentrate on the stronger. Refusing to make concessions once the argument is lost is unlikely to endear you to the hard-pressed judge with a judgment to write.

Conclusion.

It is perfectly possible that appeals are like buses – you wait ages, then several come along at once, then you wait ages again. Or it may be that the incidence of appeals is on the rise. Each case is different, and the above is only a personal view. Whatever, it's unpredictability that makes life interesting.

Nicholas Sproull

“For whatever reason, the parties (both of them of full age) had executed an express declaration of trust over the property in favour of themselves as tenants in common in equal shares and had therefore set out their respective beneficial entitlement as part of the purchase itself. In these circumstances there was no need for the imposition of a constructive trust or common intention constructive trust of the kind discussed in Stack v Dowden nor any possibility of inferring one because, as Baroness Hale recognised in paragraph 49 of her speech in that case, such a declaration of trust is regarded as conclusive unless varied by subsequent agreement or affected by proprietary estoppel.”

In another case, *Clark v Negus* [2010] EWHC 3117, Warren J was faced with an appeal where there were express trust documents. The first instance judge was criticised on the basis that:

“He did not address the question whether a constructive trust might have arisen after that date to displace the express trusts declared. Nothing in Stack v Dowden or Goodman v Gallant can be read as suggesting that this is not possible: it all depends on the facts.”

So *Goodman v Gallant* says the original document speaks for itself until set aside or rectified. *Pettitt v Pettitt* uses the words “for all time”. In *Stack v Dowden* however, Baroness Hale mentioned variation by subsequent agreement or proprietary estoppel (and this was then referred to in *Pankhania*).

Of course in *Stack v Dowden* there was no trust deed. It could be said that Baroness Hale's comment was therefore obiter. It is however, obiter of the highest authority.

Perhaps the words “affected by proprietary estoppel” are not actually very surprising (as opposed to “varied”). The essence of proprietary estoppels, of course, is that the true owner is estopped from denying the (interest) of the Claimant. Why shouldn't someone claim a proprietary estoppel, where there is a jointly owned property with a declaration as to the beneficial interests, if there is a subsequent assurance given to them e.g. “I know we hold it as joint tenants, but if you pay for the refurbishment of the roof, then your share will be enlarged by the sum you spend.” If the Claimant pays for the refurbishment then surely they should be able to rely upon the promise and having acted to their detriment to prevent the other joint owner from asserting their strict legal right to half of the equity? Of course in such a case there may be an equitable accounting argument, but the amount permitted to be claimed pursuant to equitable accounting is limited:

A trust deed

Is that it ‘for all time’?

Those who regularly advise in relation to The Trusts of Land and Appointment of Trustees Act 1996 will be achingly familiar with this scenario. A client comes to see you. He got into a relationship with someone. They bought a property together. It was conveyed into joint names. On the TR1 or equivalent, the box was ticked to say that they intended to hold the property as joint tenants or as tenants in common in equal shares. He then regales you with the contributions he made in relation to the purchase and their life together. He can show she contributed very little.

In the overwhelming majority of cases the advice will have to be that the declaration of the beneficial interests within the transfer form is definitive as to the beneficial interests. The resident District Judge in Gloucester would tell your client: “the effect of that transaction is that you gave your partner half of the money which went into the property.” You will quote to your client the well-known passage from the Court of Appeal case of *Goodman v Gallant* [1986] 1 FLR 513 @ 517:

“In a case where the legal estate in property is conveyed to two or more persons as joint tenants, but neither the conveyance nor any other written document contains any express declaration of trust concerning the beneficial interests in the property... the

way is open for persons claiming a beneficial interest in it or its proceeds of sale to rely on the doctrine of “resulting, implied or constructive trusts. If however, the relevant conveyance contains an express declaration of trust which comprehensively declares the beneficial interests in the property or its proceeds of sale, there is no room for the application of the doctrine[s] unless or until the conveyance is set aside or rectified; until that event the declaration contained in the document speaks for itself.”

You could indeed go further and as the Court of Appeal did, quote *Pettitt v Pettitt* [1970] AC 777:

“If the property in question is land there must be some lease or conveyance which shows how it was acquired. If that document declares not merely in whom the legal title is to vest but in whom the beneficial title is to vest that necessarily concludes the question of title as between the spouses for all time, and in the absence of fraud or mistake at the time of the transaction the parties cannot go behind it at any time thereafter...”

But it is right to say that there are a couple of pieces of authority which suggest that the original trust deed will not necessarily be conclusive. Note the following passage from *Pankhania v Chandegra* [2012] EWCA Civ 1438. In that case, the Court of Appeal criticised the judge who had failed to stop his enquiry after the trust deed which exhaustively defined the parties' interests. The court held, at paragraph 13 of its judgment:

see *Re Pavlou* [1993] 1 WLR 1046, and a Claimant might prefer to assert proprietary estoppel.

