This matter was heard in private. The judge gives permission for this version of the judgment to be published. In no report of, or commentary on, the proceedings or this judgment may the parties or their children or their addresses be identified. All persons, including representatives of the media and legal bloggers must ensure that the terms of this rubric are strictly observed. Failure to do so may be a contempt of court.

IN THE FAMILY COURT AT EAST LONDON

Neutral citation: [2024] EWFC 10 (B)
6th and 7th Floor
11 Westferry Circus
London
E14 4HD

Date: 15 January 2024

Before:

HER HONOUR JUDGE REARDON
[Sitting in private]

- -

Between:

PF	**Applicant**
- and -	
QF	**Respondent**

- -
- -

Mr Hames KC and Ms Sanger for the applicant
Mr Roberts KC and Ms Ashwell for the respondent

Hearing dates: 28 and 29 November and 1 December 2023

- -

JUDGMENT

Introduction

1. This is an application issued by the respondent in these proceedings, QF, for an order that the applicant PF be "debarred" from pursuing her claim for financial remedy orders under the Matrimonial Causes Act 1973.
2. The parties took part in a ceremony of marriage in 2001. For 19 years they presented to the world as a married couple. In fact, as at the date of the marriage, the applicant was married to someone else and so the marriage was void *ab initio*: MCA 1973, s11(b).
3. The nature of the respondent's application, and whether the jurisdiction to "debar" someone from bringing a financial remedies claim (still) exists, is itself a controversial issue in these proceedings. I will deal with that issue later, but for the time being intend to refer to the application as the "debarring application."
4. The respondent was represented by James Roberts KC and Jo Ashwell. The applicant was represented by Christopher Hames KC and Pippa Sanger, both acting *pro bono*. The hearing was listed with a time estimate of three days. This judgment was circulated in draft form on 19 December 2023 and handed down formally, without attendance, on 15 January 2024.
5. Because findings have been made in separate Family Law Act proceedings that the respondent has perpetrated domestic abuse against the applicant, special measures were put in place at this hearing to ensure the applicant's ability to participate and give evidence.

Factual background

6. This was the applicant's second marriage. She married her first husband in Bangladesh in 1997. She says that this was a forced marriage to which she consented only under duress. They lived together briefly in the UK but separated in 1997 or 1998. The applicant issued a divorce petition in May 1999 and decree absolute was pronounced in Ilford County Court on 10 June 2002.
7. The parties met in 1998. There is some dispute about the circumstances in which their relationship developed but it is agreed that it progressed to the point where the applicant was spending significant periods of time in the respondent's home.
8. On 28 December 2001 the parties married in Bangladesh. During the marriage they spent time living in both the UK and Bangladesh. Over the next 18 years they had two children who are now aged 19 and 15. They separated in August 2020.
9. As will be apparent from the dates set out in the preceding paragraphs, at the date when the parties married the applicant remained married to her first husband. Each of the parties says that the other was aware of this fact at the time, but that they themselves were not.
10. The respondent issued a petition for nullity on 3 March 2021. The petition is not defended.
11. The applicant issued a Form A seeking a financial remedy order on 12 September 2022. The application was listed for a first appointment in January 2023. The evening before the hearing, the respondent lodged and served this application. Directions were then made to enable the application to be heard.

Issues to be determined

12. A key issue within these proceedings is the extent of each party's knowledge, as at the date of their marriage and afterwards, that the applicant was still married to her first husband until June 2002, and therefore their own marriage was void.

13. The respondent says that until these proceedings commenced he believed, because the applicant had told him so, that her first marriage had ended in divorce before the parties met. In November 2020 he discovered the date of the applicant's decree absolute through a search of publicly-available records. He says that this news came as a huge shock to him and that he feels betrayed.
14. The respondent's case is that the applicant's conduct in deceiving him into a marriage when she knew she was not free to marry was so egregious that, as a matter of public policy, she should be debarred from pursuing any claim for financial remedies against him pursuant to the principle in *Whiston v Whiston* [1995] Fam. 198.
15. The applicant's primary case is that the principle in *Whiston* has not survived the Supreme Court's decision in *Vince v Wyatt* [2015] 2 All ER 755, and that the court does not have power to strike out a financial remedy claim on the basis that the applicant has committed bigamy. The debarring application should therefore be dismissed without further enquiry into the facts.
16. If the court considers it necessary to make findings, the applicant's case is that she did not know that her first marriage had endured beyond the date of her marriage to the respondent until after the parties had separated in 2020. She says that when they met the respondent knew she remained married to her first husband, and that he offered to and did support her with the paperwork for her divorce. By the time the parties married in Bangladesh in December 2001 she believed herself to be divorced. She did not, therefore, commit bigamy (an offence which requires *mens rea/* intent).
17. At the outset of the hearing Mr Hames asked me to decide the legal issues first, and only to embark on hearing evidence if his primary submission failed. For purely practical reasons, I declined to take that course. Three days had been set aside for this hearing, a day of which was lost due to the late arrival of relevant documents. I took the view that if I were to hear submissions on the legal issues first, and give a reasoned judgment, there would be insufficient time left to hear the evidence and make findings if that turned out to be necessary.
18. The issues that are covered in this judgment are therefore:
    a. The facts: what each party knew about the status of the applicant's first marriage, and how it came about that they married at a time when the applicant was still married to someone else;
    b. Does the power to debar a bigamous applicant from pursuing a claim for a financial remedy order still exist? – and, if so,
    c. Should it be exercised in this case, according to the facts as I have found them?

