



Neutral Citation Number: [2023] EWCA Civ 547

Case No: CA-2022-001436

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE FAMILY COURT
SITTING AT THE ROYAL COURTS OF JUSTICE

Mr Justice Peel

ZC17J00073

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/05/2023

Before:

LADY JUSTICE KING
LORD JUSTICE DINGEMANS
and
LORD JUSTICE SNOWDEN

Between:

SOFIA BOGOLYUBOVA
- and -
(1) GENNADIY BOGOLYUBOV
(2) JOINT STOCK COMPANY COMMERCIAL
PRIVATBANK “PRIVATBANK”

Claimant/Appellant

Defendants/
Respondents

James Turner KC (instructed by **Mishcon de Reya**) for the **Appellant**
Charles Howard KC (instructed by **Hughes Fowler Carruthers**) for the **First Respondent**
Lewis Marks KC and Marina Faggionato (instructed by **Hogan Lovells**) for the **Second Respondent**

Hearing date: 15 March 2023

Approved Judgment

This judgment was handed down remotely at 12:00pm on 18 May 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lady Justice King:

1. This is an appeal against a case management order made by Peel J ('the judge') on 12 July 2022. By his order, the judge refused an application to approve a proposed consent order in financial remedy proceedings, the terms of which had been agreed between Sofia Bogolyubova ('the wife') and Gennadiy Bogolyubov ('the husband').
2. The husband is a co-defendant in Chancery Proceedings. In those proceedings, it is alleged that he was central to a substantial fraud which had been successfully perpetrated against a Ukrainian bank called the Joint Stock Company Commercial PrivatBank ('PrivatBank'). If PrivatBank succeeds in its claim against the husband, he could face a liability in damages and interests in excess of \$4.2bn, a sum which would, in all likelihood, wipe out the entirety of his assets. The judge held that it would be both illogical and wrong to approve the proposed consent order until the extent of what he described as the husband's 'potentially massive liability' had been established.
3. In those circumstances, the judge adjourned the application generally. The issue before this court on appeal is whether, notwithstanding that this was a case management decision, the judge erred in law in declining to approve the proposed consent order pending the resolution of the third party proceedings. For my part, I have no hesitation in saying that he made no such error. The judge gave a careful reserved judgment before making an order which was not only well within his wide case management powers, but which, for the reasons set out below, was in my view entirely correct.

Background to the Proceedings

4. The husband and wife are both Ukrainian nationals. They were married in a religious marriage in London in 2008 before moving to the UK in 2009. They were subsequently married formally in this country on 26 May 2011, having entered into a pre-marital agreement on 10 March 2011. There are four children of the marriage who live with the wife, now in Switzerland. The husband lives in Ukraine.
5. At the time of the pre-nuptial agreement, the husband's wealth was recorded as £3bn. Under the terms of the pre-nuptial agreement in the event of a marriage breakdown, the wife was to receive a £1m lump sum plus £2m per year of the marriage. In addition, she was to receive maintenance of £500,000 pa for life and £20m in trust as a housing fund.
6. The parties separated in March 2016. By a separation agreement dated 20 February 2017, the pre-nuptial agreement was terminated and replaced by a settlement for the wife expressed to be for a minimum of £95m. Once again, the agreement recorded the extent of the husband's wealth which had, according to that document, now reduced by two thirds to £1bn.
7. Meanwhile, in 2016, Tatneft, a Russian oil company, had brought claims against the husband for around \$300m and had, within those proceedings, obtained a worldwide freezing order against him. Under the terms of the February 2017 separation agreement, the wife was to receive certain assets via trust distributions within 6 weeks of the discharge of the Tatneft worldwide freezing order. Although judicial separation proceedings were issued in March 2017, no application was made by either the husband or the wife to have a consent order made reflecting the terms of the separation

agreement in a way similar to that which is now sought by the parties in respect of the same agreement. It may be worth noting that in the Tatneft litigation, the husband's financial jeopardy stood at £300m (approximately one third of his wealth) and, unlike the present situation, there was therefore no question of the husband being left with no assets should Tatneft have succeeded in establishing its claims.

8. The Tatneft worldwide freezing order was discharged on 11 March 2020, those proceedings having been dismissed after the husband had succeeded on a limitation point. The wife was, however, notwithstanding the terms of the agreement, unable to gain access to the assets as had been intended because, by that stage, a further worldwide freezing order had been obtained against the husband by PrivatBank through the following sequence of events:
 - a. In December 2016, PrivatBank (in which the husband had been a shareholder) was declared insolvent by the National Bank of Ukraine and was subsequently nationalised.
 - b. In December 2017, PrivatBank issued proceedings against the husband, alleging that he and seven other defendants had perpetrated a massive fraud during 2013 and 2014. PrivatBank seeks damages against the husband of \$1.91bn plus interest (said to amount to a total of \$4.2bn as at 17 March 2022).
 - c. On 19 December 2017, PrivatBank obtained a worldwide freezing order in this jurisdiction against the husband. The worldwide freezing order was set aside on 4 December 2018 on grounds that there was no jurisdiction to entertain PrivatBank's claims. The Court of Appeal allowed an appeal against that decision on 15 October 2019 (*PJSC v Kolomoisky and others* [2020] Ch 783) and a further worldwide freezing order was made. Significantly, it should be noted that at para.[22] of the judgment it was recorded that both the husband and Mr Kolomoisky, the man alleged to be the co-conspirator, had each admitted that there was a 'good arguable case of fraud on an epic scale.'
9. The fraud trial is listed for a 13-week hearing in the Chancery Division commencing in June 2023. It is accepted by Mr Turner KC on behalf of the wife that, in the event that PrivatBank succeeds substantially in its action against the husband, the resulting damages order would 'wipe him out'.
10. On 18 October 2021, a decree of judicial separation was made on the wife's petition. Forms A were issued by each of the parties on 7 December 2021. The covering letter was signed by both the husband and the wife and expressed an intention to incorporate the terms of the February 2017 separation agreement in a consent order 'subject to the variation or discharge of the second worldwide freezing order'.
11. The parties re-entered into negotiations in order to attempt to turn the separation agreement into a consent order that satisfied them both. This resulted in the proposed consent order at the centre of this appeal. An application for the approval of the consent order by the court was made on 7 December 2021.

