Neutral Citation Number: [2017] EWHC 2086 (Fam)

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Case No: FD11D03744

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11 August 2017

Before :

Sir Peter Singer

- -

Between :

Clive Douglas Christopher Joy-Morancho **Applicant**

- and -

Nichola Anne Joy **Respondent**

- -

Mr Martin Pointer QC and Mr Nicholas Wilkinson (instructed by **DWFM Beckman**) for the **Applicant**

Mr Daniel Sokol (counsel authorised to conduct litigation on a direct access basis) for the **Respondent**

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Hearing date: 3 July 2017

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Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

SIR PETER SINGER

This judgment consists of 91 paragraphs and is being handed down in open court on 11 August 2017.

Sir Peter Singer:

Introduction

1. I will refer to the parties as the husband (H) and the wife (W) notwithstanding the fact that the one disputed aspect of the divorce proceedings instituted here by W 6 years ago now, in July 2011, so far finalised is their divorce, made absolute on 31 March 2015. Meanwhile litigation concerning their finances and (in France) their children has continued to run concurrently. One aspect of their financial disputes is this application lodged by H on 1 December 2015 whereby he sought and continues to seek the downward variation (as is submitted on his behalf, to a nominal order) of the spousal periodical payments of £120,000 p.a. which I had made three months earlier by my order dated 28 August 2015, to run from 1 November 2014. H also invites me to backdate this variation to 1 November 2014 and to remit any arrears which might in the event remain.

2. In a manner which I shall trace his variation application wended a dilatory course over the ensuing 21 months until it concluded in a hearing comprising a day of submissions only from counsel. Acting for him on 3 July 2017 have been Martin Pointer QC and Nicholas Wilkinson instructed by Sofia Moussaoui a partner in DFWM Beckman solicitors (Beckmans), all of whom have acted for H for some years now. Daniel Sokol, a member of the English bar authorised to conduct litigation on a direct access basis, has come relatively recently to the lists to represent W, seconded on this occasion (as at the 26 May 2017 directions hearing which preceded it) by his father Ronald Sokol who has for some years represented W in the French proceedings primarily related to the parties' 3 children, boys now aged nearly 12, 10 , and nearly 7. Mr Sokol senior has amongst other qualifications membership of the English bar, and they have been assisted by a London solicitor, Ms Joshi, who however (as I understand it) is instructed as an agent by Daniel Sokol and is not on the record as acting for W as such in these proceedings.

3. These combined endeavours in relation to this variation application in this jurisdiction have generated estimated costs liabilities of about £100,000 on H's side and, as at the conclusion of the May 2017 directions hearing, some £77,000 for W. Although I am not privy to the details of the financial arrangements on either side, as things currently are said to stand neither team of lawyers can have much optimistic expectation that their bills will be met soon if ever. This current spate of litigation is thus already beyond the point where it is proportionate, and would indeed necessarily be regarded as ruinous, if indeed either of them has still the substance left out of which to defray its expense. Each of these former spouses is, on the face of it, deep in debt: in H's case alone, in relation to historical and current legal costs alone, his liabilities to his present lawyers must now exceed £300,000. That sum is in addition to the 'upwards of £2 million on costs in this jurisdiction, and unknown but no doubt significant amounts in France and in Switzerland' which I recorded (at [191] of the August 2015 judgment) the parties had spent up to that point.

The August 2015 order

4. It will be necessary for me to refer to a number of passages from that, the main money judgment, but first a description of its salient provisions for current purposes. For the

reasons expressed in the judgment the order required H to pay periodical payments at the rate of £10,000 monthly from 1 November 2014 during joint lives, until W might remarry or until a further order of the court. The order was made upon the basis that W was to give credit 'for such sums as she in fact receives pursuant to any child maintenance order made in France and for any actual payments made by or on behalf of [H] in respect of her rent.' Throughout the period in question the combined child maintenance fixed by the French court has been and remains €3,600 per month, and W and the children have continued but may not much longer continue to occupy a property, close to where H continues to live at Château T, which commands a rent of €2,200 per month.