<u>The law</u>

Profiting from a crime: the "ex turpi causa" principle

19. The respondent bases his application to debar the applicant from pursuing a claim for financial remedies on a line of authority which suggests that in some circumstances an applicant's criminal act or (perhaps) moral culpability may "debar" them, as a matter of public policy, from pursuing a claim for financial remedies. This line of authority is connected to the legal principle that a person should not be permitted to benefit from their crime ("*ex turpi causa non oritur actio*"). Bigamy is, of course, a criminal offence under the Offences Against the Person Act 1861, s57.
20. There is nothing in the Matrimonial Causes Act 1973 which prevents financial remedy orders from being made where a marriage is void because of bigamy, or on any other grounds. On the

contrary, the statutory scheme explicitly permits an application for all forms of financial remedy to be made on or after making a decree of nullity.

21. In *Whiston v Whiston* [1995] Fam 198 the Court of Appeal held that, as a matter of public policy, a spouse who had committed bigamy should not be entitled to a financial award. The "wife" in that case had married the "husband" despite knowing that she was already married (and that her first husband was alive and well), and had concealed that fact. At first instance she was awarded a lump sum of £25,000 by the district judge, which was reduced to £20,000 by Thorpe J (as he then was) on a first appeal.
22. Ward LJ formulated the question for the Court of Appeal as follows:

> "The stark point in the appeal is, therefore, whether or not that doctrine of public policy which ordains that one should not benefit from one's own crime is available to the appellant and whether or not the respondent should be debarred from pursuing her claim because *ex turpi causa non oritur actio*".

23. His conclusion on that point was this:

> "Today we have this respondent seeking to profit from the crime. Her claim derives from the crime. Without her having entered into this bigamous ceremony she would not have got to the judgment seat at all. She should now, in my judgment, be prevented from going any further. I would therefore allow the appeal. I would accordingly dismiss her application for a lump sum and make no award to her whatever."

24. Henry LJ said:

> "This case falls squarely within the principle that as a matter of policy the court will not lend its aid to one who, to succeed, must found her claim on a criminal offence of sufficient gravity, as this crime of bigamy in my judgment was. In my judgment, neither the enactment nor the wording of the Matrimonial Causes Act 1973 in any way affects or dilutes that principle as it exists in the common law, and that principle is fatal to this claim."

25. *Whiston* has not been overturned. I observe at this point however that the approach taken by the Court of Appeal in 1995 was still firmly founded on a concept encapsulated in the term "ancillary relief", formerly used as a shorthand for all forms of financial provision on divorce. That is, that an applicant (typically a wife) would have to come to court asking for financial provision ("relief") to be made for her out of assets that had been generated by, and were held in the name of, her husband. As society has evolved, that concept has disappeared from the case law, to be replaced by a concept of equal sharing of "the fruits of the matrimonial partnership" (*Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24). As Thorpe LJ put it in *Hill v Haines* [2008] Ch 412:

> "a spouse in bringing her claim for ancillary relief does not come as a suppliant but as one seeking the quantification of her entitlement".

26. The consequence of this shift in perspective, as Baroness Hale observed in *Miller; McFarlane*, is that the court's focus on the conduct of the parties has receded:

> "145. […] In the olden days, when all the assets were assumed to be the breadwinner's and he was making an allowance to enable his wife to live separately from him, the wife's

conduct might reduce the allowance she would otherwise have needed or even extinguish it altogether. She had therefore to be 100% blameless in order to be sure of her conventional one-third share of his income. In theory, if she were 50% to blame, her share might be halved, although in practice the divorce courts were more flexible than that (but see, for example, the approach in *Ackerman v Ackerman* [1972] Fam 1, where a wife who was assessed as 25% to blame for the breakdown of the marriage was subject to a 25% discount from what she would otherwise have received). But once the assets are seen as a pool, and the couple as equal partners, then it is only equitable to take their conduct into account if one has been very much more to blame than the other."

27. The public policy arguments articulated so strongly by Ward LJ in *Whiston* were revisited a few years later by the Court of Appeal in *Rampal v Rampal (No 2)* [2002] Fam 85. In that case the facts were different from those in *Whiston* because the respondent "wife" had been aware of the respondent "husband's" bigamy at the time of their marriage. The key issue for the Court in *Rampal* was whether the decision in *Whiston* operated as an absolute bar to a bigamist's claims for financial provision. The Court of Appeal held that it did not. Thorpe LJ said:

> "[26] As a general proposition I am not in favour of strike-out applications in the field of ancillary relief. The court has abundant discretion conferred by the statute itself and particularly s 25(2)(g), requiring the court in particular to have regard to the conduct of each of the parties if that conduct is such that it would in the opinion of the court be inequitable to disregard it. In the case of a statutory claim that is obviously dishonourable, modern practice enables the judge to curtail the claim at an early stage in the exercise of discretion under s 25 rather than on the application of any rule of public policy.
> [27] In the case of *Whiston v Whiston* this court did not entertain an appeal from the grant or refusal of a strike-out as a preliminary issue. It was a second tier appeal on quantum. It may be said that the court's preference to reduce the applicant's lump sum to zero, not in the exercise of discretion and particularly the application of s 25(2)(g), but on the grounds of public policy, is in itself significant. But whilst the decision enables a strike-out application to be launched against a comparably culpable bigamist, and is indeed binding on us in such a case, I do not conclude that, as Mr Bellamy effectively decided, it establishes a rule that no bigamist is entitled to apply for ancillary relief. I will endeavour to summarise my reasons for that conclusion:
>
> > (i) Under the common law even a marriage between two males was undone by a decree of nullity, thus opening the door to a claim for ancillary relief, rather than by a declaratory judgment which precluded such a claim: see *Corbett v Corbett (orse Ashley)* [1971] P 83 at 109. In his reasoning Ormrod J made plain that the case for a declaration was more strongly made where the marriage had been celebrated between persons of the same sex than where the marriage failed for bigamy, precisely because the latter marriage 'might in other circumstances have been a valid marriage'.
> >
> > (ii) The language of the judgments in *Whiston* does not unequivocally establish the existence of a universal rule precluding the bigamist from exercising the statutory right of application.
> >
> > (iii) The crime of bigamy can surely not be said to be so serious as to suspend the general rule that whether or not the principle of public policy can be invoked to bar a claim depends upon an appraisal of the seriousness of the crime in all the circumstances. As Dr Cretney pointed out in his commentary on the decision in

Whiston v Whiston, see 112 LQR 33, Professor Kenny followed his colourful description of the crime by saying that it, like manslaughter, is peculiarly elastic in its range.

(iv) The authorities from *Gray v Barr* to *S-T v J* demonstrate that where an application to invoke statutory entitlement arises out of a criminal act the court must have regard to all the circumstances before deciding whether or not the applicant is debarred.

(v) The majority in *S-T v J* were unable to distinguish *Whiston* on the basis that the applicant's conduct was less culpable. Thus emerged the distinction between the crime that was the marriage and the crime collateral to the marriage. But that does not preclude distinguishing *Whiston* in the case of another bigamous applicant whose culpability measures so much lower on the elastic scale.

[…]

[30] In conclusion I do not regard the rule in *Whiston v Whiston* as extending to exclude every culpable bigamist whatever the circumstances of the case. The court cannot be deprived of the freedom established through a line of cases in other fields to evaluate the nature of the crime itself."

28. While the outcome in *Rampal* differed from that in *Whiston*, the reasoning of Thorpe LJ demonstrates the role that the "*ex turpi causa*" principle had in his thinking. The reason that the claim was allowed to proceed in *Rampal* was that the applicant's culpability, on the facts, was less than that of the "wife" in *Whiston*.
29. The common law "forfeiture rule" is a specific form of the "*ex turpi causa*" principle which operates to prevent a person from benefiting from an unlawful killing. However the Forfeiture Act 1982, s2 gives the court power to modify or disapply the effect of the rule if it is satisfied that the "justice of the case" requires it: s2(2). That power has been exercised in a number of cases, including *Amos v Mancini* [2020] EWHC 1063 (where the application of the forfeiture rule would have produced an outcome "significantly out of proportion" to the fault), and *Challen v Challen* [2021] 2 All ER 738 (where the deceased's abusive conduct towards the applicant meant that he had "contributed significantly to the circumstances in which he died").
30. Finally, and for completeness, Mr Hames referred the court to *HM Customs & Excise v MCA* [2003] 2 All ER 736; [2002] EWCA Civ 1039 in which Schiemann LJ said:

> ""10.. Given both the breadth of the discretion available to the court under section 25 MCA, and the correspondingly wide variety of financial relationships within marriage, it is not surprising that Part II of the MCA 1973 has generated a substantial jurisprudence. We are not concerned with that jurisprudence in this case. Two points are, however, clear from the provisions of MCA 1973. The first is that since the statute itself identifies remarriage as the only bar to the exercise of the jurisdiction under Part II in cases of divorce, it follows that — to take two examples relevant to this case – neither moral obloquy nor serious criminal convictions represent jurisdictional bars to the exercise of the jurisdiction.
> 11. It follows, as Judge LJ points out in [90], below, that the court plainly has jurisdiction to entertain applications for ancillary relief by drug dealers and the spouses or former spouses of drug dealers. Whether the court exercises its discretion so as to make orders in such cases, is, of course, another matter."

31. In *HM Customs & Excise v MCA* the issue was whether the husband's share of the family home could be transferred to the wife notwithstanding that the property was also subject to an

application for a confiscation order under the Drug Trafficking Act 1994. The wife was innocent of the husband's criminal activities and it was accepted that the property had not be acquired with criminal profits. This was not therefore a case where the "*ex turpi causa*" principle arose.

The court's power to strike out an application

32. FPR r. 4.4(1) provides as follows:

> "(1) Except in proceedings to which Parts 12 to 14 apply, the court may strike out a statement of case if it appears to the court –
>
> (a) that the statement of case discloses no reasonable grounds for bringing or defending the application;
> (b) that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings;
> (c) that there has been a failure to comply with a rule, practice direction or court order; or
> (d) in relation to applications for matrimonial and civil partnership orders and answers to such applications, that the parties to the proceedings consent."