12. On 16 February 2022, PrivatBank was notified that the husband and wife had made the application. Thereafter, on 17 March 2022, PrivatBank issued an application i) to intervene in the proceedings; ii) for a stay of the application for financial relief pending the outcome of PrivatBank's fraud claim against the husband; and iii) for specific disclosure of certain documents.
13. The issue came before Peel J on 9 June 2022 and a reserved judgment was handed down on 24 June 2022. The judge joined PrivatBank to the proceedings for the purposes of hearing its submissions and then discharged it as a party from the financial remedy proceedings. The judge refused PrivatBank's application for disclosure specifically in relation to the pre-marital agreement. There is no appeal against either of those orders.
14. That then left the husband and wife's application for approval of the consent order and PrivatBank's cross-application that the financial remedy proceedings should be stayed until after the trial in the Chancery Division. The judge refused the application to approve the proposed consent order and adjourned the financial remedy proceedings.

The proposed consent order

15. The judge was provided with a draft consent order substantially in the same terms as the separation agreement. In addition, the judge was provided with the 'Statement of Information for a Consent Order in relation to a Financial Remedy', commonly known as a Form D81 ('D81'), which is required by the Family Procedure Rules 2010 ('FPR') r 9.26. This document now put the husband's assets at £3.8bn which, as the judge noted at para.[23], represented a 'very significant increase on the figure in the separation agreement'. The notes to the husband's assets acknowledge that, as a large proportion of the husband's assets are held in Ukraine, they will have been heavily impacted by the current war, and that it was therefore not possible 'realistically to value them with any degree of accuracy.'
16. Whilst much of the husband's wealth is held in Ukraine, the D81 identifies properties in London valued at £121m.
17. It is clear, and it was accepted by Mr Turner, that even if that figure of £3.8bn does not have to be adjusted down significantly to reflect the appalling impact of the Ukrainian war, nevertheless, should PrivatBank succeed in the litigation in the Chancery Division, the husband is unlikely to be able to meet the claim against him personally which, although amounting to \$4.2bn as of March 2022, will now require there to be added at least one year's further interest.
18. Within the proposed consent order, there was what the parties have referred to as a 'conditionality clause'. This was a clause which the judge (rightly) characterised as no more than a statement of applicable law, namely that the proposed consent order could not be implemented unless and until the worldwide freezing order was varied or discharged. The clause does not, however, prevent either party from applying for a variation or discharge of the worldwide freezing order and the judge found at para.[24] that the parties' intention, if the order were made, would be to apply to Trower J (the trial judge in the PrivatBank litigation) for a variation of the worldwide freezing order so as to permit the implementation of the consent order.
19. The conditionality clause reads as follows:

“48. No substantive provision of this order or of the agreements and undertakings recited in it shall be implemented or enforceable until the earliest of (a) such date, if any, as the PrivatBank Worldwide freezing order is conclusively discharged, or varied by a competent court to the extent necessary to permit such implementation or enforcement; or (b) further order of this court permitting any such implementation or enforcement.

49. The approval by the court of this Order is entirely without prejudice to the exercise by a competent court of the power to vary the PrivatBank Worldwide freezing order, and this Order does not purport to operate so as to fetter or otherwise limit the exercise of any such power.

50. Nothing in this Order shall operate so as to estop the applicant and the respondent, jointly or severally, from applying to a competent court to dismiss, discharge or vary the PrivatBank Worldwide freezing order.”

20. The judge observed that a more restrictive condition might have been by way of an undertaking by the parties not to apply for a variation or discharge until determination of the claims of PrivatBank, but, he said, ‘that is not offered’. It follows that, upon the making of the proposed order in the financial remedy proceedings, the wife could, and the judge found that she intended to, apply to Trower J for a lump sum of up to £95m to be released to her from the frozen funds, funds said by PrivatBank to be required to satisfy the husband’s liability to the Bank. The basis of any application would inevitably be that the wife had the benefit of a financial remedy order made in the High Court Family Division and approved by Peel J, which order reflected the financial entitlement of the wife at the end of the marriage and which was required in part in order to support herself and the children of the family.

The 24 June Judgment

21. In refusing the application made jointly by the husband and wife to approve the proposed consent order, the judge said that the fundamental question was:

“30..... Should I, in the exercise of my independent duty, approve the proposed consent order? The answer, I am satisfied, is no. If PrivatBank succeeds against H, he will have a liability in damages of up to \$4.2bn which, on the basis of the evidence before me, could wipe out the entirety of his assets. I appreciate that the Form D81 suggests there might be a surplus but in the absence of corroborative documentation, I do not consider I can so find, especially as H himself acknowledges the limitations of valuations in the current economic, political, and military climate in Ukraine. That would, or could, place H in a position of inability to meet his obligations to W, both in terms of quantum and structure. It might, however theoretically, extinguish all but the £100m due to be paid to W leaving him with nil assets. It would be illogical and, in my judgment, wrong to approve an order which might subsequently be shown to be incapable of compliance, and potentially unfair to either or both parties.”

