



**MATRIMONIAL FINANCE:
“SHAPING NEW LAW INTO SOLUTION FOCUSED ADVICE FOR CLIENTS”**

**WHITE PAPER CONFERENCE
MAY 216**

DIFFICULT ENFORCEMENT ISSUES

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How do you protect a client who is faced with a spouse who is:-

- 1) **not employed by a UK company;**
- 2) **intending to take citizenship of his/her current partner's home country; or**
- 3) **intending to walk away and allow the FMH to be repossessed by the lender**

1. **What to Do When the Husband Is Not Employed by UK Company:** (*presumably working abroad*)

Maintenance/Lump Sum

(a) Jurisdiction – complex network of reciprocal arrangements with other countries

- (i) Maintenance Orders (Facilities for Enforcement) Acts 1920 and 1972

Essentially an inter-Commonwealth arrangement

MO(FE)A 1920

- enforcement depends on payer’s residence in the reciprocating jurisdiction
- the Act can only be used to enforce periodical payments - not lump sums

MO(FE)A 1972 Part I – incorporates the larger Commonwealth countries e.g. India, Canada, Australia (+ Eire, Hong Kong) similar for 1920 Act - but in addition:-

- enforcement depends on residence **or the presence of assets** in the relevant jurisdiction

- the Act can be used to enforce **lump sum as well** as periodical payments provided the lump sum was for maintenance
- (ii) Maintenance Regulation (Council Regulation (EC) No.4/2009)
- EU Countries
- the one that practitioners will be most familiar with: applying the “first in time” rule
 - 2 regimes for recognition and enforcement depending on whether or not the particular decision was given in a member state which is bound by The Hague Protocol
 - lump sums and/or transfer of property are also enforceable if they were for maintenance (i.e. if its object is to ensure the support of a spouse). This would include a Duxbury award (**Van den Boogard v Laumen [1997] QB 759** (ECJ))
 - payment of a lump sum or transfer of property which serves only the purpose of a division of property, or compensation for non-material damage, is not in the nature of maintenance
 - If Maintenance Regulation applies then ability to enforce any order in the other state as if husband were here - seek equivalent to the attachment of earnings/lump sum in the other state?

If spouse steals a march and seeks to obtain an order in the other state can a further maintenance order be made in this jurisdiction? The *Agbaje* question

See **Ramadani v Ramadani [2016] FCR 1**

The Court of Appeal dismissed a husband’s appeal in which he sought to rely on the outcome of proceedings in Slovenia (where there had been “partial withdrawal of the complaint” such that “the ... claim for

maintenance [was] stopped”). The Court of Appeal held that the Slovenian court had not made a decision nor had there been a court settlement with respect to spousal maintenance and as such, the court in England and Wales had jurisdiction to hear spousal maintenance application for the purposes of The Maintenance Regulation (the wife was and remained habitually resident in England and Wales). The court declined to determine what the position would have been if the Slovenian court *had* made a maintenance decision.

(iii) New York Convention (“The United Nations Convention on the Recovery Abroad Maintenance ”)

- Relevant provisions are contained in Part II of MO(RE)A 1972
- comprehensive list of countries participating

(iv) USA

See:-

- Reciprocal Enforcement of Maintenance Orders (United States of America) Order 2007 and
- The Recovery of Maintenance (United States of America) Order 2007,
 - replacing the old patchwork of State-by-State facilities with a single, federal channel for enforcement effective from 1st of October 2007.
 - enables the recipients of maintenance in the UK to enforce the order against the payer who is resident or has assets in any part of the USA
 - both periodical payments and lump sum orders may be enforced provided lump sum orders have the character of maintenance
 - again relevant provisions are contained in Part II of MO(RE)A 1972

- (b) Build in contingencies to the order if spouse is abroad and it is feared that he will not comply with his maintenance obligations? Capital/lump sum/security contingencies if non-payment;
- (c) If UK citizen and will seek to return here (children?) orders may be more easily enforceable against him directly (orders in personam) - ultimately against movement;

Bhura v Bhura [2012] EWHC 3363 (Fam) Mostyn J

Mostyn J made, on the application of the wife, an injunction restraining the husband from leaving the jurisdiction and directing that his passport be held by the wife's solicitors. He commented, the appropriate form of order now, rather than the charming historical relic of writ ne exeat regno, is an injunction restraining the respondent from leaving the jurisdiction. BUT this could not be used as a freestanding method of enforcement so injunction made on an interim basis only until either the hearing for the execution of the warrant or the payment of the outstanding judgement debt (deployed in **Young v Young [2012] 2 FLR 470** (during currency of proceedings) ... but see also

Prest v Prest [2016] 1 FLR 773 as to the importance of proof to criminal standard in judgment summons applications for non-payment of debts. McFarlane LJ casting doubt on the concept of "shifting evidential burden" which can be used to find the default to the requisite criminal standard.