33. R.4.4(1) is supported by PD4A which reads as follows:

> "2.1 The following are examples of cases where the court may conclude that an application falls within rule 4.4(1)(a) –
>
> (a) those which set out no facts indicating what the application is about;
> (b) those which are incoherent and make no sense;
> (c) those which contain a coherent set of facts but those facts, even if true, do not disclose any legally recognisable application against the respondent.
>
> 2.2 An application may fall within rule 4.4(1)(b) where it cannot be justified, for example because it is frivolous, scurrilous or obviously ill-founded.
> 2.3 An answer may fall within rule 4.4(1)(a) where it consists of a bare denial or otherwise sets out no coherent statement of facts."

34. The scope of the power to strike out a claim for financial remedies was considered by the Supreme Court in *Wyatt v Vince* [2015] 2 All ER 755. In that case the parties had been divorced for over 20 years and the entirety of the husband's wealth had accrued after the marriage. The husband sought to strike out the wife's claim for financial provision.
35. The Court held that the absence from the Family Procedure Rules of a power to give summary judgment on an application was deliberate, and therefore r.4.4(1) should be construed strictly. In particular, the rule did not permit an assessment of the merits of the application: the Court of Appeal had been wrong "to insinuate into the concept of abuse of process in Rule 4.4(1)(b) of the family rules an application for a financial order which has no real prospect of success" [per Lord Wilson at para 27]. Instead, the "touchstone" for an application to strike out was whether the application was "legally recognisable". An example given of an application which would not be legally recognisable was an application made after the applicant had remarried.
36. In his judgment Lord Wilson said:

> "[19] Rule 4.4 of the family rules, which contains the power to strike out an application in family proceedings, has no parallel in any of the preceding sets of rules which governed what are now called family proceedings. There has always been an inherent jurisdiction, at any rate in the High Court, to protect the court by striking out material abusive of its process; but there is no value in today considering its extent. Paragraph (4) of r 4.4 provides that para (1) does not limit any other power of the court to strike out a statement of case but no one suggests that the deputy judge had an inherent jurisdiction to strike out which went wider than that set by para (1). In my view family courts may, like civil courts, now safely proceed on the footing that, were their power under the rules not to go so far as to enable them to strike out the statement, their inherent jurisdiction, if any, would go no further: *Summers v Fairclough Homes Ltd* [2012] UKSC 26, [2012] 4 All ER 317, [2012] 1 WLR 2004 at [42]."

The evidence

37. Neither the applicant nor the respondent was a reliable witness. Partly that was because the events with which this trial was concerned took place over 20 years ago. In such circumstances the courts are well used to exercising caution when evaluating evidence, making a generous allowance for the effects of time on memory, and inaccuracy and vagueness are not usually indicators of dishonesty: see for example *Re A* [2020] EWCA Civ 1230. On occasion, however, the court encounters a witness who finds it more comfortable to allow time to blur their memories of events which they would prefer did not come to light.
38. I have thought carefully about each party's case as a whole and have come to the conclusion that there are aspects of each party's account that are inherently implausible, do not fit with the documentary evidence and the evidence of the other witnesses, and/ or do not sit easily with other aspects of the party's case.
39. I have also reached the conclusion that each party has opportunistically exploited minor and innocent discrepancies in the documentation in order to build a case against the other.
40. I am required to satisfy myself that these false accounts are lies rather than the product of a mistake or fallible memory. Where I am satisfied that a party has lied, I must consider what other explanation there may be for the lie, bearing in mind that people lie for many different reasons including shame, fear and misplaced loyalty: *R v Lucas*, adapted for the purposes of family proceedings in *Re A, B and C (Children)* [2021] EWCA Civ 451. Only if I am satisfied that there is no other explanation for the lie, and that the lie goes to significant issue, is it capable of supporting a finding of guilt.
41. I have undertaken that process as part of my evaluation of the evidence, set out below. I am satisfied that each of the false accounts that these parties have produced has been generated with a view to bolstering their case within these proceedings or to undermining the case of the other party.
42. The parties' shared lack of credibility does not mean that I disregard their evidence. I have accepted some parts of each party's account, for example where the detail and coherence has made it particularly compelling, or where a party has made an admission against his or her own interest. However my view of the parties' overall truthfulness means that it has been especially important in this case to pay attention to the wider canvas of the evidence, to consider the contemporaneous documentation, and to tread very carefully when a finding is sought based on the uncorroborated evidence of either party.