22. The judge said at para.[31] that, had the hearing been that of a First Appointment in contested proceedings, ‘the court would surely have stayed the proceedings until conclusion of the Chancery dispute, or perhaps adjourned the final hearing until after such a conclusion, because of the vast sums at stake which would have a material impact upon the financial remedies outcome’. Mr Turner accepted without hesitation that the judge was right about that and had the matter been contested, the inevitable result would have been a stay on the financial remedy proceedings pending the outcome of the PrivatBank litigation.

23. The judge went on:

“I accept that in many, perhaps most cases, the risk of a liability or debt flowing from third party litigation does not lead to a stay of the proceedings, particularly when a proposed order is made by consent. That is because the sums are generally of not such significance as to justify delay and can be dealt with by contingent sums or reverse contingent sums. Parties sometimes take a view; one might be willing to shoulder a greater risk of responsibility for uncertain and uncrystallised liabilities, but will usually seek something in return from the party which is freed from any such responsibility. The difference in this case is the sheer scale of the potential liability which, in my view, renders uncertain and unsafe any assessment of the parties’ net assets and any evaluation of whether the outcome of the proposed consent order is fair.”

24. The judge recognised at para.[32] that whilst PrivatBank did not assert a proprietary claim to any of the assets it plainly had an interest and he was therefore entitled to weigh in the balance PrivatBank’s claims against those of the husband and wife when considering whether to make the proposed order.

25. The judge was of the view that the parties were ‘seeking to put the cart before the horse’ by deploying a consent order to assist in the litigation relating to the worldwide freezing order, whereas the task he faced was to decide whether it was right to make the consent order in the first place. The judge did not accept that, in refusing to make the consent order, he would be in some way prioritising PrivatBank’s claims. In this regard, he said that:

“35. ...If PrivatBank is ultimately successful, the courts in Chancery and Family will no doubt need to consider the interrelationship between enforcement of a financial remedies order and a damages award. That is a familiar exercise, but it is unhelpful to speculate now as to how that process would play out.”

26. The judge had well in mind that what was proposed was the implementation of an agreement between the parties, saying:

41. I accept that W and H are prima facie entitled to an order which reflects the agreement reached, in accordance with the *Radmacher* principles. But that does not impede the court from

considering the order in the light of all the s25 factors, taking into account the third party interests of PrivatBank. Ordinarily the court will compute the assets and then move on to distribution. To undertake that exercise here and now is all but impossible. In my judgment, it would not be fair or appropriate to accede to the application for a consent order to be made.”

27. The judge dealt briefly with other submissions made by the parties to this effect:
- i) The wife would not need to be in a position to enforce immediately following the litigation between PrivatBank and the husband: the dispute was proceeding consensually and the wife could swiftly apply afterwards to the allocated financial remedies judge for the consent order to be made (para.[38]).
 - ii) The wife’s inability to claim against the estate of the husband in the event of his death without a consent order (given that he is not domiciled in this jurisdiction) is remedied by the fact that it is open to the husband to execute a will to make provision for the wife. The absence of testamentary provision may not, the judge held, be fatal in any event as the wife and the children are within the class of beneficiaries of various discretionary trusts. The judge noted that the earlier separation agreement recorded a covenant by the husband to make testamentary provision for the wife and children in terms no less generous than the agreement. It was not clear to the judge (and not expressly stated by the husband) that no such will was in existence (para.[39]).
 - iii) The judge noted that the argument that the consent order was needed to encourage the trustees to make distributions to the wife was raised for the first time in oral submissions and had no evidential foundation. In any event, even if correct, it would not have dissuaded him from refusing the application in circumstances where he considered that it is only when the litigation result becomes clear that he could decide whether to approve the consent order (para.[40]).
 - iv) Delay was regrettable but, in the circumstances, inevitable.
28. In summary, therefore, the judge specifically took into account the following before reaching his decision:
- a) In many, if not most, cases, the risk of there being an outstanding liability or debt does not lead to a stay, particularly if the proposed order is by consent.
 - b) In this case, an adjournment would have been inevitable had the financial remedy proceedings been contested.
 - c) In the normal course of events, the court computes the assets before distributing them. By “computing the assets” the judge plainly meant compute the net assets – i.e. the value of the assets less the amount of liabilities which a party is likely to have in the foreseeable future. This computation, the judge pointed out, is impossible in this case at the moment.

- d) That does not mean the court is prioritising PrivatBank as the courts would, following the conclusion of the Chancery proceedings, need to consider the interrelation between the enforcement of the financial remedy order and any damages award. This, the judge said, is a familiar task.
- e) Whilst the *Radmacher* principles lead to a prima facie entitlement to an order reflecting the agreement, that does not prevent the judge from having regard to the factors set out in section 25 Matrimonial Causes Act 1973 ('MCA 1973').

The Appeal

29. The grounds of appeal are somewhat discursive but can be summarised in the following way:
- i) The court, by adjourning the application for approval of the draft consent order, gave inappropriate priority to one of two potential claimants against the wealth of the husband. Neither claimant has a proprietary claim and PrivatBank is protected by the worldwide freezing order. PrivatBank will continue to have inappropriate priority in that any restoration of the application made after judgment in favour of PrivatBank would mean that the wife would face the problem that the order would then be regarded as inappropriate in the light of the husband's net asset position following the making of the damages order [Grounds 1 and 2].
 - ii) The court failed to identify any real risk of unfairness to PrivatBank and, if there were any, failed to balance the competing potential risks between the parties [Ground 3].
 - iii) The court failed to take proper account of the risk to the wife if the husband should die before her claim was restored [Ground 4].
 - iv) The court failed to take proper account of the fact that the adjournment of the application would have the effect of preventing implementation of the order in relation to certain trust assets [Ground 5].
 - v) The order for costs dealt with by the judge by way of summary assessment failed to take into account the appellant's written submissions or that the statement of costs for summary assessment had not been served two days in advance of the substantive hearing [Ground 6].
30. The focus of the submissions made at the appeal hearing by Mr Turner, and supported by Mr Howard KC on behalf of the husband, were in relation to Grounds 1, 2 and 3.
31. Grounds 4 and 5 would not on their own have justified granting permission to appeal and I would dismiss both grounds for the reasons given by the judge.
32. With respect to the parties who have spent just under £200,000 and had the benefit of eminent King's Counsel to prosecute and defend this appeal, the issue the judge had to decide is straightforward: in circumstances where all agree that a judge would, without hesitation, have adjourned the proceedings in a contested financial remedy case, did he

fall into error in declining to make an order where the only factual difference is that the parties have reached an agreement?