5. In the light of my detailed findings concerning the cogency of the case presented by H at the main hearing I adjourned W's claims of a capital nature under MCA section 24 and for pension sharing orders 'subject to and in accordance with the timetable and directions' then set out. I provisionally fixed 26 May 2017 for a directions hearing before me, to be followed (subject to those directions) by a three-day hearing on 3 July 2017. I provided for H succinctly to update his capital and income position annually at the end of each April from 2016 onwards 'in such a way as to enable [W] to ascertain the state of his finances from that document.' I also made a costs order against H, and required him to make a prompt on account payment of £334,263 with which he has not complied.

6. It can thus be seen that these two most recent hearing dates were intended for consideration to be given to W's outstanding capital claims 'unless adjourned with the consent of both [parties] or brought forward on an application by either [party].'

7. On 26 May 2017 I directed that this variation application must be heard and concluded before any consideration could be given to W's outstanding capital claims (if pursued at this point, as to date it seems they are to be) and indeed to her additional application for enforcement of what (as at the end of March this year) W asserted were just short of £200,000 of arrears of maintenance, plus some £15,000 of interest (those figures being disputed by H).

The August 2015 judgment

8. This is reported as *Joy v Joy-Morancho & Others (No 3)*, [2015] EWHC 2507 (Fam), [2016] 1 FLR 815. In the following early paragraphs I described what was the principal issue of fact in the case.

> 2 Between December 2014 and February this year I considered carefully the extent of the issues and evidence necessary to establish my conclusions on the principal issue of fact I have to decide. That is whether or not the situation described by Mr Joy (H) is accurate so that he is in truth and in fact able for the foreseeable future to pay only modest periodical payments to W and their three children, but nothing whatever by way of capital award. That proposition and that outcome depend upon whether H really faces the financial ruin he maintains overwhelmed him as a result of what he describes as the day of reckoning imposed on him by the trustees of the New Huerto Trust (NHT). Those trustees now pursue him and all those assets to which he can lay claim (and more), so he will be left without substance. His debts therefore exceed by far any assets available or likely to become available to him. His case is moreover that he has been permanently and irrevocably excluded from any potential future benefits from NHT.

3 NHT is a trust H (as settlor) established in the British Virgin Islands (BVI) in December 2002. The trust had until recently as its trustee a Hong Kong based management company Royal Fiduciary Group (RFG) of which Tim Bennett (TB) is a director. … TB does very clearly emerge as the human face and mind of the trustees, taking the lead in speaking for them and in informing and forming RFG's decisions in relation to NHT and H. … The protector of the trust is a long-standing Dubai-based friend of H, Mr Richard Smith (RS).

…

5 Only after resolving where I believe the truth lies on that primary issue of fact – whether H's plight is genuine or a contrived facade - can I proceed to consider the by no means straightforward question what capital provision, if any, in the context of a global award should be made for W; and then how she may be able to receive it if, as seems inevitable in the circumstances of this case, payment is not facilitated by those who may seek to delay or to thwart her.

9. My conclusions as to this were emphatic, and I next incorporate their bulk:

169 At [32] and [33] of the judgment I gave in March last year, [2015] EWHC 455 (Fam) I summarised what, at that interlocutory stage, was the burden of W's case thus:

> "It is in the light of this very unsatisfactory history that W invites me at this stage to take the most jaundiced view possible of H's and the Trust's and possibly also EFG's presentation. *[Explanatory note: EFG is a bank where both H and NHT as customers had enjoyed facilities.]* She invites me to conclude that what has been produced and presented is a stage-managed and crafted but fictional drama which has the underlying and collusive sub-text that H will when the dust settles return to a position where he has access, direct or indirect, to trust assets and to their value to meet his income and capital needs. She points to the hint in the 3 December meeting notes *[Explanatory note: notes produced by TB of a meeting convened in Hong Kong in December 2013 attended by H and Sofia Moussaoui and RS.]* which suggest that when the time is ripe H may be taken on as an employee of the Trust or one of its businesses and paid a salary. …
>
> "At the final hearing it may be asserted that the gloom and doom now attending H are mere theatrical devices which some time after the curtain on these proceedings comes down will be confirmed as the improbable constructs which (W maintains) they are. But at this stage I must proceed with caution, bearing in mind that the evidence in the case is not yet complete and in particular that I have heard no oral evidence specifically directed to many of the issues now raised. It remains not beyond the realms of probability to imagine that the contrary case might be made out, that RFG has throughout acted as a trustee should in balanced protection of its potential beneficiaries' interests."