43. I heard oral evidence from two witnesses called on behalf of the applicant. Her brother, WL, was a thoughtful witness who took care to answer questions as fully as he could, but was aware of the possibility he might have misremembered and did not aim for a certainty which would have been unconvincing. When he did give a full response he explained, with reference to events in his own life, why his memory was more detailed. It was not suggested to him that he was lying. His evidence was credible and I rely on his account.
44. The parties' former nanny, EM, was also in my view a truthful witness. She too acknowledged that her memory of events 20 years ago was not perfect and in one instance, on a significant point, she made a mistake about the year when a conversation had taken place (something which I consider undermines the respondent's suggestion that she has colluded with the applicant in giving her account). When she did remember an event with confidence I considered it likely that her account was accurate.
45. Although both witnesses have connections with the applicant neither appeared to have a close and detailed knowledge of the issues in these proceedings and I am satisfied that both were motivated primarily to assist the court, rather than to support the applicant's case.
46. Shortly before this hearing was due to commence the file for the applicant's divorce from her first husband was located at Romford County Court, where it had been stored since the closure of Ilford County Court where the divorce took place. To my surprise, the file was (at least on the face of it) complete, despite HMCTS' file retention policy requiring the full file to be stored for only 18 years. It contained a significant number of documents which are relevant to the issue of each party's involvement in, and knowledge of, the applicant's divorce process. It was the late discovery of this file that delayed the start of the hearing, because it was necessary for both parties to give instructions on the information it contained.
47. At the outset of the hearing I refused the applicant's application for the instruction of an expert to provide an opinion as to whether the handwriting on some of the documents in the divorce file was that of the respondent. One of the main reasons for refusing the application was the impact the instruction of an expert would have had on the trial listing and the consequent delay it would have caused to these proceedings.
48. The applicant continues to maintain that the handwriting on some of the documents in the file is the respondent's. In some circumstances the court might be able to make a finding to that effect without the assistance of expert evidence, but I am not able to do so in this case. I have no sample of the respondent's handwriting in 2001 to use as a comparison, and for the reasons I have given I do not consider the applicant's word alone to be sufficient.
49. The bundle contains the report of an expert in Bangladeshi marriage and divorce law. The application for permission was made by the applicant and I dealt with it at the first case management hearing on the respondent's application. I was, on balance, persuaded that the evidence was necessary: I did not know at that stage what findings I would be able to make on the facts, and there were some potential factual scenarios in which an expert opinion would have been required.
50. As it is, the content of that report has not been central to my determination of the issues at this hearing. The applicant seeks to rely, as I understand it, only on one limited point, which is that it appears that it might have been possible for her to secure a divorce from her first husband in such a way as would have left her free to marry the respondent in the eyes of Bangladeshi law. But the the applicant has never suggested that this is in fact what she did.
51. Finally it is necessary to refer briefly to findings made by DDJ Vokes in Family Law Act proceedings which took place in the aftermath of the parties' separation. Those findings stand, in so far as they are relevant, in the current proceedings: *Re W* [2022] EWCA Civ 1118. They are, however, limited. DDJ Vokes found that the respondent had demonstrated controlling

behaviours towards the applicant. The timeframe for that finding is not entirely clear from the judgment but it appears that the focus of the evidence at that hearing, which has been partially transcribed, was on the latter part of the parties' relationship, during a period when the respondent suspected the applicant of having an affair. It seems to me that this finding is of only limited relevance to the dynamics of the parties' relationship in 1998 – 2001 which is the period with which I am primarily concerned.

My findings on the disputed issues of fact

52. There is a dispute about how and when the parties commenced their relationship. It is unnecessary to resolve the detail of that dispute. What is clear is that from quite an early stage both parties were attracted to each other and that it was not long before they both considered themselves to be in an exclusive relationship.
53. I was struck by both parties' evidence about a trip to Morocco that took place not long after they had met. On that trip, although it was (and I accept this) common ground that a sexual relationship had not yet started, they shared a room. Their explanations for this unusual situation (particularly unusual, perhaps, for a muslim couple in 1999) were different, but equally implausible. The reality of the situation, in my view, was simple. They liked each other and both were keen to take the relationship further.
54. In late 1999 the respondent bought a house in Ilford. In January 2000, I find, the parties moved into that property together. I reject the respondent's account that they did not cohabit and that the applicant was an occasional visitor, sharing a bedroom with the nanny. There are documents that strongly suggest that the Ilford address (and, indeed, the respondent's former address) was the applicant's permanent home. I place particular weight on the evidence of EM, who worked for the family (caring for the respondent's older children) for about four months in the first half of 2000. She gave a detailed description of the layout of the house and the sleeping arrangements, which made it very clear that the parties were a couple and shared a bedroom.
55. The parties' status as an unmarried couple was of concern to both of their families. The applicant's brother admitted that he felt "uncomfortable" helping her to move her belongings into the Ilford property, knowing that she and the respondent were unmarried, although he respected her right as an adult to make these decisions for herself. He described his father's attitude as less compromising: he was very upset about the situation and found it difficult to talk about it. The applicant said that her mother's feelings about the relationship prevented her from visiting the applicant in her home in London until 2002. As for the respondent, he described the parties' living arrangements (although he was speaking about a later period) as "living in sin", and said that his own mother "was the kind that would not allow it".
56. The applicant's case is that the respondent told his family that she was his wife. The respondent denies this but I find it is accurate. On 11 September 2001 (the day of the Twin Towers attacks, which is why everyone remembers the date) the respondent's father was diagnosed with pancreatic cancer. Both parties were in hospital with him at the time. In her evidence the applicant spoke of being with her "father-in-law," and I am satisfied that is how her relationship with the respondent was perceived by the wider family, whatever they may or may not have understood about the legal status of the relationship.
57. The respondent's case is that he believed that the applicant was already divorced when he met her. He said that the applicant had put her marital status on her CV; that is strongly denied and

is inherently unlikely. I find that the respondent fabricated this part of his evidence to cover the fact that he could not give a coherent, convincing account of having been told explicitly by the applicant that she was divorced.