It is suggested that the more troubling aspect of Baroness Hale's dictum is the part where it was suggested that the interests could be varied by "subsequent agreement". What would be the requirements of such an agreement? Saying that there could be a subsequent agreement rather sounds like a constructive trust and of course the authorities suggest that where there is a trust deed there is no room for the imposition of a constructive or resulting trust.

In his excellent and recently published book "Cohabitation Claims", John Wilson QC deals with this subject at his page 43:

"Since the decision of the Supreme Court in *Jones v Kernott*, there has been a debate as to whether or not an express declaration of trust can be superseded by a subsequent agreement or by the imposition of an "ambulatory" constructive trust. The point was found to be arguable in *Clarke v Meadus*, but the current view would appear to be that it cannot be so superseded [citing academic commentary]. It may be possible to establish that the express declaration of trust has been superseded by a subsequent agreement, although this would require express documentation."

It is suggested in conclusion, that the important points to bear in mind are as follows:

■ In difficult areas of the law, courts love clear authorities and nice clear dividing lines. *Goodman v Gallant* provides this and it is suggested that it is likely to remain the "lodestar" in this area.

■ Baroness Hale's dictum from *Stack v Dowden* establishes that the broad statements from *Goodman* and from *Pettitt* are perhaps too wide. On top of set aside or rectification should be added in some cases a subsequent agreement or proprietary estoppel. Query: it might be the case that the deed will be definitive in relation to the beneficial interests at the time of purchase but that the rules may be different in relation to a subsequent agreement?

■ The subsequent agreement point requires clarification and it could be risky to proceed on that basis alone. The reality may be that proceeding on that basis but also pursuing proprietary estoppel is the answer. It is likely that in most cases, where a subsequent agreement is alleged, the Claimant will then have acted to their detriment so as to found a case for proprietary estoppel.

■ As a back up, the principles of equitable accounting may still provide some recompense for the joint owner who fails in their claim for proprietary estoppel but has expended significant money on the property.

■ As a final aside, an often overlooked provision to bear in mind is section 37 of The Matrimonial Proceedings and Property Act 1970. Under this section a formerly engaged person can claim an interest in the property of the person to whom they were engaged on the basis of improvements they made to the other person's property or a jointly owned property: see e.g. *Dibble v Pfluger* [2011] 1 FLR 659.

David Chidgey

for add-backs. More unusual examples of cases involving add-backs include a party blocking an obvious sale, misappropriation of funds from the other party and a failed business venture, which have had the impact of reducing the assets available for distribution. However, as stated in *Vaughan v Vaughan* [2007] EWCA Civ 1085 by Wilson LJ 'a notional reattribution has to be conducted very cautiously, by reference only to clear evidence of dissipation (in which there is a wanton element) and that the fiction does not extend to treatment of sums reattributed to a spouse as cash which he can deploy in meeting his needs'.

Two recent cases have sparked interest around add-backs and whether there is a new approach to them. In *MAP v MFP* [2015] EWHC 627 (Fam) Moor J found that the Husband had spent around £250,000 on cocaine and prostitution. However, Moor J came to the conclusion that an add-back should not be allowed in relation to this figure. Moor J stated that a spouse must take their partner as they find them; he said it would be wrong to allow the Wife to take advantage of the Husband's great abilities that enabled him to make a success of the company worth £28 million, while not taking the financial hit from his personality flaw that led to his cocaine addiction and his inability to rid himself of the habit. Moor J took the view that whilst the Husband's spending was morally culpable it was not deliberate or wanton dissipation within the meaning of the authorities.

So is *MAP v MFP* likely to lead to the end of add-backs? Has this case raised the bar in terms of the seriousness of conduct required to justify an add-back? Whilst the outcome may seem somewhat surprising given the nature and extent of the Husband's spending, it serves to remind practitioners that add-back arguments involve a very subjective assessment by the Court which will require careful and cautious consideration in the context of the facts of the case. In this case the Husband had been the driving force in building up a successful property maintenance company worth £28 million, and it was in the context of that fact that Moor J held that the Wife could not cherry pick aspects of his personality.

MAP v MFP involved a number of other arguments around add-backs which illustrate the fact-specific approach. Entrepreneurs Relief of £271,000 lost by the Wife as a consequence of the Husband dismissing her from the company when she found out about his involvement with prostitutes was added back. The tax consequences of an overdrawn Director's loan account since the valuation of the

Last of the over-spenders?

The concept of an add-back is not an uncommon feature of day-to-day practice in financial remedies. Many parties who have been found to have dissipated assets through their reckless or wanton conduct will face a 'Norris' add-back (named after the case of *Norris v Norris* [2003] 1 FLR 1142) to restore the balance.