170 The evidence is now complete and so is my conviction that W's suspicions and her case against H and TB/RFG and the Trust are made out. Their position is an elaborate charade, the stage management of which has been conducted ruthlessly and without regard to cost. I do not need to speculate how TB plans to re-establish the access H enjoyed to capital and income which previously was his albeit via elaborate financial arrangements designed no doubt initially for fiscal purposes to distance him from their source. I do not need to consider whether the exclusion deed could or could not be upset, nor whether the undisclosed opinions taken from leading Chancery counsel on the topic by H are soundly based if, consistent with H's case, he could not even have made the trust deed available for their consideration. I am confident that when the time is ripe and there is the will to get H out of this impasse where seemingly he is stuck in what on any realistic view would be inextricable penury, TB will find a way.

171 I am of course conscious of the fact that very considerable professional effort on both sides was put into the preparation and presentation of documents and the collation of

authorities representing the fruits of significant research into a number of topics with which, in this judgment, I have not dealt. That is because it has been unnecessary, in my view, to traverse the factual and legal issues to which they gave rise given what I regard as a clear route through to an informed estimation by me of the probable development of the future relationship between H, TB/RFG and NHT.

172 There may be other routes, but it does not follow that I must follow them. My conclusion is clear, that H will far more likely than not via car-related employment with an NHT entity once again within the foreseeable future be in a position to support a very affluent lifestyle. That conclusion does not depend on nor would it be affected by the outcome of any attempt on my part to evaluate, for instance, what might be the prospects of any attempt in the BVI court to undermine the validity of the exclusion deed. Nor indeed need I, even if safely I felt that I should or could, try to form a view on the question whether Bannister J in his BVI Court might have reached a different conclusion in November 2013 if he had had the benefit of the submissions as to English trust law made to me, far less as to whether he might have approved the deed in the form in which it was so shortly thereafter executed.

The rationale of the order

10. This appears from the following excerpts:

Conclusion

174 The determination with which NHT assets have been protected and the vigour with which TB has made clear that none will be either coerced or encouraged to go in W's direction are undeniable. Were I in a position to make orders directly against NHT or its assets (which on the findings I have made I do not believe, as a matter of law, I could) it is clear W would face an uphill and most likely doomed and interminably Sisyphean struggle to collect. Were I to make a lump sum order against H I can be sure that would not encourage TB and RFG to make the necessary funds available to him with which to meet that obligation.

175 So (as I canvassed I might during the course of the evidence and with Mr Pointer as he made his closing submissions) I shall adjourn W's claims for a lump sum and for any adjustment of property order (save that I will dismiss her claims to vary NHT on the basis it is a nuptial trust, and for the transfer to her of cars from the Car Portfolio which I have found are not his).

176 I am mindful of cases where it has been said that capital claims should not be left indeterminately unresolved, but there are hard cases (a category within which this case certainly falls) where fairness and justice must prevail over the normal desirability of finality in litigation. I refer as examples to *Hardy v Hardy* [1981] 2 FLR 321 and *MT v MT (Financial Provision: Lump Sum)* [1992] 1 FLR 362. In my judgment it is certainly foreseeable that an accommodation will be made to give H access to part of the millions held within NHT.

177 I am not deterred by the consideration that for the moment H maintains that he has neither an income nor access to funds for living other than by borrowing from friends and relatives who in due course he must repay. Although he has been reticent in the extreme in divulging what considerations prevent him from commencing employment while residing primarily in France, I conclude that they are fiscal. Paying some tax and having an income would appear to most people to be preferable to having no income upon which to pay tax.