58. The applicant's brother WL met the respondent in 1999. Some time thereafter, the applicant went to Bangladesh to see her father. While she was away the respondent had trouble getting hold of her so he telephoned her brother at home. During a conversation with the applicant's sister-in-law, in WL's presence, the respondent spoke about his feelings for the applicant. The applicant's sister-in-law reminded him that they could not marry because she was not yet divorced. WL was very clear that this was something the respondent already knew.
59. As the divorce file shows, over the course of 1999 – 2001 there was considerable activity within the applicant's divorce proceedings. Initially she was unable to locate her first husband. After some time she instructed solicitors who similarly struggled, and made an application for deemed service; this was initially granted but later revoked.
60. It seems very unlikely that the respondent was unaware of these developments. For the best part of two years the parties' living arrangements were unusual within their community in that they were a committed, cohabiting couple who were not married to each other. Both, I find, felt the strain of the situation. They each respected their culture and I got no sense that either had any desire to rebel against it. In my judgement, the only reason the parties did not marry before December 2001 was the fact that the applicant was not yet divorced. I find that the respondent was fully aware of that fact.
61. It is unnecessary, in those circumstances, to consider the applicant's allegation that the respondent's handwriting is on some of the documents in the divorce file. Whatever part he played in the divorce process he was, I have found, fully aware that it was continuing.
62. The applicant's first husband was finally located in June 2001. On 2 July 2001 he signed the acknowledgement of service. On 30 July 2001, the applicant swore an affidavit in support of her application for decree nisi.
63. EM recalled a conversation with the applicant, around the time of their birthdays in September, when the applicant told her that her husband had finally been found (the way EM put it was, "the papers for her divorce had arrived"), and she and the respondent had gone out for dinner to celebrate. EM thought the year this happened was 2000, but that was obviously a mistake and I find, as the applicant says, that this conversation took place in September 2001. Otherwise EM's recollection was full and detailed. The conversation clearly made an impression and EM understood that this was an event of considerable significance.
64. The respondent denied any recollection of this news, or of a celebratory meal. I did not find his denial convincing.
65. I find that in the applicant's mind – and presumably also in the respondent's – the discovery of the whereabouts of the applicant's first husband came as a huge relief because it removed what the applicant had understood to be the main factor holding up her divorce. By this stage, the divorce proceedings had been continuing for over two years. However, as it transpired, the process was not as close to completion as the applicant believed.
66. On 8 September 2001 a District Judge refused the certificate of entitlement to decree nisi, on the basis that the name on the latest version of the applicant's petition did not match her first husband's name on the marriage certificate. The applicant's solicitors wrote to the court explaining, with information that can only have come from the applicant herself, the reasons for the difference. On 22 November 2001 the court again refused the petition, and on 3 December 2001 the solicitors wrote to the court with an amended petition. That was where matters stood as at the date of the parties' marriage on 28 December 2001.

67. On 2 January 2002 the court refused the amended petition. On 22 March 2002 the applicant had to attend Ilford County Court in person to swear an affidavit in support of yet another application for directions for trial. That succeeded, and decree nisi was finally pronounced in April 2002, four months after the parties' marriage ceremony.
68. The applicant's case throughout these proceedings has been that she was unaware of the steps that were being taken over this period in respect of her divorce. She says that the respondent managed the process for her, because he was familiar with it having gone through a divorce himself. She says that while he must have known as at December 2001 that she was not divorced, she herself believed she had been.
69. The applicant's account is obviously implausible and I do not accept it. The divorce file shows her active engagement with the divorce process, particularly over the period after her first husband was located. In October 2001 she gave instructions to her solicitors to explain the discrepancy between the names on the petition and the marriage certificate. In March 2002 she had to attend Ilford County Court in person to swear an affidavit. She cannot possibly have been unaware that she was not yet divorced.
70. I find that as at December 2001 both parties were fully aware that the applicant was not yet divorced. It seems likely that after the applicant's first husband had been located both hoped and expected that the divorce process would reach a swift conclusion. They could not have anticipated the further delay of almost a year which resulted from the repeated refusals of a certificate. However they both knew, on 28 December 2001, that the latest application for directions for trial had been rejected and that the applicant was not yet divorced.
71. The next issue for determination is how it came about that the parties entered into a ceremony of marriage in circumstances where they were both aware that the applicant was not yet free to marry.
72. On 17 November 2001 the respondent's father died in Bangladesh.
73. On 25 December 2001 the parties travelled to Dubai. The applicant says that the intention was to have a holiday in Dubai. The respondent says this was a stopover on the way to Bangladesh where they were to attend his father's 40-day prayers.
74. On 27 December the parties travelled overnight from Dubai to Bangladesh. On the morning of their arrival they participated in a marriage ceremony. Some members of the respondent's family were present; none of the applicant's were. They went straight from the ceremony to the 40-day prayers. The following day they returned to Dubai, where they remained for two days before travelling home to London.
75. The applicant's case is that she knew nothing of an intended marriage until the morning of the ceremony. She says that the ceremony was arranged by the respondent and his family and conducted in a language which she did not fully understand (she spoke English and Sylheti, but not Dhaka Bengali at that time). She says she was upset that her marriage was so brief and that she did not have wedding clothes or her jewellery with her, but because she did want to marry the respondent she acquiesced in the ceremony.
76. The respondent says that the marriage was necessary because his mother, who (he says) knew the parties were not married, would not agree to the applicant attending the 40-day prayers. He says that the marriage was discussed and agreed between the parties before they left the UK. In fact, the respondent says, it was the applicant who was the primary mover behind the marriage and who spoke with his mother and brothers to arrange it.
77. Both parties say they were innocent of any awareness that the marriage was void. I have found each party's case on that point to be untrue. The evidence about the marriage needs to be considered in the light of that finding.