As stated in *Martin v Martin* [1976]

Fam 335, by Cairns LJ, a party who fritters away the assets by 'extravagant living or reckless speculation' cannot claim 'as great a share of what is left as if he had behaved reasonably'. Under the strain of marital breakdown, it is not uncommon for a party to go on a spending spree, to spiral into substance misuse or to simply try to divest themselves of assets for the purpose of financial remedies proceedings by transferring them to a third party. Gambling, alcoholism, expensive cars, luxury holidays, impressive gifts and blatant transfers to third parties, have all founded the basis

company were, in view of the Husband's rate of expenditure, to be his sole responsibility. A dividend unreasonably withheld from the Wife by the Husband was added back. Moor J declined to add-back £230,000 spent on drugs therapy and £260,000 spent on property improvements, rejecting the arguments for an add-back in relation to these matters on the basis that the money was spent by the Husband not to defeat the Wife's claims but due to the Husband's flawed character. In relation to the drugs therapy this was the Husband trying to put matters right; he was ill and he needed treatment.

The issue of add-backs was put before the Court of Appeal in *Rapp v Sarre* [2016] EWCA Civ 93 (18/02/16). The parties were married for 15 years with no children. The marriage ran into difficulties after nine years when the Wife discovered that the Husband was taking cocaine, drinking excessively and suspected he was using female escorts. The Husband's attempts to address his difficulties through residential treatment were unsuccessful. The marriage ended due to the Husband's addictive behaviour. The Husband had worked as a successful trader until his employer discovered his addictive behaviour some six years earlier. The Judge, at first instance, divided the assets of £13.5 million between the parties 54.5% to the Wife and 45.5% to the Husband on a clean break. The reasons given for the departure from equality were in part to cater for the Wife's needs and in part the Husband's conduct, which the Judge had accepted led to 'the reckless frittering away of family money'. In relation to conduct, the Judge did not adopt an add-back approach because the spending could not be quantified precisely (although he undertook some broad calculations to establish that it was over £600k). The Judge took into account the distress the Husband's behaviour had caused the Wife and stated:

"It would be inequitable to disregard the [money] wantonly expended and the distress to the wife of the husband's addictive behaviour" which, along with the need factor, he considered justified "the modest departure from equality".

The Husband appealed to the Court of Appeal on several grounds including the Judge's approach to the needs of the parties and his assessment of the Husband's behaviour. The appeal was dismissed as the award was justified on the basis of need. As to the Judge's approach to the Husband's addictive behaviour, the Court of Appeal held that the order was justified on need alone and therefore even if the Husband succeeded in this argument

the Court of Appeal would not interfere. Therefore, there was no consideration of the question of whether the Husband's behaviour amounted to conduct.

It would have been interesting to see the Court of Appeal's approach to the issue of whether the Husband's conduct in *Rapp v Sarre* justified an add-back or a departure from equality in light of *MAP v MFP*. Can any distinctions be drawn between the two cases to justify the reasoning behind the decision of the Judge at first instance in *Rapp v Sarre*? The net assets in *MAP v MFP* were significantly greater than in *Rapp v Sarre* and arguably they were largely a direct product of the Husband's character. It is perhaps comforting that these cases illustrate the Court's ability to apply s.25 to achieve a nuanced and fact-specific approach rather than an approach of punishing the spending party. As a matter of general principle therefore: cases in which add-back arguments are upheld will be those where the assets available exceed the needs of the parties, the expenditure is wanton such that it may be classed as financial misconduct and is not demonstrative of the flaws in the character of the spending party that the party seeking the add-back has benefited from.

Gemma Borkowski

Albion Chambers Matrimonial Finance Team

Team Clerks

Michael Harding
Julie Hathway
Marcus Harding



Charles Hyde QC
Call 1988 QC 2006
Head of Chambers
Deputy High Court Judge
Recorder



Deborah Dinan-Hayward
Call 1988
Team Leader



Nicholas Sproull
Call 1992



Jonathan Stanniland
Call 1993



Daniel Leafe
Call 1996



Hannah Wiltshire
Call 1998



David Chidgey
Call 2000



Linsey Knowles
Call 2000



Stephen Roberts
Call 2002



Benjamin Jenkins
Call 2004



Joanna Lucas
Call 2004



Gemma Borkowski
Call 2005



Philip Baggley
Call 2009



Emily Brazenall
Call 2009



Erinna Foley-Fisher
Call 2011



Kevin Farquharson
Call 2011



Alexander West
Call 2011



Alexander Small
Call 2012

Any comments made or views expressed on the law within any articles in this newsletter are the views of the writer and are not necessarily the views of any other member of chambers and should not be relied upon as legal advice.