33. Mr Turner, supported by Mr Howard, submits that the answer is ‘yes’ because:

- i) Whilst he accepts that the general approach of the court is to look at the net figures before distribution, if the claim brought by PrivatBank succeeds in full there will be nothing left for the wife. The court will therefore have given PrivatBank, which has no proprietary interest in the assets of the husband, improper priority over that of the fully entitled wife.
- ii) Section 25(2) MCA 1973 should not be overinterpreted. The court ‘may’ ‘have regard’ to ‘the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future’. It follows, Mr Turner submits, that the court can make an order in circumstances where there remain uncertainties in relation to even significant and substantial financial matters. This is particularly the case where the proposed order reflects the terms of a carefully negotiated agreement between the parties.
- iii) The wife, unlike PrivatBank, would suffer significant prejudice if the order is not made. Not only would there be delay, but she would be unable to progress matters with various discretionary trusts, and she would have no protection in the event of the death of the husband.
- iv) Conversely, PrivatBank would suffer only the prejudice of the risk of the wife succeeding in an application before the trial judge in the Chancery proceedings to vary the worldwide freezing order so as to satisfy the terms of the order approaching £100m. It may be that further prejudice would be occasioned to PrivatBank if the wife were able to prove her lump sum order in subsequent bankruptcy proceedings. This was not argued before the judge but, in any event, submits Mr Turner, it cannot properly be described as causing prejudice to PrivatBank if a wife is able to prove a properly made financial remedy order in bankruptcy proceedings in circumstances where PrivatBank has no proprietary interest in any of the assets.
- v) In some respects, the situation is similar to the situation where there are competing claims against one fund by a virtue of the existence of a proceeds of crime order, or where there are the competing interests of an unsecured creditor and a former spouse in bankruptcy proceedings. In each case, an order can be made in favour of the wife at the expense of the third party debtor.

The law in relation to the approval of consent orders

34. Given that the court declined to approve a consent order, the starting point must be section 33A MCA 1973 which says:

“(1) Notwithstanding anything in the preceding provisions of this Part of this Act, on an application for a consent order for financial relief the court *may, unless it has reason to think that there are other circumstances into which it ought to inquire,*

make an order in the terms agreed on the basis only of the prescribed information furnished with the application.”

(my emphasis)

35. I considered in some detail the role of the court where agreements have been reached between the parties in *Haley v Haley* [2020] EWCA Civ 1369; [2021] Fam 317 (*'Haley'*), principles which apply equally to the application made by the husband and wife in the present case:

“36. Where, however, the parties have been able to reach agreement, the Family Procedure Rules 2010 (“FPR”) set out, at r 9.26, the requirements for obtaining a consent order with agreed terms. One of the requirements is for the filing of a statement of information.

37. By FPR PD 9A, paras 7.1 – 7.3, the statement of information must be in the prescribed form, setting out personal and financial information so that the court can undertake its inquisitorial jurisdiction when considering whether to approve an agreement.

38. Section 33A of the MCA 1973, as inserted by section 7 of the Matrimonial and Family Proceedings Act 1984, provides that:

‘the court may, unless it has reason to think that there are other circumstances into which it ought to inquire, make an order in the terms agreed on the basis only of the prescribed information furnished with the application.’

39. The court, therefore, scrutinises the statement of information, with the list of factors from s25 MCA 1973 at the forefront of its judicial mind. The proper exercise of the court’s inquisitorial jurisdiction, in relation to the making of consent orders, was graphically described in *L v L* [2006] EWHC 956 (Fam), [2008] 1 FLR 26 at [73], as being not ‘a rubber stamp’ but that, whilst the court must always exercise a discretion, it should not be to the extent of acting as ‘a bloodhound or a ferret.’

40. In *Sharland v Sharland* [2015] UKSC 60, [2015] 2 FLR 1367, the Supreme Court considered the relationship between the court and parties who wish to resolve their financial dispute following divorce by way of a consent order. Baroness Hale said:

’18. It has long been possible for a married couple to make a binding agreement about the financial consequences of their present separation. However, it is not possible for such an agreement to oust the jurisdiction of the court to make orders about their financial arrangements.’”