Mostyn J riposte to McFarlane LJ in **Migliaccio v Migliaccio [2016] EWHC 1055** (26/04/16) (a) its ok it was only obiter and anyway (iii) he's wrong because he ignored binding precedent of Court of Appeal case in **Karoonian v CMEC [2012] 3 FCR 491!**

- (d) Does the company have UK offices - against which 3rd party disclosure orders could be sought? **Norwich Pharmacal applications**

2. Where the Husband Is Intending to Take Citizenship in a Foreign Country

Presumably the fear is future non-compliance

- a. Security? Including on costs/fees/maintenance? - Seek undertakings as to engagement in the proceedings - as to acceptance of jurisdiction
 - b. Interim Injunctions - against property/income/capital/investment? Is there enough to launch protective proceedings
 - Art 24 of Brussels I and the Lugano Convention - an application may be made to the courts of a contracting state for “such provisional, including protective, measures” as may be available under the law of that State, even if that State is not the forum for the dispute. In other words, the courts of member states of the EC and EFTA will support each other’s litigation where necessary, by granting injunctions and other protective measures
 - s.37 MCA 1973 - NB extended definition of *defeating the claim for financial relief includes frustrating or impeding the enforcement of any order which might be or has been made*” s.37(1)(iii))
 - c. Notices against property where there is any interest
 - d. Again, in terms of enforcement - orders in personam
 - e. Use of Hadkinson orders. When non-compliance/non-payment – “pay to play orders”
 - f. Importance of course of early understanding of the applicable law in a foreign state. How will it deal with English orders? May inform whether interim applications under the FPR Part 20 necessary
 - g. **Proactive case management powers** under FPR 2010 Part 4.1(3) - use very early on – very broad
- (3) Except where these rules provide otherwise, the court may—
- (a) extend or shorten the time for compliance with any rule, practice direction or court order (even if an application for extension is made after the time for compliance has expired);

- (b) make such order for disclosure and inspection, including specific disclosure of documents, as it thinks fit;
- (c) adjourn or bring forward a hearing;
- (d) **require a party or a party's legal representative to attend the court;**
- (e) hold a hearing and receive evidence by telephone or by using any other method of direct oral communication;
- (f) direct that part of any proceedings be dealt with as separate proceedings;
- (g) stay the whole or part of any proceedings or judgment either generally or until a specified date or event;
- (h) consolidate proceedings;
- (i) hear two or more applications on the same occasion;
- (j) direct a separate hearing of any issue;
- (k) decide the order in which issues are to be heard;
- (l) exclude an issue from consideration;
- (m) dismiss or give a decision on an application after a decision on a preliminary issue;
- (n) direct any party to file and serve an estimate of costs; and
- (o) **take any other step or make any other order for the purpose of managing the case and furthering the overriding objective.**

(4) When the court makes an order, it may—

- (a) make it subject to conditions, **including a condition to pay a sum of money into court;** and
- (b) **specify the consequence of failure to comply with the order or a condition.**

3. What to Do When the Husband Is Intending to Walk Away and Allow the FMH to Be Repossessed by the Lender

- a. Always a very difficult situation. Is it time to apply for interim sale? Can we fend off the mortgagees?
 - (i) First though - practical solutions? Discuss with the mortgagees? Payment holidays-no steps to be taken during the proceedings?
 - (ii) Obviously notices - but they will not protect against a trustee in bankruptcy or mortgagee possession proceedings
 - (iii) is the mortgage joint - taking over the mortgage applying for interim maintenance - it is an option?

- b. Interim Sale? Is it the only way to protect what's left?

BR v VT [2015] EWHC 2727 (Fam)

The husband in financial remedy proceedings applied for an interim order for the termination of the wife's rights of occupation of the FMH¹, an order removing the wife's home rights² and an order for the vacant possession³

Mostyn J explored three procedural routes by which conferred jurisdiction for an interim order the sale

- (i) section 17 of the Married Women's Property Act 1882;
- (ii) sections 13 and 14 of the Trusts of Land and Appointment of Trustees Act 1996 (so long as both parties have a beneficial interest); and
- (iii) FPR 2010 Part 20.2(1)(c)(v) - the counterpart CPR 1998 Part 25.1(1)(c)(v)

Mostyn J expressed a respectful difference with the conclusion of :-

- (a) Ward LJ in **Wicks v Wicks [1999] 1 FLR 470** that "the power to order a sale of the FMH [under MWPA 1882] will not include a power to order possession of it" - given the previous decision of "a strong Court of Appeal" in **Short v Short [1960] 1 WLR 833** to the contrary ;
- (b) Wilson LJ in **Miller-Smith v Miller-Smith [2010] 1 FLR 1402** to the effect that "if the claim for interim relief is formulated under TOLATA then the exercise under section 33 of the 1996 act can be bypassed ".

Mostyn J emphasised that if the court has before it an application by one spouse for an interim order the sale of the FMH - whether that application is made under MWPA, TOLATA or FPR 2010 Part 20.2(1)(c)(v) - the court cannot order vacant possession of it without first undertaking the exercise required by **s.33 of the Family Law Act 1996**, (i.e. an occupation order)

Mostyn J considered that "*there is no alternative but that the home must be sold as soon as possible, and for this purpose the wife's home rights must be terminated.*

¹ Pursuant to s.33(3) FLA 1996

² Pursuant to paragraph 1 of schedule 4, Family Law Act 1996

³ The husband did not formally apply for interim order for sale because the former matrimonial home was in his sole name

Only in this way can the pressing debts, most importantly to HMRC, be paid and the revenue deficit eliminated. The future housing parties will have to be in rented accommodation". He ordered the wife's rights of occupation be terminated and her home rights notice to be vacated. The "*positive order for the sale of the home*" was made pursuant to FPR 2010 Part 20.2(1)(c)(v)

Finally

NB see The Law Commission "**Enforcement of Family Financial Orders**".

Consultation on this project closed on 31st July 2015. The Law Commission aims to publish a report with their recommendations to the government within 18 months to 2 years from the close of consultation.

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