178 It is a matter ultimately of choice for H, but clearly he has the faculty to make substantial earnings. He spoke of earning £120,000 a year at the point, until the beginning of 2010, when he embarked upon his sabbatical. TB clearly values him highly as a potential employee of Anthology. The Car Portfolio appears to have fared prodigiously well under his tutelage. The commercial worth to that business of his knowledge, his contacts, his experience and his enthusiasm must in my judgment be at least £200,000 a year at this stage, plus the prospect of whatever bonus arrangement is arrived at. I take his

> earning capacity at that figure as its minimum. [In the light of the application made by Mr Pointer at the June hearing for permission to appeal against the order for periodical payments, referred to below, it occurs to me that this last sentence lacks precision. H's earning capacity in Anthology's employ, the faculty upon which I have based that order, includes what I anticipate will be substantial bonuses: as to which, historically, see [99] above.]
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> 179 The evaluation of W's entitlement to continuing provision by way of periodical payments has to be approximate and broadbrush for a number of reasons. Her case has not been presented on a needs basis. Where she will live appears uncertain (although H made it clear that, again for fiscal reasons, he would rather she did so outside France). She envisaged continuing to rent, and in current circumstances will have no alternative but to do so. Her attempts to establish a budget are now out of date. So the best I can do without anything much by way of evidence to go on is to fix on a figure which it would be very reasonable for W to have available to meet her living costs, and those of the children while in her care. The order will be for H to pay W maintenance pending suit until decree absolute and thereafter periodical payments at the annual rate of £120,000 per annum, payable monthly in advance during joint lives until she remarries or further order. H should continue to have credit for actual payments made in respect of her rent, if that is the system which still operates.
>
> 180 I wish to make it plain that this order is not intended to carry with it any element of capital adjustment: it is based entirely on maintenance provision and it is for that purpose that I make it.
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> 181 The order will be backdated to 1 November 2014, and as before will be on the basis that W gives credit against it for such sum as she in fact receives each month pursuant to the French child maintenance order. I will formally adjourn the applications W makes for English orders for their benefit.

11. On 17 June 2015 I heard submissions in relation to costs. My conclusions in relation to them are to be found from [185] onwards of the August 2015 judgment, and resulted in the on account costs order against H to which I have already referred. Mr Pointer on that occasion applied for permission to appeal which I refused in these terms:

> 243 Mr Pointer and I were both content, at the conclusion of the June hearing, for him to make this application there and then. As to the periodical payments order, he referred to H as having no income as a reason why no order should have been made, and would like the Court of Appeal also to deal with the question whether in any event £120,000 per annum (with credit for sums actually paid in relation to the French child maintenance order, and in respect of W's rent) is excessive. He also raised as a ground of appeal the disregard which he rightly anticipated I would apply to his arguments based upon FPR 28.3(7) and what he terms the illogicality of a costs order when seen in the light of what in the main judgment I have said about the unlikelihood of TB making money available to H for the purpose of paying it over to W.

12. I observe that the intended appeal did not, at this first instance permission stage, challenge my findings on the principal issue (my 'elaborate charade' etc. findings) but was clearly targeted at the periodical payments order both in principle and as to quantum, and the costs order.

Post-judgment developments

13. On 15 September 2015 H sought permission from the Court of Appeal to appeal against the periodical payments order.

14. On 26 October 2015 the judgment of the Court of Appeal of the Eastern Caribbean Supreme Court became available, reversing the November 2013 decision of Bannister J [Ag.] sitting in the Commercial Court of the British Virgin Islands in which he declined to sanction the execution of a deed by the NHT Trustees intended irrevocably to divorce H from any benefit from the trust so as to protect its assets from incursion by this court in the financial remedy proceedings then under way. I will deal with the impact, or rather the lack of any impact, which this has upon the rationale of my 2015 judgment and the August 2015 order in due course.

15. On 30 November 2015 H concluded a contract of employment with an English registered company, which I will designate SCo, at an annual salary of €120,000 gross, with no provision for the payment of bonuses.

16. By a notice of application dated 1 December 2015 Beckmans issued this application 'to vary a periodical payments order'. No documentation in support of the application was filed, and I do not know when it was served on the solicitors then acting for W. For whatever reason no further steps appear to have been taken by either party or the court until the date was fixed for the April 2016 directions hearing referred to below.

17. On 9 December 2015 King LJ gave detailed written reasons refusing H permission to appeal to the Court of Appeal in relation to my periodical payments and costs orders and declined to stay the order for periodical payments, concluding that H had no reasonable prospect of success.

18. On 26 April 2006 District Judge Macgregor gave directions in relation to the variation application. There appears to be some confusion about whether there was however rudimentary an actual hearing or whether the judge was simply asked to approve an order in effect agreed between the parties but not on its face stated to be by consent. Whatever the precise nature of its gestation the order set forth not only a timetable designed to lead to a final hearing of the variation application 'with a time estimate of 3 days on the first available date after 20 September 2016' to be listed in consultation with counsel's clerks; but also a conditional stay on the August 2015 periodical payments order.