36. In *Xydhias v Xydhias* [1999] 2 All ER 386, the Court of Appeal emphasised that, because section 33A was designed to allow consent orders to be considered on the papers, the duty of the court to consider the merits of the settlement and to consider whether there are other circumstances into which it ought to inquire is not removed. Thorpe LJ emphasised at p395h that ‘It is clear that the award to an applicant for ancillary relief is always fixed by the court’.
37. It follows that the judge, in scrutinising the D81, will do so against the backdrop of section 25 MCA 1973. Under section 25(2)(a) and (b), the court is required to have regard to:
- “(a) the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future, including in the case of earning capacity any increase in that capacity which it would in the opinion of the court be reasonable to expect a party to the marriage to take steps to acquire;
- (b) the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future;”
38. In this appeal, the focus in relation to section 25(2) MCA 1973 has centred around future financial resources and obligations of the husband as it was the inability of the judge to form any realistic view as to the likely net assets following the PrivatBank litigation that meant that the judge felt unable to make a consent order based only on the D81.
39. It was rightly recognised by the judge that there can be many and various circumstances where there are financial unknowns but that an order will nevertheless be made by consent. Such imponderables are often, but not by any means always, in relation to potential outstanding tax liabilities. Mr Turner submits that as section 25(2) MCA 1973 goes no further than to say that the court ‘may have regard’ to obligations which are reasonably foreseeable, there is nothing to prevent a judge making an order in circumstances where it is not possible to compute the net assets with precision. That is undoubtedly the case, as was acknowledged by the judge. Equally, however, section 33A MCA 1973 gives a judge the statutory power to decline to make an order based solely on the D81 where he or she has reason to think that there are other circumstances into which they ought to inquire. In the present case, the judge concluded that there were circumstances into which he ought to inquire, namely the extent of the available (net) assets at the conclusion of the PrivatBank litigation.

The relevance of Radmacher

40. Both Mr Turner and Mr Howard laid heavy emphasis on the importance to be attached to the fact that the proposed order reflected an agreement reached between the parties at, they said, enormous expense over a lengthy period of time. They each submitted that, following the authority in *Granatino v Radmacher* (formerly *Granatino*) [2010] UKSC 42; [2011] 1 AC 534 (‘*Radmacher*’), the court should have approved the order which Mr Turner described as being ‘presumptively binding’. Neither Mr Turner nor Mr Howard took the court to section 33A MCA 1973 in their written material or oral

presentations, simply relying on a bald submission that the parties had agreed the order and so it should be made.

41. The principles established in *Radmacher* are absolutely clear, and a number of passages in the judgments are routinely rehearsed to the effect that the court will give weight to an agreement (pre or post-nuptial) made between a couple as to the manner in which their financial arrangements should be regulated in the event of separation in circumstances where it is fair to do so.
42. In the well-known passage at para.[78] of his judgment, Lord Philips said that the reason that the court should give weight to a nuptial agreement ‘is that there should be respect for individual autonomy’. He went on:

“The court should accord respect to the decision of a married couple as to the manner in which their financial affairs should be regulated. It would be paternalistic and patronising to override their agreement simply on the basis that the court knows best. *This is particularly true where the parties' agreement addresses existing circumstances and not merely the contingencies of an uncertain future.*”

(My emphasis)

43. Mr Howard submits that individual autonomy should be respected in this case. If the husband is willing to take the risk of being left with nothing after the litigation and settlement of his agreement with his wife, then that, he says, is a matter for the husband who, as a sophisticated entrepreneur, is well capable of making such a decision. I note however that Lord Philips specifically emphasised at para.[78] that the issue of respect for individual autonomy applies ‘particularly’ when the agreement ‘addresses existing circumstances and not merely the contingencies of an uncertain future’. In my view, the proposed order does not address the existing circumstances. The existing circumstances are that there is outstanding litigation against the husband which, if successful, would mean that he would have no net assets to distribute, let alone £100m.
44. It is hard to imagine a more uncertain future in relation to the financial position of these parties given the size and nature of the case brought by PrivatBank against the husband. In my view, the judge had well in mind the principles in *Radmacher* which he weighed against the uncertainties endemic in the case.
45. Mr Howard for his part submits that *Radmacher* deals with the position where there are no third party interests, and that third parties who have no proprietary interest in the assets have no locus unless there is extreme prejudice. It follows, he says, that as PrivatBank has no proprietary interest in any of the assets, the court should determine whether to give effect to the consent order by reference only to the fact that it is a ‘*Radmacher* compliant’ agreement. That submission singularly fails to take into account the statutory requirement in section 33A MCA 1973.
46. Mr Howard also emphasised that certain of the London assets, including the matrimonial home which had been valued at £60m in 2009, had been acquired before the alleged fraudulent activities. In his submission, it follows that these assets should be regarded in a different light from other assets, the provenance of which is more

uncertain. For reasons dealt with at para.[63] below, the fact that the purchase of the London properties pre-date the alleged fraud is of no assistance to the wife and husband.

47. In this case, the judge was faced with exercising his section 33A duty to consider the proposed award and in my judgement was entitled to conclude that, notwithstanding the fact that the agreement was, on the face of it, *Radmacher* compliant, the uncertainty underlying the order was of such a scale that there were other circumstances into which he ought to inquire, namely the Chancery Division litigation.
48. The dangers of second guessing the outcome of substantial future third party litigation was highlighted in *George v George* [2003] EWCA Civ 202; [2004] 1 FLR 421 (*'George'*). In that case, an adjournment had been refused to a husband who asserted that he owed an enforceable debt to a Swiss trust that had issued a writ in the High Court to recover the debt. The judge found that the husband was not threatened by any future liability to the trust and made an order in financial remedy proceedings on that basis. Judgment was subsequently given in the Queen's Bench proceedings in favour of the Swiss trust in relation to the same debt to the tune of £500,000. Thorpe LJ said:

“14. It is easy with hindsight to perceive where this case has gone wrong. It cannot be right for the judge in ancillary relief proceedings to anticipate or to forecast the outcome of related proceedings in another Division or within another justice system, when the risk of false assumption can be eliminated either by adjourning the ancillary relief application to await the outcome of the proceedings in the other Division or by ensuring that both sets of proceedings are either allocated to the same judge or alternatively prepared and dispatched in tandem.”
49. The parties can of course reach an agreement whereby it is agreed that one party will absorb the outcome of third party litigation. It is a matter of common sense, however, that the approach of Thorpe LJ in *George* applies equally to cases where there is a proposed consent order in circumstances where it is not possible to assess with any reasonable certainty the parameters for the outcome of the litigation or where losing the litigation will mean that there are no net assets available with which to satisfy the terms of the proposed agreed order.
50. Contrary to the submission of Mr Howard, the fact that *Radmacher* did not concern the proprietary interests of a third party does not mean that claimants in third party litigation have no interest justifying being heard where there is a proposed agreement. The enforceability of a *Radmacher* agreement stems from the fact that what is in play is an agreement between two parties in relation to the division of matrimonial assets. It cannot have been intended that, merely because those parties have reached an agreement as between themselves as to the distribution of assets, that agreement has the effect of depriving any third party of being able to make submissions in relation to the creation of other claims to payment from those assets. If the third party claims a proprietary interest, they will usually be joined as a party or as an intervener. If the third party does not assert a proprietary claim but may nevertheless be materially affected by the order sought, the court will make orders in order to ensure that the third party is heard whether by intervention or otherwise. Here, the judge joined PrivatBank for the purpose only of hearing their submissions as to the making of the order. I note that there has been no appeal against the judge's order in this respect.

Prejudice to the parties

51. Mr Turner accepted that the order made was a case management order and the proper approach is that articulated by Peter Jackson LJ in the Practice Note in *H-D-H (Children)* [2021] EWCA Civ 1192 at para.[23], which says that:

“The reasoned case management choice of a judge who approaches the law correctly and takes all relevant factors into account will be upheld on appeal unless it has been shown that something has gone badly wrong with the balancing exercise.”

52. Mr Turner reminded the court that any case management decision has to be decided on a proper application of principles. He says the judge was in error in this case because, in failing to make the order as requested, the judge wrongly gave PrivatBank, a claimant with a non-proprietary interest in the husband’s assets, priority over what he described as the wife’s earned entitlement, causing the wife significant prejudice. Any prejudice to PrivatBank, Mr Turner said, was alleviated by the condition within the draft order that the wife could not enforce the order without a judge varying the worldwide freezing order.

53. It was in this context that Mr Turner relied upon *HM Customs and Excise v MCA & Anor, A v A* [2002] EWCA Civ 1039 (*‘MCA & Anor’*) to support his submission that the prejudice against the wife in the event that the order was not made was such that her interest in the financial remedy proceedings could and should take priority over any potential award in damages.

Criminal Confiscation by analogy

54. Part 2 of the Proceeds of Crime Act 2002 is concerned with the confiscation of the proceeds of crime. Its purpose is to ensure that criminals do not profit from their crimes and it is designed to send a strong deterrent message to that effect.

55. Mr Turner relied upon *MCA & Anor*, a case where the judge exercised his discretion to make an order in financial remedy proceedings notwithstanding the fact that a confiscation order had been made against the husband under the Drug Trafficking Act 1994.

56. The core principles to be drawn from *MCA & Anor* were set out by Schiemann LJ as follows:

- i) Neither the MCA 1973 nor the Drug Trafficking Act (nor the Proceeds of Crime Act) take priority. Both Acts confer a discretion on the court which the court may or may not choose to exercise (para.[43]).
- ii) Section 25 of the MCA 1973 requires the court to take into account all the facts of the case and in particular the various factors set out in section 25(2) when deciding whether and, if so, in what manner to exercise its powers under sections 23 and 24.
- iii) It is not axiomatic that the public interest lies more in enforcing a confiscation order than in making an order under the MCA 1973.

57. In *MCA & Anor* the wife was entirely innocent of any criminal involvement and the house in which she had a genuine beneficial interest was untainted. The wife was in poor health and had only modest earnings. Schiemann LJ concluded at para.[48] that satisfying the criminal confiscation order in its entirety would mean that ‘a substantial injustice would be done to Mrs A in order to garner the sum of £29,260 into the coffers of the state.’ The house was accordingly transferred to the wife.
58. Mr Turner submits that *MCA & Anor* makes it clear that even a court-imposed confiscation order does not automatically take priority over an application in financial remedy proceedings. In the present case, the wife is in an even better position as no third party order has yet been made; PrivatBank has only an undetermined claim and in any event, he says, the court would have a discretion to make an order in the wife’s favour even after damages were awarded against the husband. In those circumstances, he argues, given the prejudice to the wife if an order is not made, the court should have approved the proposed consent order.
59. *MCA & Anor* is not, however, the end of the story.
60. The appeal of *CPS v Richards & Richards* [2006] EWCA Civ 849 (*‘Richards’*) followed *MCA & Anor* and was a case which went the other way in that the Court of Appeal set aside a lump sum order of £39,250 in circumstances where the wife, unlike the wife in *MCA & Anor*, had known all her married life that their lifestyle had been funded by drug trafficking. Thorpe LJ said at para.[26]:
- “Where assets are tainted and subject to confiscation they should ordinarily, as a matter of justice and public policy, not be distributed. This is not to say that the court is deprived of jurisdiction under the 1973 Act nor to say that no circumstances could exist in which an order would be justified; an example of a seriously disabled child living in specially adapted accommodation was mooted in argument. It is to say that, in most cases, and certainly in this one, the fact that the assets are tainted is the decisive factor in any balance. The error of the judge lay in thinking that the requirement to conduct a balancing exercise meant that in every case, all factors are relevant. In cases such as this the knowledge of the wife, throughout her married life, that the lifestyle and the assets she enjoyed were derived from drug trafficking is dispositive.”
61. *Stodgell v Stodgell* [2009] EWCA Civ 243 (*‘Stodgell’*) followed three years later. It was an application for permission to appeal to the Court of Appeal from a decision made by Holman J in the Administrative Court. Holman J held that the wife’s application for a financial remedy could not proceed until a confiscation order which had been made against the husband had been discharged. Once that had been done, he held it would be possible to ‘see if there were any other assets which she [could] attack’. In that case, the available assets would have been insufficient to meet the confiscation order. The wife, unlike the wife in *Richards*, was entirely innocent and was not complicit in the husband’s crimes.