78. I find that it was the respondent who arranged the marriage, and that the applicant was unaware of the plans until shortly before the ceremony took place. The respondent's evidence about the "discussions" he said he had with the applicant about marriage before leaving on the trip was vague and I was not convinced that any such conversation had taken place. It was the respondent's family who arranged the marriage, and the suggestion that the applicant was behind the arrangements is fanciful. I think it is unlikely that the respondent's parents had known the parties were not yet married, although his brothers must have done – at least those who were present at the ceremony. It seems likely to me that the respondent felt very uncomfortable about bringing the applicant to the 40-day prayers without being married to her: as I have said, these parties both had respect for their families and their cultural heritage and the respondent would, I think, have felt that to act in such a way would be a betrayal of his parents at an emotional and sensitive time. The opportunity to marry in Bangladesh, where the ceremony could take place quickly and where the formalities were limited (there was, for example, no need to produce a copy of the applicant's decree absolute) must have been tempting.
79. In contrast, it is difficult to understand from the applicant's perspective why she would have felt an urgent need to marry at that particular time, when she had already waited two years and when her divorce process seemed at last to be drawing to a conclusion; and I thought her evidence was credible when she said that she would have preferred her marriage to take place after she had made preparations for wedding clothes and jewellery, with her family around her, and most probably in the UK.
80. Both parties, I have found, knew that the applicant was not divorced. They also, it follows, knew that the other knew that too. I find that it was easier and more comfortable for both parties to embark on their married life together on the basis that although the applicant was not quite divorced, they expected that she soon would be. I rather suspect that over the ensuing years neither party gave much thought to the relative timings of their marriage and the applicant's divorce. It was highly unlikely, after all, that anyone other than the parties themselves would ever challenge the legitimacy of their marriage.
81. Both parties have alleged, at various times since their separation, that the other perpetrated an elaborate deception in order to bring about the current situation. The applicant has said that the respondent tricked her into an unlawful marriage with a view to avoiding any later claims on his finances. She has also said that the respondent has used his influence in Bangladesh to obtain false documents in her name – for what purpose, it is not clear. The respondent has said, on the basis of some inconsistencies between the applicant's name on her birth certificate, the marriage certificate and her Bangladeshi passport, that the applicant has used false names and false identities and has been set on a path of betrayal over the past 20 years.
82. I agree with the respondent that if he had deliberately manipulated the applicant into a void marriage, he would not have taken the steps he took during the relationship to transfer assets into the applicant's sole name, and he would not have indicated an initial intention not to defend her (divorce) petition. I am also of the view, because it is frankly quite obvious, that the differences in the way the applicant's name and other details appear on various pieces of official documentation are due to a combination of human error and different naming or recording conventions, and that neither party has sought to create false documents or false identities.
83. These were, in my judgement, opportunistic allegations invented by each party on the basis of minimal evidence.
84. I have found that both parties knew that the applicant was still married when they entered into a ceremony of marriage in December 2001. Although the respondent arranged the ceremony the applicant was content to take part in it. Both wanted to marry. Their relationship lasted for

over 20 years and they had two children. Throughout that period both knew that their marriage was legally void, but I very much doubt that this was a matter of real concern to either of them until the relationship broke down and they decided to weaponise this aspect of their shared history against each other.

Does the jurisdiction to "debar" still exist?

85. I start with the applicant's primary case, which is that the principle in *Whiston* has been overruled by the decision of the Supreme Court in *Wyatt v Vince*. The applicant argues that the circumstances in which a court can strike out a claim for financial remedies are now strictly limited and there is no room for a "rule" that a culpable bigamist should be debarred from pursuing an application for a financial remedy order.
86. The decision in *Whiston* is just one strand in a strong line of authority which supports the common law rule, of wide application, that a person should not profit from his crime. Another example of the *ex turpi causa* principle is the forfeiture rule: the principle that a perpetrator of an unlawful killing should not benefit from the crime. That rule is unlikely to apply to most financial remedy cases, for obvious reasons. But is is possible to conceive of circumstances in which it might: for example, a penniless H kills his father-in-law, as a result of which W inherits, and H then brings a needs-based claim. The forfeiture rule might well operate to prevent H from benefiting from the inheritance via a financial remedy order[1].
87. I do not accept that the decision of the Supreme Court in *Wyatt v Vince* can be read in such a way as to overturn a principle which is embedded in law and operates in a wide variety of different contexts (bigamy and unlawful killing being just two examples). The *ex turpi causa* principle was not considered in *Wyatt v Vince*, which concerned an application to strike out for different reasons.
88. I do accept that an application to strike out or "debar" a claim on the basis of the rule in *Whiston*, or any other iteration of the *ex turpi causa* principle, must, in the light of Lord Wilson's observations at paragraph 19 of *Wyatt v Vince* (set out above), fall within the scope of FPR 4.4. In his skeleton argument Mr Roberts acknowledged that the respondent's application "sits best… under FPR r.4.4(1)(b): that the application is an abuse of the court's process or otherwise likely to obstruct the just disposal of the proceedings". In closing submissions he confirmed that he was not seeking to advance the respondent's case on any other basis.
89. In principle, I agree that a claim brought in contravention of a rule of law based on public policy grounds (such as the *ex turpi causa* principle) is susceptible to being struck out as an abuse of process under r.4.4. Of course any strike-out application would have to accommodate a counter-argument that in the circumstances of the particular case an exception to the rule should be applied. So, for example, the murderous son-in-law might ask for the forfeiture rule to be disapplied under s2 of the Forfeiture Act; or, as in this case, a bigamous (or potentially bigamous) spouse might argue that their actions were closer to those of Mrs Rampal than Mrs

