PWC	parent with care
RPI	Retail Prices Index
RSC	Rules of the Supreme Court 1965, SI 1965/1776
SCA 1981	Supreme Court Act 1981
SERPS	State Earnings Related Pensions Scheme
SJE	single joint expert
the 2008 Regulations	Occupational Pension Schemes (Transfer Values) (Amendment) Regulations 2008, SI 2008/1050
TLATA 1996	Trusts of Land and Appointment of Trustees Act 1996
WRPA 1999	Welfare Reform and Pensions Act 1999

CHAPTER 1

INTRODUCTION TO FINANCIAL REMEDIES

SCOPE OF THIS CHAPTER

1.1 Financial remedies comprise those orders of a financial nature which the court may make in proceedings for divorce, judicial separation or nullity of marriage. In this chapter, the range of possible orders is set out and the general principles on which orders are made are considered. In later chapters, each type of order (eg periodical payments orders) is examined in detail; in this chapter, certain matters common to all such orders are considered, although where any individual factor merits more detailed examination it is the subject of a chapter in its own right.

This book also deals with one type of remedy which does not depend on the issue of proceedings for divorce etc, namely, applications for neglect to maintain under s 27 of the Matrimonial Causes Act 1973 (MCA 1973). The principles applicable to such applications are considered in Chapter 14.

Many readers were more familiar with the term 'ancillary relief' than 'financial remedy'. The change in nomenclature was brought about by the Family Procedure Rules 2010 (hereafter FPR 2010) which came into force on 6 April 2011. Not only the names have changed; while the procedural reforms introduced originally as the pilot scheme and then as standard from June 2000 have survived more or less unscathed, the numbering is different and, as will be seen, there are a few changes of substance.

1.2 It would be unusual for the court to consider making one type of order only. That might in fact be the result of a particular case, but the court must have regard to the overall position, and the result of most applications is that a combination of orders is made. The court must take an overview of the whole case.

DEFINITIONS

1.3 'Financial remedy' is defined by the FPR 2010[1] as:

> '(a) a financial order;'

This is the class of remedies with which this book will principally be concerned. However, the term encompasses a number of other remedies such as:

- an order under Sch 1 to the Children Act 1989 (orders for children);
- an order under Part 3 of the Matrimonial and Family Proceedings 1984 (relief after overseas divorce);
- an order under s 27 of the MCA 1973 (failure to maintain).

A complete list will be found in the rules at Appendix B.

'Financial order' is defined as:

> '(a) an avoidance of disposition order;
> (b) an order for maintenance pending suit;
> (c) an order for maintenance pending outcome of proceedings;
> (d) an order for periodical payments or lump sum provision as mentioned in section 21(1) of the 1973 Act, except an order under section 27(6) of that Act;
> (e) an order for periodical payments or lump sum provision as mentioned in paragraph 2(1) of Schedule 5 to the 2004 Act, made under Part 1 of Schedule 5 to that Act;
> (f) a property adjustment order;
> (g) a variation order;
> (h) a pension sharing order; or
> (i) a pension compensation sharing order;'
>
> ("variation order", "pension compensation sharing order" and "pension sharing order" are defined in rule 9.3.)' [and will be considered in more detail in Chapter 10].

THE PRINCIPLES GOVERNING THE EXERCISE OF THE COURT'S DISCRETION

1.4 Before embarking on a detailed consideration of the individual factors in s 25(2), the court's overall approach will be considered. This must involve consideration of the issues of equality and fairness, which have assumed greater significance over recent years.

Section 25 of MCA 1973 contains the matters to which the court is to have regard in deciding how to exercise its powers under ss 23, 24 and 24A. It has

[1] Rule 2.3(1).

frequently been said[2] that the statutory 'guidelines' must be the principal determining factors for the court; decided cases showing how the court's discretion has been exercised on other occasions are of limited relevance although, clearly, guidance from appellate courts as to occasions on which courts have misdirected themselves are valuable.

In a leading case,[3] Butler–Sloss LJ, as she then was, stated the position as follows:

> 'There is a danger that practitioners in the field of family law attempt to apply too rigidly the decisions of this court and of the Family Division, without sufficiently recognising that each case involving a family has to be decided upon broad principles adapted to the facts of the individual case. Ancillary relief applications are governed by the statutory framework set out in the Matrimonial Causes Act 1973 as amended in 1984. Sections 25 and 25A provide the guidelines and require the court to have regard to all the circumstances of the individual case and to exercise the discretion of the court to do justice between the parties.'

Although *White v White*, from which these words are taken, was subsequently the subject of appeal to the House of Lords (and will be frequently mentioned in the following pages), the guidance given in this extract remains compelling law. Indeed, as will be seen, the House of Lords reinforced the principle that the provisions of the statute are pre-eminent.

Each case will turn on its own facts, and reference to the statutory criteria is therefore always essential. However, this point needs reinforcing in view of the attention given to leading cases which have reached the House of Lords and Supreme Court in recent years and which must be analysed in some detail. The point which will be made, and which perhaps needs to be made now so that it may be borne in mind when the reader considers decisions of any of the highest courts, is that, notwithstanding the valuable guidance given in the speeches or judgments, authority for any proposition must ultimately be derived from the statute and not from any judicial gloss thereon.

EQUALITY AND FAIRNESS

1.5 Although s 25 prescribes the matters to which the court must have regard, it does not suggest or recommend any starting point, tariff or formula for deciding what proportion of the assets of the parties each should receive. This is in contrast to other jurisdictions, many of which contain prescriptions as to percentages to be awarded to each party, often depending on the length of the marriage. It is frequently argued by practitioners and academic commentators that the law of England and Wales should be amended to contain such guidelines. However, judges have continued to emphasise that such prescription is not possible within the terms of the statute, and that each

[2] Notably, first in *Sharpe v Sharpe* (1981) Fam Law 121, (1981) *The Times*, 7 February.
[3] *White v White* [1998] 2 FLR 310, CA.

case must be considered on its own merits against the background of consideration of the s 25 factors. What has been described as 'the search for principle' continues.

Having said that, guidance was given in the two decisions of the House of Lords which are about to be considered, and it will be seen that, save in one important area (as to which see **1.41**), there was general agreement as to certain important principles.

Neither the words 'fairness' nor 'equality' appear in the Matrimonial Causes Act. However, in *White v White*, Lord Nicholls, after recording the self-evident proposition that the court must act in a just and non-discriminatory way, set out the important principle that this means that the court must be fair, and that fairness implies equality. The 6 years which elapsed between the decision of their Lordships' House in *White v White* (*White*) and *Miller v Miller* and *McFarlane v McFarlane* (*Miller/McFarlane*) saw much discussion on the part of practitioners and judges as to what this meant in various classes of case.

Before analysing the statutory factors therefore, we will consider the following:

(1) the significance of *White v White*;
(2) *Miller/McFarlane*; and
(3) developments post *Miller/McFarlane*, in particular *Charman v Charman*.

White v White

1.6 Very few cases relating to financial remedies reached the House of Lords or now reach the Supreme Court. Family cases which get that far usually relate to children, particularly public law issues. When the financial dispute between Mr and Mrs White reached their Lordships in 2000[4] it was thought that this would be the final word on these matters for some considerable time. *White* set out guidelines for the determination of such cases which may be summarised as follows:

- The court must be fair. There can be no discrimination between husband and wife in their respective roles. Whatever the division of labour, fairness dictates that this should not prejudice either party when considering the statutory factors. There should be no bias in favour of the breadwinner as against the homemaker and child-carer.
- When carrying out the statutory exercise, the judge should always check his tentative views against the 'yardstick of equality of division'. Equality should only be departed from if, and to the extent that, there is good reason for doing so. This does not mean that there is a starting point or presumption of equality.

[4] *White v White* [2001] 1 AC 596.

- The concept of reasonable requirements is erroneous. The statute refers to 'needs' but this is only one of the statutory factors.