62. Hughes LJ gave a detailed judgment for which permission was given to report, notwithstanding that it was a permission to appeal application. Hughes LJ said at para.[9]:

“This case is a good illustration of the fact, that while non-complicity in the crime is a necessary condition for the wife to succeed in an ancillary relief claim as a matter of discretion where she is in competition with a confiscation order, such non-complicity is not a sufficient condition. She will also fail in a number of other circumstances, including where the husband’s assets are reduced to nil by having to pay now what he ought to have paid years ago.....Of course it is relevant where assets can be traced to acquisition from the proceeds of crime, but that is not the only case in which justice requires that the confiscation order should be met before there can be any question of allocating the assets between husband and wife. Another such case, of which is this one, is where the domestic economy and the assets accumulated are only of the size they are because the husband has failed to pay the tax due. If this husband had paid his tax and penalties, his assets would be nil rather than either £880,000 or £750,000.”

63. Hughes LJ went on at para.[10] to say that it was not critical that two of the properties in question had not been acquired from crime. ‘What was critical’, he said, ‘is that they could not have been and cannot be preserved without non-payment of the tax and the penalties’. Hughes LJ’s observation in this regard undermines the submission of Mr Howard that certain of the London properties should be in some way immune from any order for damages as they had been purchased prior to the alleged fraud which is said to have been perpetrated in 2013 and 2014.

64. In *Stodgell*, it was conceded on behalf of the wife that the sum subject to the confiscation order could equally well have been recovered by the Crown bankrupting the husband, in which case there would have been no available assets outside the bankruptcy from which to make a lump sum order in favour of the wife. That concession was, Hughes LJ said at para.[10], ‘fatal’:

“It is fatal because it fully justifies Holman J's conclusion. It is not that there was no discretion but it fully justified the way Holman J exercised it. That is not a question of treating a state creditor as in some way stronger than a private creditor. It is a question of ascertaining what are the assets available for distribution between husband and wife.”

65. Mr Turner relied on the fact that in *MCA & Anor* the court made an order in favour of the wife notwithstanding the existence of a criminal confiscation order. That exercise of judicial discretion must however be considered against the backdrop of the other cases in which the Court of Appeal subsequently considered the issue. Together, the three cases establish that:

- i) Where there is a criminal confiscation order, the court may make an order in financial remedy proceedings on condition that:

- a) The applicant has not been complicit in the criminal proceedings/fraud;
and
- b) The assets are untainted.
- ii) Where, however, the assets are tainted, that fact will almost always be a decisive factor in the balance against the making of an order in favour of a wife.
- iii) Even a wholly innocent applicant wife may fail in her application where the husband's net assets are reduced to nil by having to pay now what should have been paid previously.
- iv) By failing to make a lump sum order in favour of a wife and leaving her with no claims in the event of the husband's bankruptcy, the court is not treating a state creditor as having stronger claims than the wife, but simply ascertaining what net assets are available for distribution between husband and wife.

Discussion

- 66. As discussed at para.[47] above, in my judgement the judge was right to take the view that, notwithstanding the agreement and regardless of the motivation of the parties in seeking to turn the agreement into an order, there were circumstances into which, pursuant to section 33A MCA 1973, he should inquire.
- 67. The judge, in making such inquiries, would have a somewhat easier task in deciding how to exercise his or her discretion where a criminal compensation order has been made. The judgment made in the criminal compensation proceedings would of itself tell the judge how much was to be paid under the terms of the order which would enable the judge to ascertain whether or not there would be any assets left after satisfaction of the order. Even then, however, the judge might still have to hear evidence in order to decide if the wife was 'non complicit' and would have had to give the Crown the opportunity to make submissions before approving any agreed order which purported to give a wife priority over the confiscation order.
- 68. The judge in the present case was not in a position either to know or to make any factual determinations. He knew that there is a good arguable case that the husband had been a party to a massive fraud, but no findings have yet been made. Against the backdrop of a proposed consent order, the judge was not in a position to determine whether there was or was not 'non-complicity' on the wife's part. In any event, it is agreed that if PrivatBank succeeds in its claims, the husband's assets will be 'reduced to nil'.
- 69. In those circumstances, adjourning the application for the approval of the consent order would appear to be an obvious solution. The judge was not giving PrivatBank priority but simply adjourning the proceedings until there was a clearer picture. After the trial in the Chancery Division, the court would know whether there had indeed been a fraud and, if so, whether the husband would have any assets left after satisfaction of any award of damages. Only then would the judge be in a position to decide, by analogy to the principles in *Richards* and *Stodgell*, whether he should exercise his discretion to approve an award agreed between the parties, an award which if made would entitle the wife to compete for payment with the enforcement of any damages award in favour of PrivatBank.

