Austin Kemp

2023

High Value Divorce Report

A review of high value divorce cases in 2023.

Introduction

Whilst 2022 may not have been the busiest year for financial remedy applications (the most recent figures show a drop of 20%), there was no shortage of interesting high net worth cases reported. The following is a selection of the most noteworthy.

Working out a nuptial agreement

Collardeau - Fuchs v Fuchs

Nuptial agreements, whether entered into before or after the marriage are, for obvious reasons, a common feature in high net worth cases, and so it was in 2022.

Perhaps the most high-profile such case was Collardeau-Fuchs v Fuchs, which made the mainstream media, at more than one point in the year.

The case concerned a couple who had enjoyed an "extremely high standard of living", with numerous properties around the world. Prior to their marriage in 2012 they entered into a pre-nuptial agreement in New York. The husband's net worth was disclosed in the sum of $1,018,215,671, and the wife's net worth was stated to be $4,471,500.

Following the marriage they executed a 'modification agreement' in New York in 2014, which increased the financial provision made to the wife pursuant to the pre-nuptial agreement.

The couple separated in March 2020, and the wife issued divorce proceedings in December of that year. Given that both parties essentially agreed to be bound by the terms of the pre-nuptial agreement, as amended, one would have thought that the divorce settlement might be a straightforward matter.

Not so. The case ultimately occupied six days of Mr Justice Mostyn's time, comprising a one day hearing of the wife's maintenance pending suit application in February 2022, and a five-day final hearing in October.

Why was this so? The primary reason, in a nutshell, was that the parties could not agree as to exactly what the wife was entitled to under the pre-nuptial agreement, leaving Mr Justice Mostyn to decide the matter for them.

The moral of the story is quite simple: when entering into a pre-nuptial agreement, make sure that its terms are crystal clear, and fully understood by both parties.

A question of anonymity

We remain with Mr Justice Mostyn for the next case, or rather sequence of cases.

Anonymity is obviously a major concern for anyone involved in financial remedy proceedings, especially if they are a person of substantial means. No one wants their 'dirty linen' washed in public, but more particularly no one will want their private business affairs made public.

Thus until recently parties wishing to keep their affairs private would request that any published judgment in their case be anonymised, safe in the knowledge that their request was likely to be granted.

Until the intervention of Mr Justice Mostyn, that is. In November 2021 Mr Justice Mostyn (who it must be remembered was the National Lead Judge of the Financial Remedy Court) announced that in future his 'default position' would be to publish financial remedy judgments in full without anonymization, and that there would have to be a good specific reason to depart from this rule. And in 2022 Mr Justice Mostyn confirmed this position, in a series of judgments, including Xanthopoulos v Rakshina and Gallagher v Gallagher.

And now his approach has been approved by none other than Sir James Munby, the former President of the Family Division, who has said that there is no convincing objection to Mr Justice Mostyn's default position.

So anyone going to court to resolve a financial remedies dispute can no longer rely upon any published judgments of their case being anonymised. The answer, of course, is to ensure that the dispute is resolved out of court, if at all possible.

The duty of disclosure

Goddard-Watts

The case Goddard-Watts v Goddard-Watts, (finally) decided by Sir Jonathan Cohen in February, was remarkable, not so much for what was decided, but for the case's "very unusual history".

It is a model reminder of the duty of both parties to financial remedy proceedings to make full and frank disclosure of their means.

Because this was the second rehearing of the wife's claim for financial remedy orders, the two previous orders having been set aside as a result of the non-disclosure of the husband.

The first order, made in 2010, was set aside after the wife subsequently found out that there were significant trust assets of which the husband had failed to disclose that he was the primary beneficiary.

A second order was made in 2016. This was also later set aside, after it transpired that the husband had failed to disclose an offer he had received for shares owned by him, which indicated that they were worth over five times their valuation of around £16 million.

Thankfully, when the matter went before Sir Jonathan Cohen last year he did not find the husband's disclosure to have been "significantly deficient or material to the outcome." We are not told, however, how much the husband was ordered to pay towards the wife's costs of the previous hearings. But the judge, in this case, went on to award the wife some additional capital to meet her income needs.

Court only for the very rich?

Gallagher case

The Gallagher case was also notable for a different reason, also relating to comments made by Mr Justice Mostyn.

In a second judgment Mr Justice Mostyn commented that: "Financial remedy litigation seems to be fast heading for Ritz Hotel status - so expensive that it is only accessible by the very rich." He made the comment after noting that the parties in the case had incurred costs in the "extraordinary amount" of £1,670,380, or 5% of the total assets.

Now, the comment may be somewhat of an exaggeration, particularly given that there were still nearly 30,000 financial remedy applications made just in the first three quarters of 2022, but the point is still well made – litigants, no matter their means, should always conduct their cases proportionately.

The comment followed similar observations by Mr Justice Mostyn in the Xanthopoulos case referred to above, where he said that the parties had run up "beyond nihilistic" costs of between £7.2 million and £8 million (to which he also described as 'apocalyptic'), and called for the introduction of a cap on costs in family cases, although quite how this would work is unclear.

A case on enforcement

Barclay

The Ritz hotel was also a feature in another high-profile high net worth case in 2022, which also made headlines in the mainstream media.

The case concerned Sir Frederick Barclay who, with his deceased twin brother Sir David, built a business empire that included the Ritz hotel.