However, this was not to be the last word and certain issues remained to trouble the courts, including the Court of Appeal. These issues may be summarised as essentially the search for fairness, and what fairness means. Given that the court must be fair, and given that the yardstick of equality is overriding but does not amount to a rigid regime of equality, what are the circumstances in which the court may be fair and at the same time depart from equal shares? Would this be appropriate where, for example, the marriage was short; if so, what constitutes a short marriage? Would it be appropriate where one party had created the wealth enjoyed by the couple by his or her exceptional contributions? If so, how exceptional would the contributions have to be? It would be inappropriate to recite here the cases in which these issues were discussed and sometimes contradictory answers given.[5] Running parallel with all this was academic criticism of the whole approach of the law of England and Wales.[6] This law is based on a discretionary approach, and even in recent times judges in the Court of Appeal have gone out of their way to emphasise that there is no formula which will apply to all cases; these matters have to be considered on a case-by-case basis.[7] The criticism made is that even on that basis, analysis of the cases reveals no rational pattern, and further, that this unpredictable case-by-case approach is unfair, since parties who wish to settle their disputes are given uncertain guidance and often have to risk large sums of money to achieve a result.

The combined appeals of *Miller v Miller* and *McFarlane v McFarlane* which were decided by the House in May 2006 therefore attracted widespread interest, both among family lawyers and in the popular press.

Miller and *McFarlane*

1.7 The House of Lords heard the appeals in *Miller v Miller* and *McFarlane v Macfarlane* (*Miller/McFarlane*) together because they clearly raised similar issues. Both were 'big money' cases, and both dealt with the issues arising out of *White* which are briefly outlined above. The facts in both cases need not be described here;[8] rather, the principles established or affirmed will be considered.

[5] For a detailed analysis see R Bird 'Dividing Marital Assets after Lambert' [2003] Fam Law 534. However, two decisions of Coleridge J repay careful reading, namely *H-J v H-J (Financial Provision: Equality)* [2002] 1 FLR 415, and *G v G (Financial Provision: Equal Division)* [2002] EWHC 1339 (Fam), [2002] 2 FLR 1143. In *Lambert v Lambert* [2002] EWCA Civ 1685, [2003] 1 FLR 139, CA Thorpe LJ said that Coleridge J was not wrong (i e he was right!) to find that '50/50 resonates with fairness' [para 38].

[6] Among many others see in particular R Bailey-Harris [2003] Fam Law 386, J Eekelar [2003] Fam Law 828 and Jens M Scherpe in 'Fifty years in Family Law, Essays for Stephen Cretney (Intersentia 2012,) p 133.

[7] See e g Wall LJ in *Miller v Miller* [para 88].

[8] For more detail see R Bird *Miller and McFarlane: The implications for Family Lawyers* (Family Law, 2006).

White v White re-affirmed

1.8 The two most important speeches were those of Lord Nicholls and Baroness Hale, who tried to set out a clear list of principles to be followed. They began with some fairly obvious but nonetheless important points; the court must be fair, and the statutory first consideration of the welfare of the children must be observed. The principles of *White v White*, such as fairness, non-discrimination and the yardstick of equality, were repeated and remain of the first importance.

Three principles: meeting needs, compensation and sharing

The House underlined the fact that financial relief is not a matter of taking from one party to give to the other, but is rather a matter of a proper and fair sharing of assets which both of them, in their interdependent and joint lives, have acquired.

The three principles which this case established and/or confirmd as being the rationale for financial provision contained in the 1973 Act may be summarised as follows:

(1) *Meeting the needs of the parties*

Lord Nicholls said that mutual dependence begets mutual obligations of support. Fairness requires that the assets of the parties should be divided so as to meet their housing and financial needs.

Baroness Hale said that the most common rationale for redistribution is that the relationship has generated needs which it is right that the other party should meet. Needs may arise as a result of one party having been a homemaker and childcarer, and needs generated by such a choice are 'a perfectly sound rationale for adjusting the parties respective resources in compensation'.

(2) *Compensation*

Lord Nicholls said that compensation is aimed at redressing any significant prospective disparity between the parties arising from the way they conducted their marriage. Baroness Hale described this as compensation for relationship-generated disadvantage, which goes beyond need.

(3) *Sharing*

Lord Nicholls saw sharing as derived from the basic concept of equality permeating a marriage. Husband and wife are equal partners in marriage.

Baroness Hale described this as the sharing of the fruits of the matrimonial partnership.

These three principles may be taken as the foundation for any intellectual approach to the task of awarding financial provision. However, both Lord Nicholls and Baroness Hale made it clear that these are general principles and that they must be adapted to suit the requirements of a particular case. In

particular, Lord Nicholls emphasised that equality applies 'unless there is good reason to the contrary. The yardstick of equality is to be applied as an aid, not a rule'.

Legitimate expectations and standard of living

1.9 The judge at first instance, and the Court of Appeal, had approved the concept of 'legitimate expectations'. The House strongly disapproved this concept; this could play no part in the decision-making process.

However, the importance of the standard of living of the parties during the marriage was affirmed, and this was one of the statutory factors prayed in aid by Lord Nicholls to justify the *Miller* award. For obvious reasons, it will only be important in cases where assets exceed needs, but this is an important reminder of the need to consider all the s 25 factors.

Application to smaller money cases

1.10 One of the problems with discussing decisions of the higher courts is that they normally involve very large amounts of money and rich parties. Many practitioners will be more interested in whether or not they apply to the normal run of cases.

It must first be said that the *White v White* principles of fairness, non-discrimination and the yardstick of equality apply to all cases, big or small and regardless of the length of the marriage. However, Lord Nicholls makes it clear that while the approach has to be the same, the result will be different in cases where the needs exceed the assets because the funds are not available to take the matter further. It is worth repeating his words:

> 'When the marriage ends fairness requires that the assets of the parties should be divided primarily so as to make provision for the parties' housing and financial needs, taking into account a wide range of matters such as the parties' ages, their future earning capacity, the family's standard of living, and any disability of either party. Most of these needs will have been generated by the marriage, but not all of them. Needs arising from age or disability are instances of the latter.
>
> In most cases the search for fairness largely begins and ends at this stage. In most cases the available assets are insufficient to provide adequately for the needs of two homes. The court seeks to stretch modest finite resources so far as possible to meet the parties' needs. Especially where children are involved it may be necessary to augment the available assets by having recourse to the future earnings of the money-earner, by way of an order for periodical payments.'

Baroness Hale expressed similar views. An equal partnership does not always dictate equal sharing of the assets. (One could interject there the view that, in lower value cases, it almost never does.) As Baroness Hale, said, equal division may have to give way to the needs of one party or the children.

> 'Too strict an adherence to equal sharing and the clean break can lead to a rapid decrease in the primary carer's standard of living and a rapid increase in the breadwinner's. The breadwinner's unimpaired and unimpeded earning capacity is a powerful resource which can frequently repair any loss of capital after an unequal distribution.'

Baroness Hale adds that recognising this is one reason why English law has been successful in retaining a home for the children.

Other issues were discussed in this case, but they will be considered under their separate subject-matter headings, see:

- 'Duration of marriage' at **1.32**;
- 'Contributions' at **1.39** et seq; and
- 'Conduct' at **1.52**.

Charman v Charman

1.11 After the decision of the House of Lords in *Miller/McFarlane*, the courts were not idle. The first significant development was the decision of the Court of Appeal in *Charman v Charman* to which reference must now be made. In its judgment in *Charman*, the court dealt with several issues of considerable importance.[9]

The first of these issues was how the yardstick of equality should be approached. In the course of argument, there had been debate as to whether a judge should begin with some notion of equality and then, as it were, depart from it where appropriate, or whether the various s 25 factors should be considered with no preconceptions and then the provisional result compared with the yardstick of equality. The court dealt with this by reference to the new concept of 'sharing' introduced in *Miller*, and it is worth quoting the passage from the judgment of the court in full. This begins at para [64] where it is said that:

> '"The yardstick of equality of division", first identified by Lord Nicholls in *White* at p 605G, filled the vacuum which resulted from the abandonment in that decision of the criterion of "reasonable requirements". The origins of the yardstick lay in s 25(2) of the Act, specifically in s 25(2)(f), which refers to the parties' contributions: see the preceding argument of Lord Nicholls at p 605D–E. The yardstick reflected a modern, non-discriminatory conclusion that the proper evaluation under s 5(2)(f) of the parties' different contributions to the welfare of the family should generally lead to an equal division of their property unless there was good reason for the division to be unequal. It also tallied with the overarching objective: a fair result.