70. Both Mr Turner and Mr Howard dealt with the hypothetical situation that there were bankruptcy proceedings at the conclusion of the Chancery proceedings. Whilst this Court did not, and could not, consider the complexities consequent upon the husband being domiciled elsewhere, nevertheless the parties made submissions against the backdrop of the English courts having assumed jurisdiction and the fact of there being well over £100m of property assets in London.
71. All agreed that, had the judge made the order sought having approved the terms pursuant to section 33A MCA 1973, the order would not thereafter be susceptible to being set aside as a transaction defrauding creditors under section 423 of the Insolvency Act 1986 no matter how suspicious PrivatBank may be as to the good faith behind the agreement. As a consequence, once the settlement is contained within an order (as opposed to a separation agreement), then pursuant to Insolvency (Amendment) Rules 2005 rule 12.3(2)(a), the lump sum provision in the region of £100m would become provable in the bankruptcy and the wife would be entitled to a proportionate share in any subsequent distribution of the husband's assets by the trustee in bankruptcy.
72. With respect to Mr Turner, I do not agree that depriving the wife of the chance to make an application for a variation of the worldwide freezing order or to prove the order in any subsequent bankruptcy amounts to giving PrivatBank impermissible priority over her claims. It is at all times relevant to have in mind the overall context which is that the claims made by PrivatBank are being made against the backdrop of what has been said to be a good arguable case that the husband was involved in a fraud involving billions of pounds, a fraud which led to the Ukrainian government recapitalising the bank at a time the IMF was providing emergency funding to the Ukrainian State.
73. As Hughes LJ said in *Stodgell*, it is not a question of treating (in that case) a state creditor as in some way stronger than a private creditor, it is a question of ascertaining what assets are available for distribution as between husband and wife. Similarly, in *George* it was not a case of giving the Swiss trust the potential to have priority over the wife's claims, but rather that it is not right in financial remedy proceedings for a court to anticipate, or to forecast, the outcome of related proceedings in another Division, when the risk of a false assumption can be eliminated by adjourning the ancillary relief application to await the outcome of the other proceedings. In my judgement, that is all the more the case where one is looking at a claim of this astonishing size arising out of an alleged fraud. The judge rightly said that 'It would be illogical and in my judgment, wrong to approve the consent order until the extent of H's potentially massive liability is established'.
74. It should also be borne in mind that Hughes LJ said in *Stodgell* that even a wholly innocent wife would not succeed in a claim for financial relief in the context of a criminal compensation claim where 'the husband's assets are reduced to nil by having to pay now what he ought to have paid years ago'. Likewise, even a wholly innocent wife might not succeed in a claim for financial relief where the husband's assets are reduced to nil by having to pay compensation to a third party for losses which a court has found that he caused by a fraud some years earlier.
75. I also do not accept that any prejudice to PrivatBank is ameliorated by the necessity for the wife to seek a variation of the world-wide freezing order in the Chancery Division. The wife would doubtless seek to contend before the judge in the Chancery Division that the purpose of a freezing injunction is not to provide security or priority to a

claimant, and that the separation agreement is analogous to the genuine settlement by the defendant of a dispute with a third party in the ordinary course of business or life, with which a freezing injunction is not intended to interfere: see e.g. *Normid Housing Association v Ralphs & Mansell* [1989] 1 Lloyd's Rep 274 and *Law Society v Shanks* [1988] 1 FLR 504. In that context, it is by no means certain that the Chancery judge, faced with an approved order made by a specialist Family Division judge giving effect to the separation agreement, would feel able to refuse such an application.

76. It follows that it would have been wrong for the judge to have approved the proposed order in circumstances where it is accepted by all concerned that there is a good arguable case against the husband in the proceedings in another Division which, if proved, will wipe out the entirety of his asset base.
77. For those reasons, I would dismiss the appeals on Grounds 1, 2 and 3.

Costs Appeal

78. Mr Turner also seeks to appeal against the summary assessment of costs made by the judge at the conclusion of the hearing. The husband did not appeal the order made in the same terms against him.
79. In brief, whilst the statement of costs for summary assessment had not been served in advance pursuant to CPR PD 44.9.5(4), the judge is entitled to dispense with that requirement.
80. There are numerous cases where this Court has emphasised the heavy burden faced by an appellant in succeeding in an appeal against costs. To pick but two examples:
- i) In *SCT Finance v Bolton* [2002] EWCA Civ 56, Wilson J (as he then was) started the judgment of the court at para.[2] with the following:
- “2. This is an appeal...in relation to costs. As such, it is overcast, from start to finish, by the heavy burden faced by any appellant in establishing that the judge's decision falls outside the discretion in relation to costs conferred upon him under CPR 44.3(1). For reasons of general policy, namely that it is undesirable for further costs to be incurred in arguing about costs, this court discourages such appeals by interpreting such discretion very widely.”
- ii) In *The Secretary of State for Transport, High Speed Two (HS2) Limited v Elliott Cuciurean* [2022] EWCA Civ 661, Lewison LJ said:
- “66. An award of costs is an exercise of discretion by the judge. Since the judge has a wide discretion, it is well-settled that an appeal court should not interfere simply because it considers that it would have exercised the discretion differently. As Chadwick LJ explained in *Johnsey Estates (1990) Ltd v Secretary of State for the Environment* [2001] L & TR 32, that principle:
- ‘...requires an appellate court to exercise a degree of self-restraint. It must recognise the advantage which the trial judge

enjoys as a result of his "feel" for the case which he has tried. Indeed, as it seems to me, it is not for an appellate court even to consider whether it would have exercised the discretion differently unless it has first reached the conclusion that the judge's exercise of his discretion is flawed. That is to say, that he has erred in principle, taken into account matters which should have been left out account, left out of account matters which should have been taken into account; or reached a conclusion which is so plainly wrong that it can be described as perverse.”

81. The judge gave a brief judgment as to costs on 30 June 2022. The judge correctly stated that this was a ‘blank sheet’ case where there was no presumption of costs under FPR 28.3 nor that costs should follow the event. The judge exercised his discretion to carry out a summary assessment of the costs and, in doing so, made a substantial deduction of 30% from the quantum of costs sought by PrivatBank in order to reflect the fact that, whilst the bank substantially succeeded in its application, it did not succeed in relation to its application for specific disclosure or a stay. The order made by the judge was an entirely proper and appropriate exercise of discretion and I would also dismiss the appeal in relation to costs.

Conclusion

82. For these reasons I would dismiss the appeal on all grounds.

Lord Justice Dingemans:

83. I agree.

Lord Justice Snowden:

84. I also agree.