The case involved one of the biggest divorce settlements ever in this country. In March 2021 Sir Frederick was ordered by Mr Justice Cohen to pay his ex-wife, Lady Hiroko Barclay, lump sums totalling £100 million, to be paid as to £50 million in 3 months and the remainder in a little over one year.

The payments were not made, and Lady Barclay issued contempt proceedings for non-payment. Hearings took place in July and August. Mr Justice Cohen did not find Sir Frederick in contempt, as Lady Barclay had failed to prove that Sir Frederick had the means to pay.

However, this did not mean that payment was no longer due, and the possibility of Sir Frederick, who is now 88 years old, being committed to prison remained.

Mr Justice Cohen did, however, find Sir Frederick in contempt in Lady Barclay's applications relating to the non-payment of the sum of £185,000 by way of a Legal Services Payment Order previously made and his unilateral halving of the maintenance payments he was ordered to pay to Lady Barclay.

The case is a reminder that everyone must comply with court orders, no matter who they are. As counsel for Lady Barclay said:

"There is a real public interest that men in Sir Frederick Barclay's position, captains of industry, media moguls, knights of the realm, like anyone else in this country, ignore court orders at their peril."

Treatment of pre-marital assets

ARQ v YAQ

It is of course not unusual that one party should bring to the marriage significant financial assets that they acquired prior to the nuptials.

The question is: how should the court treat such assets?

The answer may well be different in high net worth cases, compared to cases involving more modest means. This is because the court will treat assets acquired prior to the marriage as 'non-matrimonial', so that they will, in general, remain the property of the party who acquired them, only to be shared with the non-owning party if that is required to meet their needs.

This was demonstrated in the case ARQ v YAQ. The case concerned a 15 year and 9 month marriage, in which the assets totalled some £132.6 million including assets which were determined to be non-matrimonial as they had been brought into the marriage by the husband and remained in the husband's name. This figure was reduced down to £112.6 million when looking at matrimonial assets. However, of this, a very substantial proportion had been brought into the marriage by the husband but then transferred to the wife as a result of tax planning advice and so had become matrimonialised. It was not possible to quantity this exactly, so a specific sum could not be called 'non-matrimonial'.

In the circumstances Mr Justice Moor held that the £112.6 million should be divided 60:40 in favour of the husband, in consideration of the fact that he brought assets into the marriage.

Financial remedy proceedings

Simon v Simon

One might think that finding funds to pay legal fees would not be an issue in high net worth cases.

But of course one of the parties may not have, or may not have access to, the funds to pay their legal costs.

In such a case they may find the answer in a litigation lender, who will lend them money to pay their costs. But the litigation lender will of course expect repayment, as was demonstrated in the case Simon v Simon.

The case involved what the judge described as "bitterly contested financial remedy proceedings", in which the wife had obtained loans from a litigation lender, totalling near to £1 million.

Now, the wife would clearly have been liable to repay the loans from any assets she recovered in the proceedings, but in the event she agreed to only receive the right to reside in a property owned by the husband's trust for the rest of her life, but no additional liquid capital to pay the loans.

Concerned that the wife "might be attempting to enter into an agreement with the husband whereby she surrenders the entirety of her lump sum which would prevent her from being able to discharge her obligations under the loan agreement", the litigation lender applied to be joined to the proceedings, so that they could heard before the court approved the agreement. Due to the sequence of events, the judge approved the agreement without being aware of the joinder application. The agreement was set aside pending arguments being heard by the litigation lender.

The joinder application was opposed by the husband, on whose behalf it was argued that the lender was "trying to move from being an unsecured creditor of the wife to being a secured creditor of both wife and husband".

Notwithstanding this, the judge held that the lender should be joined. The case has been listed for a four-day hearing March this year.

Disclosure

X v Y

Capital claims left open where failure to provide full disclosure

For our last case we return to the issue of disclosure. X v Y may, or may not, be a high-money case.

The problem is, we don't know.

We do know that in 2014 the husband had told the wife that a prospective purchaser wished to buy his company for £80 million.

But when the wife issued a financial remedies application the husband failed to engage in full and frank disclosure. He claimed that the deal to sell his company had fallen through, and it became clear that there may never have been an offer to buy his company at all.

The husband claimed that he had no income at all, and debts of £2 million. The wife, on the other hand, produced various internet posts by the husband which contradicted the husband's evidence.

The court was left with no clear picture of the husband's finances. On the one hand there was evidence of financial success. On the other hand there was specific evidence of the husband having dishonestly and deliberately over-stated his financial position.

Having initially sought a lump sum of some £6.8million, the wife asked the court to adjourn her capital claims, on the basis that she may well have to restore the matter to the court in the future.

Hearing the case, His Honour Judge Edward Hess agreed. He said:

"If a litigant engages in conduct, which may include full or partial non-disclosure, which causes the court to conclude that a once-off division of capital now is likely to cause unfairness and injustice to the other party then the court, in exception to the normal practice, has a discretion to decide that the normal desirability of finality in litigation should be overridden to preserve the possibility of a fair outcome for the parties."

Finding that this was such a case, he therefore adjourned the wife's capital claims generally with liberty to restore, provided that any application to restore must be issued before 3rd August 2032, failing which they will stand dismissed.

Summary

As will be seen, the area of high net worth financial remedy cases continues to develop, and in ways that may not necessarily be expected. It is hoped that this review will provide a useful and interesting look at some of the most important developments in 2022.

For more information on this report or to answer any questions, please contact:
marketing@austinkemp.co.uk

Austin Kemp

www.austinkemp.co.uk