[9] It is worth noting that this was a particularly strong court, consisting of the President, and Thorpe and Wilson LJJ. It would be difficult to conceive a greater concentration of expertise in this field. Moreover, the judgment was the judgment of the court, so there are no differences of opinion to be analysed.

> [65] Although in *White* the majority of the House agreed with the speech of Lord Nicholls and thus with his description of equality as a "yardstick" against which tentative views should be "checked", Lord Cooke, at p 615D, doubted whether use of the words "yardstick" or "check" would produce a result different from that of the words "guideline" or "starting point". In *Miller* the House clearly moved towards the position of Lord Cooke. Thus Lord Nicholls, at [20] and [29], referred to the "equal sharing principle" and to the "sharing entitlement"; those phrases describe more than a yardstick for use as a check. Baroness Hale put the matter beyond doubt when, referring to remarks by Lord Nicholls at [29], she said, at [144],
>
> > "I agree that there cannot be a hard and fast rule about whether one starts with equal sharing and departs if need or compensation supply a reason to do so, or whether one starts with need and compensation and shares the balance."
>
> It is clear that the court's consideration of the sharing principle is no longer required to be postponed until the end of the statutory exercise. We should add that, since we take the "the sharing principle" to mean that property should be shared in equal proportions unless there is good reason to depart from such proportions, departure is not from the principle but takes place within the principle.'

It might seem from this, therefore, that sharing, which means equality and equal shares, is now more of a starting point than a yardstick.

The court then amplified this to guidance to 'flesh out'[10] what the concepts of 'sharing', 'need' and 'compensation' set out in *Miller* actually meant. First, on the issue of what property falls to be shared, and whether there should be a category of 'matrimonial property', the court said:

> '[66] ... We consider, however, the answer to be that, subject to the exceptions identified in *Miller* ... the principle applies to all the parties' property but, to the extent that their property is non-matrimonial, there is likely to be better reason for departure from equality. It is clear that both in *White* at p 605 F–G and in *Miller* at [24] and [26] Lord Nicholls approached the matter in that way; and there was no express suggestion in *Miller*, even on the part of Baroness Hale, that in *White* the House had set too widely the general application of what was then a yardstick.'

The court then dealt with the three principles enunciated in *Miller* as follows:

> '[70] Thus the principle of **need** requires consideration of the financial needs, obligations and responsibilities of the parties (s 25(2)(b)); of the standard of living enjoyed by the family before the breakdown of the marriage (s 25(2)(c)); of the age of each party (half of s 25(2)(d)); and of any physical or mental disability of either of them (s 25(2)(e)).
>
> [71] The principle of **compensation** relates to prospective financial disadvantage which upon divorce some parties face as a result of decisions which they took for

[10] The author's term, not the court's.

CHAPTER 7

ORDERS FOR SALE

INTRODUCTION

7.1 The effect of a financial remedy order is frequently that property must be sold. This may happen as a direct result of the order, for example if the former matrimonial home is to be sold, or perhaps when some asset has to be sold to provide a lump sum for one of the parties. This chapter will consider briefly the types of order for sale which may be made and the law and practice involved.

ORDER FOR SALE UNDER SECTION 24A OF MCA 1973

7.2 Statutory power of sale is provided by s 24A which provides that:[1]

> 'Where the court makes under section 23 or 24 of this Act a secured periodical payments order, an order for the payment of a lump sum or a property adjustment order, then, on making that order or at any time thereafter, the court may make a further order for the sale of such property as may be specified in the order, being property in which or in the proceeds of sale of which either or both of the parties to the marriage has or have a beneficial interest, either in possession or reversion.'

7.3 This power of sale is, therefore, ancillary to the principal capital order which has been made, and is only exercisable if such an order has been made.[2] An order for a lump sum, property adjustment or secured provision takes effect only on decree absolute, so no order could be made under this section to take effect before that time.[3] Subject to that proviso, the order may be made either at the same time as making the principal order or at any time thereafter; however, it must be the case that the court could not make such an order if the principal order had been complied with.

The order may contain a provision that it shall not take effect until the occurrence of an event specified by the order or the expiration of a period so specified. The court has, therefore, considerable discretion as to the terms which it imposes.

7.4 Section 24A also contains further provisions ancillary to the power to order sale. It is provided that any order for sale may contain such consequential

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1 MCA 1973, s 24A(1).
2 *Thompson v Thompson* [1986] Fam 38.
3 MCA 1973, s 24A(3).

or supplementary provisions as the court thinks fit and, without prejudice to the generality of those provisions, may include:[4]

> '(a) provision requiring the making of a payment out of the proceeds of sale of the property to which the order relates, and
> (b) provision requiring any such property to be offered for sale to a person or class of persons specified in the order.'

The order could, therefore, for example, require the sale of a property owned by the respondent, and the payment of a lump sum from the proceeds of sale with the balance to be paid to the respondent; or the sale of a jointly owned former matrimonial home, with a requirement that one of the parties to the marriage and his or her cohabitant be entitled to bid. It is not uncommon for such orders to provide that the property be sold for the best offer received in excess of a certain figure.

What the order cannot do is require payments to third parties such as creditors who have no connection with the property or the sale thereof;[5] it would be proper to include an order for payment of estate agents' charges but not for payment of debts owed by the parties.

7.5 When the property in respect of which sale is sought is owned jointly by one of the parties and a third party, it is provided that:[6]

> '... before deciding whether to make an order under this section in relation to that property, it shall be the duty of the court to give that other person an opportunity to make representations with respect to the order; and any representations made by that other person shall be included among the circumstances to which the court is required to have regard under section 25(1) ...'

It follows from this that the court must direct service of all relevant proceedings on the third party; procedure for this is considered in more detail at **16.9**. In *Ram v Ram (No 2)*[7] it was held that the court's power under s 24A is limited to property in which either or both of the parties has or have a beneficial interest in possession or reversion. Thus, where a bankruptcy order has been made and the property therefore vested in the trustee, the bankrupt has no beneficial interest even after his discharge.

HOW IS JURISDICTION EXERCISED?

7.6 There is no separate set of guidelines applicable to orders under s 24A. An order under this section is an order to which s 25 applies, and the exercise

[4] MCA 1973, s 24A(2).
[5] *Burton v Burton* [1986] 2 FLR 419.
[6] MCA 1973, s 24A(6).
[7] [2004] EWCA Civ 1684, [2005] 2 FLR 75.

of the court's discretion will be governed by the usual s 25 factors. An order under s 24A may be made if the court considers it necessary to do so to achieve its purpose pursuant to s 25.

INTERIM ORDERS

7.7 There is no power to make an interim order for sale under s 24A or, indeed, under any other provision. This is considered in more detail at **4.5**.

FPR 2010, RULE 9.24

7.8 FPR 2010, r 9.24(1) provides that, where the court has made an order under MCA 1973, s 24A, the Matrimonial and Family Proceedings Act 1984, s 17(2), or the Civil Partnership Act 2004, Sch 5, Part 3 or Sch 7, para 9(4), it may order any party to deliver up to the purchaser or any other person possession of the land, including any interest in, or right over, land, receipt of rents or profits relating to it, or both.

7.9 It has been held that RSC Ord 31, r 1 did not permit the court to order an interim sale of a property pending the final resolution of an application for ancillary relief.[8]

THE TRUSTS OF LAND AND APPOINTMENT OF TRUSTEES ACT 1996

7.10 Under s 30 of the Law of Property Act 1925 (LPA 1925), when property was held on trust for sale (which was always the case when jointly owned) either trustee could apply to the court for an order for sale, which would be granted unless, for example, it could be found that the purposes for which the trust was established (such as the provision of a family home) had not been fulfilled. Section 30 has now been repealed by the Trusts of Land and Appointment of Trustees Act 1996 (TLATA 1996) and, for the purposes of this chapter, the important part of this statute is s 14 which permits the court to order sale.