[1] Curiously, s3 of the Forfeiture Act 1982 disapplies the forfeiture rule to certain specified applications, including MCA 1973, s31 (variation applications) but not other forms of financial remedy. This is a loose end I have resisted the temptation to pull.

Whiston. But if those arguments failed and the court determined that the public policy rule should have full effect, I am of the view that this could – in principle – result in the claim being struck out as an abuse of process, and without further consideration of the MCA 1973, s25 factors.

90. So my conclusion is that the rule in *Whiston* survives *Wyatt v Vince*, provided that the application falls within the scope of FPR r.4.4(1).
91. Before leaving the issue of jurisdiction, however, it is necessary to look carefully at what *Whiston* is actually authority for.
92. It is clear from the judgments of Ward and Henry LJJ in *Whiston*, read together with the subsequent decision in *Rampal*, that the ratio of the case is not that bigamy itself operates as a bar to a financial remedies claim, but that "a criminal offence of sufficient gravity" may. The history of financial remedies law – and family law more generally – provides a vivid illustration of how quickly social attitudes can shift, and how flexible the family justice system must be to respond[2]. The gravity or otherwise of a criminal offence – or other culpable ("*turpis*") behaviour – may be viewed very differently at different times. In 1995, it seems, bigamy was sufficiently grave to trigger the operation of the *ex turpi causa* rule, although the Court of Appeal did acknowledge that attitudes towards bigamy had moved on since 1603, when the penalty for the offence was death. It is not for me to express a view as to whether social attitudes to bigamy have evolved further since *Whiston* was decided and, provided that I proceed on the basis that the heart of the decision is the *ex turpi causa* principle and not this particular instance of it, I can decide this case without doing so.
93. Finally it is important to recognise that the gravity of the offence is a necessary, but not sufficient ingredient of the *ex turpi causa* principle. The operation of the principle is triggered by the causal link between the offence and the claimed benefit. In *Whiston* Ward LJ described the applicant's claim as "a claim which she would not be entitled to make had she not practised her deception and had remained a mere cohabitee". There is no general rule that even a very serious criminal offence will debar the perpetrator from making a financial remedies claim. In the vast majority of cases where conduct, even "gasp factor[3]" conduct, is raised, it is incidental to the financial remedies claim and not the factor which made the claim possible. Such conduct will fall to be considered, if at all, under MCA 1973 s25(2)(g) and there will be no scope for a r.4.4 strike-out application.
94. On that basis, I would accept that the court has jurisdiction to strike out a claim, or "debar" a person from pursuing it, where it contravenes a rule of public policy to such an extent that to permit it to proceed would be an abuse of process.

<u>If the jurisdiction exists, should it be exercised on the facts of this case?</u>

95. I have found that the applicant knew she remained married to her first husband when she entered into a marriage ceremony with the respondent; but so did the respondent. Neither misled the other. For over 18 years these parties lived together in a partnership which both were content to treat as a marriage. When this broke down both tried to save it. I note that despite their polarised positions now, the parties were both sufficiently invested in their relationship to attend Relate counselling over a period of about two years.

[2] See, for example, the concept of "Adulterine Bastardy", the subject of a legal textbook referred to in Peter Jackson LJ's fascinating Nicholas Wall Memorial Lecture, "Is Family Law law?": https://www.judiciary.uk/the-nicholas-wall-memorial-lecture-given-by-lord-justice-peter-jackson-is-family-law-law/

[3] *S v S* [2007] 1 FLR 1496.

96. The facts of this case are therefore much closer to those of *Rampal* than to *Whiston*.
97. I do not know much about the nature and extent of the matrimonial assets in this case, but I do know that both parties worked during the marriage, and cared for their children, and overall there appears to have been what is these days a fairly standard pooling of assets and resources, and a sharing of responsibilities. It is difficult in those circumstances to characterise the applicant's claim as an attempt by a bigamist to enrich herself in a way that would not have been possible in the absence of a fraudulent or criminal act. Whether, on different facts and after a more traditional marriage, a respondent could still argue a *Whiston* case, despite the developments in financial remedies law since 1995, is a question which will have to await another day.
98. For those reasons, this claim is not, in my view, an abuse of process. On the contrary, there are clear public policy arguments in favour of recognising the partnership and ensuring a fair division of its assets. MCA 1973 confers a power on the court to make financial remedy orders after a nullity petition; that power exists, presumably, for cases such as this, where to ignore the fact that a social and economic partnership existed, even if the marriage itself was void, would be to create a real risk of injustice.
99. The respondent's application to strike out the applicant's claim for financial remedies is therefore refused.