The difference between s 14 and LPA 1925, s 30 is that there is now no presumption as to an order for sale. Instead, the court is directed by s 15 to have regard to various matters such as the intentions of the persons who created the trust, the purposes for which the property is held, the welfare of any minor occupying the property, and the interests of any secured creditor.

[8] *Wicks v Wicks* [1998] 1 FLR 470, CA.

7.11 It is unlikely that it will be necessary to make an application under s 14 in the course of an application for financial relief. Nevertheless, the statutory powers exist, and it may be necessary to have them in mind as a fall-back position in some situations.

This was in fact the case in *Miller-Smith v Miller-Smith*.[9] Here it was held that where the court is confronted by an application under TLATA 1996 between separated spouses it should ask itself whether the issues raised by the application can reasonably be left to be resolved within an application for financial relief following divorce. In the circumstances of this case, where the house was larger than required to meet the wife's needs and it was unlikely that the financial relief proceedings would be determined within another year, the Court of Appeal upheld a decision that the house should be sold.

For further discussion in the context of insolvency, see Chapter 12.

[9] [2009] EWCA Civ 1297, [2010] 1 FLR 1402.

CHAPTER 8

AVOIDANCE OF DISPOSITION AND OTHER INJUNCTIONS

INTRODUCTION

8.1 The course of an application for a financial remedy does not always run smoothly. Sometimes, orders are not obeyed, parties are less than frank, and, in extreme cases, there may be a concerted effort to defeat the just entitlement of one of the parties by the other party. The court therefore has to have powers to overcome such stratagems.

These powers may be summarised as follows:

(a) the power to prevent or set aside a disposition under s 37 of the MCA 1973;
(b) a similar power under the inherent jurisdiction of the court;
(c) the power to grant a freezing injunction;
(d) the power to grant a search order.

8.2 These powers and remedies will be considered in turn. The first is by far the most common.

APPLICATIONS UNDER SECTION 37 OF MCA 1973 FOR AN AVOIDANCE OF DISPOSITION ORDER

8.3 It is provided that:[1]

> 'Where proceedings for financial relief are brought by one person against another, the court may, on the application of the first-mentioned person –
>
> (a) if it is satisfied that the other party to the proceedings is, with the intention of defeating the claim for financial relief, about to make any disposition or to transfer out of the jurisdiction or otherwise deal with any property, make such order as it thinks fit for restraining the other party from so doing or otherwise for protecting the claim;

[1] MCA 1973, s 37(2).

(b) if it is satisfied that the other party has, with that intention, made a reviewable disposition and that if the disposition were set aside financial relief or different financial relief would be granted to the applicant, make an order setting aside the disposition;

(c) if it is satisfied, in a case where an order has been obtained under any of the provisions mentioned in subsection (1) above by the applicant against the other party, that the other party has, with that intention, made a reviewable disposition, make an order setting aside the disposition;

and an application for the purposes of paragraph (b) above shall be made in the proceedings for the financial relief in question.'

8.4 Section 37(2) refers to s 37(1) which is a definition section. There, it is provided that, for the purposes of s 37:[2]

'... "financial relief" means relief under any of the provisions of sections 22, 23, 24, 24B, 27, 31 (except subsection (6)) and 35 above, and any reference in this section to defeating a person's claim for financial relief is a reference to preventing financial relief from being granted to that person, or to that person for the benefit of a child of the family, or reducing the amount of any financial relief which might be so granted, or frustrating or impeding the enforcement of any order which might be or has been made at his instance under any of those provisions.'

By FPR 2010, r 2.3 an order for avoidance of disposition is a financial order. By r 9.3 an avoidance of disposition order means, in addition to orders under MCA 1973, s 37, orders under similar provisions in the statutes relating to financial relief after overseas divorce and dissolution of civil partnerships. Orders after overseas divorce are considered in Chapter 15, and this book is not concerned with civil partnerships.

Issues arising out of the remedy under s 37 will now be considered in turn.

Two types of remedy

8.5 Section 37 gives the right to apply for two distinct remedies. The first, which is pre-emptive, is the power of the court to prevent a disposition before it has been made. Thus, for example, a spouse who threatened to transfer assets to another person, or to squander some asset, could be ordered not to do so; banks or other financial institutions can be served with copies of any order made which would normally have the result of freezing transactions.

The second is the power to undo or set aside any disposition which has been made. Where a spouse transfers assets to another with the intention of putting them out of reach of the court, the person to whom the assets were transferred can be ordered to transfer them back so that they may form part of the funds available for distribution between the parties. This provision itself falls into two

[2] MCA 1973, s 37(1).

categories, namely the power to set aside in anticipation of the hearing of an application for a financial remedy, and the power to set aside at or after the hearing.

Separate factors obviously govern these two remedies, but there are a number of common factors which will be considered.

The requirement for an application for a financial remedy

8.6 Section 37 is a remedy ancillary to an application for a financial remedy; there cannot be a free-standing s 37 application. Subsection (2) begins by requiring that financial proceedings are brought by one person against another, and there can be no application under s 37 unless this has happened. Where the applicant is a petitioner, or a respondent who has filed an answer, the application for a financial remedy contained in the petition or answer will be deemed sufficient for this purpose, although it would normally be considered right to require a Form A to have been issued; s 37 is a discretionary remedy, and the court would not normally think it right to make an order unless satisfied that the application for financial relief was to proceed.

The application for financial relief may be filed at court at the same time as the s 37 application. In cases of urgency, the court will accept an undertaking to file the application by a fixed date.

8.7 'Financial relief' is defined by s 37(1) as, in effect, an application for either a financial provision order, a property adjustment order, an order for maintenance pending suit, an order on the ground of neglect to maintain, or a variation order.

Only the applicant can apply

8.8 After reciting the need for an application for financial relief by one person against another, s 37(2) sets out the remedies which may be granted 'on the application of the first mentioned person', ie the applicant for financial relief. A respondent to such an application who had made no prayer for financial relief in an answer would have no right to apply under s 37. This is perhaps a formal hurdle only because all the respondent would have to do would be to file a notice of application, but the point should be noted.

What is a 'disposition'?

8.9 The section provides that 'disposition' does not include provision made by will or codicil, but that it does include any conveyance, assurance or gift of property of any description, whether made by an instrument or otherwise.[3] Apart from this, no attempt is made to define the term, but clearly it includes any act, deed or transaction which has the effect of transferring ownership or

[3] MCA 1973, s 37(6).

possession from one person to another. It has been held to include a legal charge on real property.[4] It has also been held that failure to deal with property, as opposed to a positive dealing, is not a disposition.[5] A notice to quit a periodic tenancy is not a disposition and cannot be set aside under s 37.[6]

'With the intention of defeating the claim for financial relief'

8.10 The court must be satisfied that, in the case of a pre-emptive application, the disposition or transfer is to be made, or, in the case of a post-disposition or transfer application, has been made, with the intention of defeating the applicant's claim for financial relief. The onus of proof is on the applicant, and if this burden is not discharged the order cannot be made. However, it has been held that the question which the judge must ask himself is whether he is 'satisfied', and that it is inappropriate to add tests such as 'beyond reasonable doubt' or 'on the balance of probabilities'.[7]

To some extent, the task of the applicant is made easier by s 37(1) which goes some way to defining 'defeating the claim'. Here, it is said that this means any of the following:[8]

(a) preventing (any) financial relief from being granted to the applicant, either for herself or for a child;

(b) reducing the amount of any financial relief which might otherwise be granted;

(c) frustrating or impeding the enforcement of any order for financial relief which might be made or which has been made.

The court will therefore have to find that one of these results is more likely than not to happen if an order is not made.

8.11 This leaves the question of proving 'intention'. Where it is found that one of the outcomes set out above is likely to occur, the court would have no difficulty in deducing that the respondent to the application intended that to happen. A person is deemed to intend the normal consequences of his actions, and where, for example, the inevitable result of a transfer of a property to someone else would be that the funds available for distribution between the spouses would be diminished, it would almost inevitably have to be found that the transferor had intended that consequence.

Different factors might arise where there could be more than one reason for the disposition or transfer, particularly where it could also be said that the funds available for distribution would not be diminished. For example, a person

4 *Whittingham v Whittingham* [1979] Fam 9, CA.
5 *Crittenden v Crittenden* [1990] 2 FLR 361, CA.
6 *Newlon Housing Trust v Alsulaimen* [1998] 2 FLR 690, HL.
7 *K v K (Avoidance of Reviewable Disposition)* (1983) 4 FLR 31, CA.
8 MCA 1973, s 37(1).

whose livelihood depended on the sale and purchase of assets should not be prevented from trading for no other reason than a pending financial remedy application, and a person involved in any business should not be subjected to unusual and unreasonable restrictions. In the context of marriage breakdown, it is not unusual for the parties to be both deeply suspicious of each other and resentful of any interference with their normal activities. The court has to distinguish these cases from those where there is evidence that some deliberate attempt to defeat the claim is being or has been made.[9]

In *Mubarak v Mubarik*[10] it was held that s 37 requires an actual intention to defeat a claim to be in existence at the time of the disposition; here, the court could not be satisfied that the husband had made the disposition with the intention of defeating the claim for ancillary relief (as opposed to tax evasion).

Special considerations in applications to set aside dispositions

8.12 As has already been mentioned, the power to set aside a disposition is distinct from the power to prevent a disposition. Clearly, once a disposition or transfer has been made, it may be that third parties have acquired rights in the property concerned, and different considerations arise from those when it is sought to prevent a disposition from taking place. The various relevant factors will now be considered.

Reviewable dispositions

8.13 For a disposition or transfer to be set aside, it has to be 'reviewable'. This term is defined by the section. First, it is provided that:[11]

> '... any disposition made by the other party to the proceedings for financial relief in question (whether before or after the commencement of those proceedings) is a reviewable disposition for the purposes of subsection (2)(b) and (c) above unless it was made for valuable consideration (other than marriage) to a person who, at the time of the disposition, acted in relation to it in good faith and without notice of any intention on the part of the other party to defeat the applicant's claim for financial relief.'

8.14 The significance of this is that it will be presumed that any disposition is reviewable unless the respondent to the application (and the transferee) can establish all the matters mentioned, namely:

(a) valuable consideration (for this purpose, marriage does not count);

9 See *Smith v Smith* (1973) Fam Law 80; the court must be satisfied that a disposition is in fact about to take place, and also that its intention is to defeat the applicant's claim. There is no general power to freeze a party's assets pending the hearing of an application for financial relief.
10 [2007] 2 FLR 364, Holman J.
11 MCA 1973, s 37(4).

(b) transferee acting in good faith;[12]

(c) transferee without any notice of transferor's intention to defeat applicant's claim.

The onus will therefore be on the respondent or transferee to satisfy the court of these matters. This applies to any transfer or disposition which the respondent has made.[13]

The limitations of s 37 were demonstrated by the decision in *Ansari v Ansari*.[14] Here, the husband and a third party had conspired to defeat the wife's claim; a house which was owned by the husband was transferred to the third party who then charged it to a bank for a large sum. The bank had notice of the wife's family home rights. The wife's application to set aside the charge failed, on the ground that the husband was not a party to the bank's charge which was therefore not a reviewable disposition made by 'the other party'. It was also held, per curiam, that even if the charge had been a reviewable disposition, the bank would have been able to rely on s 37(4). The fact that the bank had notice of the wife's rights did not mean that it had notice of the husband's intention to defeat the wife's claims.

Presumption of intention to defeat claim in some cases

8.15 The section goes further. It is provided that:[15]

> 'Where an application is made under this section with respect to a disposition which took place less than three years before the date of the application or with respect to a disposition or other dealing with property which is about to take place and the court is satisfied –
>
> (a) in a case falling within subsection (2)(a) or (b) above, that the disposition or other dealing would (apart from this section) have the consequence, or
> (b) in a case falling within subsection (2)(c) above, that the disposition has had the consequence,
>
> of defeating the applicant's claim for financial relief, it shall be presumed, unless the contrary is shown, that the person who disposed of or is about to dispose of or deal with the property did so, or, as the case may be, is about to do so, with the intention of defeating the applicant's claim for financial relief.'

[12] See *Whittingham v Whittingham* [1979] Fam 9, CA; at the very least lack of good faith involves lack of honesty, and may require something akin to fraud.

[13] There is no general rule that anyone acquiring an interest in property from someone he knows to be divorced thereby has notice of an application for financial relief. However, the facts may indicate constructive notice. A bank may be under an obligation to make inquiries, and a lender who knows that an aspirant borrower has been involved in divorce proceedings is obliged to ask him whether his spouse has any potential interest in a property sought to be charged; however, it is under no obligation to verify information given by the borrower unless the spouse is in occupation of the property. See *Whittingham v Whittingham* (above); *B v B (P Ltd Intervening) (No 2)* [1995] 1 FLR 374, CA.

[14] [2008] EWCA Civ 1456.

[15] MCA 1973, s 37(5).

8.16 This subsection therefore erects a further hurdle which the respondent or transferee must cross. Where the disposition was either less than 3 years before the application, or, in the case of an application to prevent a disposition, has not yet been made, and it is established to the satisfaction of the court that its effect will be to defeat the applicant's claim for financial relief (as defined in s 37(1): see 8.7) it will be presumed that the intention was or is to defeat the claim for financial relief unless the respondent is able to prove the contrary.

Consequential directions

8.17 When an order is made setting aside a disposition, the court must give consequential directions as it thinks fit for giving effect to the order, including directions requiring the making of any payments or the disposal of any property.

How will the court exercise its discretion?

8.18 Even if the court finds in favour of the applicant on the issues of intention to defeat the claim, etc the position remains that the court 'may' make an order under s 37; the final disposal is subject to the discretion of the court. Clearly, each case will turn on its own facts, and, as always, the factors set out in s 25 apply.

In deciding whether or not to grant an order under s 37(2)(a) (a pre-emptive order), and assuming that the intention on the part of the respondent had been proved, the court would normally feel obliged to make an order unless it could be demonstrated that the disposition or transfer need not affect the final result because there would be more than enough capital left to provide for any order which the court could conceivably make.

In deciding whether or not to set aside a disposition, the same consideration will apply, but the court will also have to weigh up the hardship which would be caused to the transferee if the disposition were set aside against that which would be caused to the applicant if it were not set aside.

In *Joy v Joy*[16] Sir Peter Singer made an order setting aside a charge over a Bentley car given by a husband in favour of his solicitor to secure his costs.

Foreign property

8.19 It has been held that an order under s 37 can be granted even though the property in question is outside England and Wales.[17] The court might, in the exercise of its discretion, decline to make any order which would be unenforceable, but that would not per se prevent an application being made and an order granted in appropriate cases.

[16] [2014] EWCA Civ 520.

[17] *Hamlin v Hamlin* [1986] 1 FLR 61, CA.

- That once the arbitration has started they will not start court proceedings or if already started they will apply for a stay.
- That they have read the current edition of the IFLA rules and will comply with them. That they understand and agree that any award of the arbitrator will be final and binding subject to any arbitral process of appeal or review or in accordance with Part 1 of the Act, and subject also to any changes that the court, to which an application is made to enforce the award, may require before it makes any orders embodying the award.
- That they will apply to the court for orders to reflect the award, that the court has a discretion as to whether, and in what terms, to make orders and that they, the parties, will take all reasonably necessary steps to see that such orders are made.

22.10 Rule 9 of the IFLA rules provides that 'the parties are free to agree as to the form of procedure ... and, in particular to adopt a documents-only procedure or some other simplified or expedited procedure'. In default, and once the arbitration agreement has been signed, the arbitrator will decide what procedure to adopt but it is envisaged that the parties will have agreed this before signing. By rule 10 the arbitrator will invite the parties to make written submissions as to the issues to be decided and the procedure to be adopted. Thereafter, a tailor-made procedure will be adopted to suit the circumstances of the particular case.

22.11 Once the arbitrator has dealt with the case and heard all the evidence he or she will give a written award, similar to a judgment in a conventional case. This will then have to be converted into a consent order for the approval of the court. Any application to set aside the award of the arbitrator will have to be dealt with according to the principles contained in the 1996 Act.

FUTURE DEVELOPMENTS

22.12 Following the President's decision in *S v S* he indicated that he intended to put the procedure for arbitration on a more formal footing. In an article[5] in March 2014 he said that, pending more general changes to the Family Procedure Rules in relation to arbitration and other forms of ADR, he proposed to issue, for discussion and comment, both a draft rule change to enable relevant applications under the Arbitration Act 1996 to be made in the Family Division and not only, as at present, in the Commercial Court, and also draft Guidance dealing with a number of procedural matters not covered by *S v S*. At present, such further guidance is still awaited.

[5] [2014] Fam Law 301.

CHAPTER 23

FUTURE DEVELOPMENTS

INTRODUCTION

23.1 Family law is always subject to legislative change, and the purpose of this chapter is to alert the reader to the probable shape of things to come. As has been seen in this book, many of the most important developments over recent years have been judge-made and many would think that the law as it now stands needs a period of consolidation rather than reform. However, the will of Parliament is unpredictable and it is inevitable that there will be some changes, though probably not in ways one could predict.

REFORM OF MCA 1973, SECTION 25

23.2 During the parliamentary passage of the FLA 1996, the then Lord Chancellor announced his intention of considering whether anything could be learned from the Scottish system of ancillary relief with a view to improving the system in England and Wales. This statement aroused little attention, but it became clear that these ideas were being pursued when the then parliamentary secretary in the Lord Chancellor's Department, Mr Geoffrey Hoon, announced, at the annual conference of the Solicitors Family Law Association in 1998 that the government was giving favourable consideration to adopting the Scottish concept of a presumption of equal sharing of matrimonial property (as defined in the Family Law (Scotland) Act 1985), and making pre-nuptial contracts enforceable, subject to various safeguards. This gave rise to some debate, although the only formal consultation which the government carried out was to invite the Lord Chancellor's Advisory Group on Ancillary Relief to comment. In the event, the Advisory Group advised against amendment of s 25 in this way, and no more came of the proposal. As will be seen later, the desire to change has not gone away and it calls for more clarity in the law have recently been renewed.

The decisions of the House of Lords in *White v White* and *Miller/McFarlane* (as to which see Chapter 1) do not seem to have stopped the calls for a more predictable and formulaic approach. No doubt conscious of this continuing debate, in *Charman v Charman*[1] the Court of Appeal added a postscript entitled 'Changing the Law'. At the end of a lengthy review of the history, the Court identified the new problems which have arisen as follows:

[1] [2007] EWCA Civ 503 at para [106] et seq.

'[116] However a social change that was not perhaps recognised in that decision was the extent to which the origins and the volume of big money cases were shifting. Most of the big money cases pre-*White* involved fortunes created by previous generations. The removal of exchange control restrictions in 1979, a policy that offered a favourable tax regime to very rich foreigners domiciled elsewhere, and a new financial era dominated by hedge-funds, private equity funds, derivative traders and sophisticated off-shore structures meant that very large fortunes were being made very quickly. These socio-economic developments coincided with a retreat from the preference of English judges for moderation. The present case well illustrates that shift. At trial Mr Pointer achieved for his client an award of £48 million. Before us he freely conceded that he could not have justified an award of more than £20 million on the application of the reasonable requirements principle. Thus, in very big money cases, the effect of the decision in *White* was to raise the aspirations of the claimant hugely. In big money cases the *White* factor has more than doubled the levels of award and it has been said by many that London has become the divorce capital of the world for aspiring wives. Whether this is a desirable result needs to be considered not only in the context of our society but also in the context of the European Union of which we are a singular Member State, in the sense that we are a common law jurisdiction amongst largely Civilian fellows and that in the determination of issues ancillary to divorce we apply the lex fori and decline to apply the law more applicable to the parties.

[117] In the case of *Cowan* the need for legislative review in the aftermath of the case of *White* was articulated: see paragraphs 32, 41 and 58. Undoubtedly the decision in *White* did not resolve the problems faced by practitioners in advising clients or by clients in deciding upon what terms to compromise.

[118] However this court adopted a cautious approach both in *Cowan* and in the later case of *Lambert*. In his submission Mr Singleton drew attention to an article by Joanna Miles in International Journal of Law, Policy and the Family 19 (2005) 242. He told us that he had incorporated the article in his argument for Mrs McFarlane in the House of Lords. The article criticises the earlier decision of this court in the conjoined appeals of *McFarlane* and *Parlour* [2005] Fam 171 for having declined the opportunity to identify principles underpinning the exercise of judicial discretion under the Act of 1973. The article is particularly interesting in that it demonstrates that the principles discussed in the article (needs, entitlement and compensation), were subsequently the principles identified by the House of Lords in deciding the conjoined appeals of *Miller* and *McFarlane*.'

Later, in relation to the European aspects, the Court had this to say:

'[124] Any harmonisation within the European region is particularly difficult, given that the Regulation Brussels I is restricted to claims for maintenance and the Regulation Brussels II Revised expressly excludes from its application the property consequence of divorce. In the European context this makes sense because in Civilian systems the property consequences of divorce are dealt with by marital property regimes. Almost uniquely our jurisdiction does not have a marital property regime and it is scarcely appropriate to classify our jurisdiction as having a marital regime of separation of property. More correctly we have no regime, simply accepting that each spouse owns his or her own separate property during the marriage but subject to the court's wide distributive powers in prospect upon a decree of judicial separation, nullity or divorce. The difficulty of harmonising our law concerning the property consequences of marriage and divorce and the law of the Civilian Member States is exacerbated by the fact that our law has so far given little status to pre-nuptial contracts. If, unlike the rest of Europe, the property consequences of divorce are to be regulated by the principles of needs, compensation and sharing, should not the parties to the marriage, or the projected marriage, have at the least the opportunity to order their own affairs otherwise by a nuptial contract? The White Paper, "Supporting Families", not only proposed specific reforms of section 25 but also to give statutory force to nuptial contracts. The government's subsequent abdication has not been accepted by specialist practitioners. In 2005 Resolution published a well argued report urging the government to give statutory force to nuptial contracts. The report was subsequently fully supported by the Money and Property Sub-Committee of the Family Justice Council.'

The Court of Appeal recommended research by the Law Commission, and particularly stressed the need to reform the law to include the enforceability of pre-nuptial contracts.[2] The calls to reform the law to make pre-nuptial contracts enforceable as such have become ever more strident and it seems highly likely that this will be a prime candidate for reform, particularly in a period when a higher than ever proportion of marriages are second and subsequent marriages.

So far, Parliament has shown no sign of wishing to embark on the time-consuming and unpredictable task of family law reform and there are many other issues demanding the attention of the present coalition government. However, the presence in the government of several socially liberal members (not all of one party) means that the future is more than usually unpredictable.

23.3 Following the close of the consultation on agreements in 2011 (as to which, see **23.5** below) the Law Commission decided to consider two other significant aspects of the financial consequences of divorce and dissolution. (The Government announced that decision in February 2012 as part of its response to the Family Justice Review.)

These two aspects, which are the subject of a supplementary consultation, are:

(1) the law relating to financial needs on divorce and dissolution; and

(2) the legal status of 'non-matrimonial property'.

The Law Commission has now reported[3] and its conclusions are well summarized at paras 1.6-1.8 of its report as follows:

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[2] Though it has to be said that this would not have achieved very much in *Charman*. When the parties married they had no money and would, no doubt, have agreed equal sharing at that stage.

[3] LC 343 April 2014.

'1.6 We think that the objective of independence is the right one. We are therefore not advocating an overall change in the courts' approach. That is in line with the view of most of our consultees, many of whom were very keen not to detract from the courts' discretion.

1.7 However, we do think that action is needed. Although the law is largely well-understood by family lawyers, it is inaccessible to the general public and there is evidence that the courts in different areas of the country do not always apply the law consistently.

1.8 **We recommend** that the meaning of "financial needs" be clarified in guidance published by the Family Justice Council. Clarification will ensure that the term is applied consistently by the courts, reinforcing judicial best practice. It will also give people without legal representation access to a clear statement of their responsibilities and the objective of eventual independence that a financial settlement should strive to achieve.'

At para 1.11 the Law Commission continued as follows:

'1.11 **We recommend** that legislation be enacted to introduce "qualifying nuptial agreements". These would be enforceable contracts, not subject to the scrutiny of the courts, which would enable couples to make contractual arrangements about the financial consequences of divorce or dissolution. In order for an agreement to be a "qualifying" nuptial agreement, certain procedural safeguards would have to be met. Qualifying agreements could not, however, be used to contract out of "financial needs.'

23.4 In April 2014 it was announced that the government had asked the Family Justice Council to publish clarification of the meaning of 'needs'. No mention was made of the Law Commission's recommendations as to legislating regarding pre-nuptial contracts.

THE FAMILY JUSTICE REVIEW

23.5 The Family Justice Review, which was commenced in 2010, produced its interim report in 2011. Although most of the report is concerned with children's cases the possibility of reform and simplification of the law relating to financial remedies is mentioned, almost in passing. It remains to be seen what changes may be proposed in the final report. Any such changes would of course require primary legislation.

APPENDICES

7.11 It is unlikely that it will be necessary to make an application under s 14 in the course of an application for financial relief. Nevertheless, the statutory powers exist, and it may be necessary to have them in mind as a fall-back position in some situations.

This was in fact the case in *Miller-Smith v Miller-Smith*.[9] Here it was held that where the court is confronted by an application under TLATA 1996 between separated spouses it should ask itself whether the issues raised by the application can reasonably be left to be resolved within an application for financial relief following divorce. In the circumstances of this case, where the house was larger than required to meet the wife's needs and it was unlikely that the financial relief proceedings would be determined within another year, the Court of Appeal upheld a decision that the house should be sold.

For further discussion in the context of insolvency, see Chapter 12.

[9] [2009] EWCA Civ 1297, [2010] 1 FLR 1402.

CHAPTER 8

AVOIDANCE OF DISPOSITION AND OTHER INJUNCTIONS

INTRODUCTION

8.1 The course of an application for a financial remedy does not always run smoothly. Sometimes, orders are not obeyed, parties are less than frank, and, in extreme cases, there may be a concerted effort to defeat the just entitlement of one of the parties by the other party. The court therefore has to have powers to overcome such stratagems.

These powers may be summarised as follows:

(a) the power to prevent or set aside a disposition under s 37 of the MCA 1973;
(b) a similar power under the inherent jurisdiction of the court;
(c) the power to grant a freezing injunction;
(d) the power to grant a search order.

8.2 These powers and remedies will be considered in turn. The first is by far the most common.

APPLICATIONS UNDER SECTION 37 OF MCA 1973 FOR AN AVOIDANCE OF DISPOSITION ORDER

8.3 It is provided that:[1]

> 'Where proceedings for financial relief are brought by one person against another, the court may, on the application of the first-mentioned person –
>
> (a) if it is satisfied that the other party to the proceedings is, with the intention of defeating the claim for financial relief, about to make any disposition or to transfer out of the jurisdiction or otherwise deal with any property, make such order as it thinks fit for restraining the other party from so doing or otherwise for protecting the claim;

[1] MCA 1973, s 37(2).

(b) if it is satisfied that the other party has, with that intention, made a reviewable disposition and that if the disposition were set aside financial relief or different financial relief would be granted to the applicant, make an order setting aside the disposition;

(c) if it is satisfied, in a case where an order has been obtained under any of the provisions mentioned in subsection (1) above by the applicant against the other party, that the other party has, with that intention, made a reviewable disposition, make an order setting aside the disposition;

and an application for the purposes of paragraph (b) above shall be made in the proceedings for the financial relief in question.'

8.4 Section 37(2) refers to s 37(1) which is a definition section. There, it is provided that, for the purposes of s 37:[2]

'... "financial relief" means relief under any of the provisions of sections 22, 23, 24, 24B, 27, 31 (except subsection (6)) and 35 above, and any reference in this section to defeating a person's claim for financial relief is a reference to preventing financial relief from being granted to that person, or to that person for the benefit of a child of the family, or reducing the amount of any financial relief which might be so granted, or frustrating or impeding the enforcement of any order which might be or has been made at his instance under any of those provisions.'

By FPR 2010, r 2.3 an order for avoidance of disposition is a financial order. By r 9.3 an avoidance of disposition order means, in addition to orders under MCA 1973, s 37, orders under similar provisions in the statutes relating to financial relief after overseas divorce and dissolution of civil partnerships. Orders after overseas divorce are considered in Chapter 15, and this book is not concerned with civil partnerships.

Issues arising out of the remedy under s 37 will now be considered in turn.

Two types of remedy

8.5 Section 37 gives the right to apply for two distinct remedies. The first, which is pre-emptive, is the power of the court to prevent a disposition before it has been made. Thus, for example, a spouse who threatened to transfer assets to another person, or to squander some asset, could be ordered not to do so; banks or other financial institutions can be served with copies of any order made which would normally have the result of freezing transactions.

The second is the power to undo or set aside any disposition which has been made. Where a spouse transfers assets to another with the intention of putting them out of reach of the court, the person to whom the assets were transferred can be ordered to transfer them back so that they may form part of the funds available for distribution between the parties. This provision itself falls into two

[2] MCA 1973, s 37(1).

categories, namely the power to set aside in anticipation of the hearing of an application for a financial remedy, and the power to set aside at or after the hearing.

Separate factors obviously govern these two remedies, but there are a number of common factors which will be considered.

The requirement for an application for a financial remedy

8.6 Section 37 is a remedy ancillary to an application for a financial remedy; there cannot be a free-standing s 37 application. Subsection (2) begins by requiring that financial proceedings are brought by one person against another, and there can be no application under s 37 unless this has happened. Where the applicant is a petitioner, or a respondent who has filed an answer, the application for a financial remedy contained in the petition or answer will be deemed sufficient for this purpose, although it would normally be considered right to require a Form A to have been issued; s 37 is a discretionary remedy, and the court would not normally think it right to make an order unless satisfied that the application for financial relief was to proceed.

The application for financial relief may be filed at court at the same time as the s 37 application. In cases of urgency, the court will accept an undertaking to file the application by a fixed date.

8.7 'Financial relief' is defined by s 37(1) as, in effect, an application for either a financial provision order, a property adjustment order, an order for maintenance pending suit, an order on the ground of neglect to maintain, or a variation order.

Only the applicant can apply

8.8 After reciting the need for an application for financial relief by one person against another, s 37(2) sets out the remedies which may be granted 'on the application of the first mentioned person', ie the applicant for financial relief. A respondent to such an application who had made no prayer for financial relief in an answer would have no right to apply under s 37. This is perhaps a formal hurdle only because all the respondent would have to do would be to file a notice of application, but the point should be noted.

What is a 'disposition'?

8.9 The section provides that 'disposition' does not include provision made by will or codicil, but that it does include any conveyance, assurance or gift of property of any description, whether made by an instrument or otherwise.[3] Apart from this, no attempt is made to define the term, but clearly it includes any act, deed or transaction which has the effect of transferring ownership or

[3] MCA 1973, s 37(6).

possession from one person to another. It has been held to include a legal charge on real property.[4] It has also been held that failure to deal with property, as opposed to a positive dealing, is not a disposition.[5] A notice to quit a periodic tenancy is not a disposition and cannot be set aside under s 37.[6]

'With the intention of defeating the claim for financial relief'

8.10 The court must be satisfied that, in the case of a pre-emptive application, the disposition or transfer is to be made, or, in the case of a post-disposition or transfer application, has been made, with the intention of defeating the applicant's claim for financial relief. The onus of proof is on the applicant, and if this burden is not discharged the order cannot be made. However, it has been held that the question which the judge must ask himself is whether he is 'satisfied', and that it is inappropriate to add tests such as 'beyond reasonable doubt' or 'on the balance of probabilities'.[7]

To some extent, the task of the applicant is made easier by s 37(1) which goes some way to defining 'defeating the claim'. Here, it is said that this means any of the following:[8]

(a) preventing (any) financial relief from being granted to the applicant, either for herself or for a child;

(b) reducing the amount of any financial relief which might otherwise be granted;

(c) frustrating or impeding the enforcement of any order for financial relief which might be made or which has been made.

The court will therefore have to find that one of these results is more likely than not to happen if an order is not made.

8.11 This leaves the question of proving 'intention'. Where it is found that one of the outcomes set out above is likely to occur, the court would have no difficulty in deducing that the respondent to the application intended that to happen. A person is deemed to intend the normal consequences of his actions, and where, for example, the inevitable result of a transfer of a property to someone else would be that the funds available for distribution between the spouses would be diminished, it would almost inevitably have to be found that the transferor had intended that consequence.

Different factors might arise where there could be more than one reason for the disposition or transfer, particularly where it could also be said that the funds available for distribution would not be diminished. For example, a person

[4] *Whittingham v Whittingham* [1979] Fam 9, CA.
[5] *Crittenden v Crittenden* [1990] 2 FLR 361, CA.
[6] *Newlon Housing Trust v Alsulaimen* [1998] 2 FLR 690, HL.
[7] *K v K (Avoidance of Reviewable Disposition)* (1983) 4 FLR 31, CA.
[8] MCA 1973, s 37(1).

whose livelihood depended on the sale and purchase of assets should not be prevented from trading for no other reason than a pending financial remedy application, and a person involved in any business should not be subjected to unusual and unreasonable restrictions. In the context of marriage breakdown, it is not unusual for the parties to be both deeply suspicious of each other and resentful of any interference with their normal activities. The court has to distinguish these cases from those where there is evidence that some deliberate attempt to defeat the claim is being or has been made.[9]

In *Mubarak v Mubarik*[10] it was held that s 37 requires an actual intention to defeat a claim to be in existence at the time of the disposition; here, the court could not be satisfied that the husband had made the disposition with the intention of defeating the claim for ancillary relief (as opposed to tax evasion).

Special considerations in applications to set aside dispositions

8.12 As has already been mentioned, the power to set aside a disposition is distinct from the power to prevent a disposition. Clearly, once a disposition or transfer has been made, it may be that third parties have acquired rights in the property concerned, and different considerations arise from those when it is sought to prevent a disposition from taking place. The various relevant factors will now be considered.

Reviewable dispositions

8.13 For a disposition or transfer to be set aside, it has to be 'reviewable'. This term is defined by the section. First, it is provided that:[11]

> '... any disposition made by the other party to the proceedings for financial relief in question (whether before or after the commencement of those proceedings) is a reviewable disposition for the purposes of subsection (2)(b) and (c) above unless it was made for valuable consideration (other than marriage) to a person who, at the time of the disposition, acted in relation to it in good faith and without notice of any intention on the part of the other party to defeat the applicant's claim for financial relief.'

8.14 The significance of this is that it will be presumed that any disposition is reviewable unless the respondent to the application (and the transferee) can establish all the matters mentioned, namely:

(a) valuable consideration (for this purpose, marriage does not count);

[9] See *Smith v Smith* (1973) Fam Law 80; the court must be satisfied that a disposition is in fact about to take place, and also that its intention is to defeat the applicant's claim. There is no general power to freeze a party's assets pending the hearing of an application for financial relief.
[10] [2007] 2 FLR 364, Holman J.
[11] MCA 1973, s 37(4).

(b) transferee acting in good faith;[12]

(c) transferee without any notice of transferor's intention to defeat applicant's claim.

The onus will therefore be on the respondent or transferee to satisfy the court of these matters. This applies to any transfer or disposition which the respondent has made.[13]

The limitations of s 37 were demonstrated by the decision in *Ansari v Ansari*.[14] Here, the husband and a third party had conspired to defeat the wife's claim; a house which was owned by the husband was transferred to the third party who then charged it to a bank for a large sum. The bank had notice of the wife's family home rights. The wife's application to set aside the charge failed, on the ground that the husband was not a party to the bank's charge which was therefore not a reviewable disposition made by 'the other party'. It was also held, per curiam, that even if the charge had been a reviewable disposition, the bank would have been able to rely on s 37(4). The fact that the bank had notice of the wife's rights did not mean that it had notice of the husband's intention to defeat the wife's claims.

Presumption of intention to defeat claim in some cases

8.15 The section goes further. It is provided that:[15]

> 'Where an application is made under this section with respect to a disposition which took place less than three years before the date of the application or with respect to a disposition or other dealing with property which is about to take place and the court is satisfied –
>
> (a) in a case falling within subsection (2)(a) or (b) above, that the disposition or other dealing would (apart from this section) have the consequence, or
> (b) in a case falling within subsection (2)(c) above, that the disposition has had the consequence,
>
> of defeating the applicant's claim for financial relief, it shall be presumed, unless the contrary is shown, that the person who disposed of or is about to dispose of or deal with the property did so, or, as the case may be, is about to do so, with the intention of defeating the applicant's claim for financial relief.'

[12] See *Whittingham v Whittingham* [1979] Fam 9, CA; at the very least lack of good faith involves lack of honesty, and may require something akin to fraud.

[13] There is no general rule that anyone acquiring an interest in property from someone he knows to be divorced thereby has notice of an application for financial relief. However, the facts may indicate constructive notice. A bank may be under an obligation to make inquiries, and a lender who knows that an aspirant borrower has been involved in divorce proceedings is obliged to ask him whether his spouse has any potential interest in a property sought to be charged; however, it is under no obligation to verify information given by the borrower unless the spouse is in occupation of the property. See *Whittingham v Whittingham* (above); *B v B (P Ltd Intervening) (No 2)* [1995] 1 FLR 374, CA.

[14] [2008] EWCA Civ 1456.

[15] MCA 1973, s 37(5).

8.16 This subsection therefore erects a further hurdle which the respondent or transferee must cross. Where the disposition was either less than 3 years before the application, or, in the case of an application to prevent a disposition, has not yet been made, and it is established to the satisfaction of the court that its effect will be to defeat the applicant's claim for financial relief (as defined in s 37(1): see 8.7) it will be presumed that the intention was or is to defeat the claim for financial relief unless the respondent is able to prove the contrary.

Consequential directions

8.17 When an order is made setting aside a disposition, the court must give consequential directions as it thinks fit for giving effect to the order, including directions requiring the making of any payments or the disposal of any property.

How will the court exercise its discretion?

8.18 Even if the court finds in favour of the applicant on the issues of intention to defeat the claim, etc the position remains that the court 'may' make an order under s 37; the final disposal is subject to the discretion of the court. Clearly, each case will turn on its own facts, and, as always, the factors set out in s 25 apply.

In deciding whether or not to grant an order under s 37(2)(a) (a pre-emptive order), and assuming that the intention on the part of the respondent had been proved, the court would normally feel obliged to make an order unless it could be demonstrated that the disposition or transfer need not affect the final result because there would be more than enough capital left to provide for any order which the court could conceivably make.

In deciding whether or not to set aside a disposition, the same consideration will apply, but the court will also have to weigh up the hardship which would be caused to the transferee if the disposition were set aside against that which would be caused to the applicant if it were not set aside.

In *Joy v Joy*[16] Sir Peter Singer made an order setting aside a charge over a Bentley car given by a husband in favour of his solicitor to secure his costs.

Foreign property

8.19 It has been held that an order under s 37 can be granted even though the property in question is outside England and Wales.[17] The court might, in the exercise of its discretion, decline to make any order which would be unenforceable, but that would not per se prevent an application being made and an order granted in appropriate cases.

[16] [2014] EWCA Civ 520.

[17] *Hamlin v Hamlin* [1986] 1 FLR 61, CA.