19. As to the timetable, both parties were to file Forms E by a date in May 2016 (and in fact did so shortly thereafter); and to file and serve the documents normally required for a first appointment by 21 June 2016 (which neither party did by that date or at all); and sequentially to file concise narrative statements in support of and in answer to the application, a process which if it had ever taken place should have been completed by 13 September 2016. In fact, as will be seen, mutual silence (at least in terms of the progressing of the variation application) reigned supreme until the following April, 2017.

20. As to the stay (pending final determination of the variation application) the order provided that it was conditional upon H continuing to pay 'in full and as it falls due' (words worth noting) the French child maintenance order (€3,600 per month) and W's 'current rent [€2,200 per month] or rent for a replacement property at up to the same rate' and furthermore provided that the stay was ordered on the basis that H would discharge forthwith 'any arrears of French child maintenance and/or arrears of W's rent which have accrued.'

21. As from the following month, May 2016, H ceased to pay rent to the landlord and has not since done so.

22. On 21 June 2016 H, represented by Mr Pointer and Mr Wilkinson, failed in his renewed attempt at an oral hearing to persuade Black LJ (as she then was) to give permission to appeal my August 2015 order.

23. From October 2016 H's monthly payments of child maintenance began to reduce below €3,600 (although he recouped the shortfall to some extent during December 2016). From January 2017 until June 2017 payments dropped to €500 per month.

24. On 15 March 2017 Mr Daniel Sokol on behalf of W lodged her application for enforcement in relation to the almost £200,000 of arrears which she claims were then outstanding. W's witness statement in support of the application was signed on 31 March 2017. It was listed for first hearing together with the 26 May 2017 directions hearing.

25. Earlier in the spring I had initiated enquiries in an attempt to ascertain what had happened to H's variation application, given the potential hearing dates already fixed in 2015 for May and July 2017 if W's capital claims were to be restored. It may have been this which led to the Clerk of the Rules being invited to fix the one hour directions appointment and the three day final hearing which District Judge Macgregor's order had required should be fixed for the previous autumn. This the court did on 7 April 2017 and the dates requested by counsel's clerk were fixed and the variation application put in the court diary for hearing before a Judge of the Division. When this came to my attention I was concerned for a number of reasons. One was that the judge in question has never previously been concerned with the affairs of these parties, and would therefore inevitably need to spend considerable time reading into the case: a huge waste of what is currently more than usually scarce and therefore precious judicial time. Another was the obvious nonsense of my dealing in May and July with W's enforcement application (coupled, if pursued, with her restored capital claims) *before* H's variation application had been determined.

26. I brought these concerns to the attention of Mostyn J in his administrative capacity as the Judge of the Family Division in charge of the Financial List who on 14 April directed that all further first instance hearings in this case, whether in relation to interpretation, implementation, enforcement, variation or otherwise should be allocated to me, and that a hearing may only be released to another judge if this is agreed and authorised by me.

27. H by the end of April 2017 had filed (as required by previous orders) a single sheet document summarising all significant changes over the previous year in his capital and income position. His income had fallen short by some £6,000 of the figure he had anticipated in his May 2016 Form E; but his asserted liabilities had increased by €69,000, SFr 123,000 and £20,000.

28. On 15 May 2017 H filed his evidence in support of his variation application, a 20-page 100-paragraph Statement supported by a 262-page exhibit. The first 11 pages and 54 paragraphs of the Statement, and the first 157 pages of the exhibit, are in support of

the variation application. The balance of the documentation relates to the issue whether the stay conditions had been complied with, and whether the time limit for the filing of the statement in support of the variation application should be extended.

29. On 26 May 2017 after hearing counsel's submissions I gave directions which can for present purposes be summarised as being that this July hearing should address H's variation application on the basis of submissions, half a day being allowed for each party, with no further evidence to be filed or enquiries made without my express approval.

30. I will explain further below how and why, in the light in particular of *Crossley v Crossley* [2007] EWCA Civ 1491, [2008] 1 FLR 1467; *Wyatt v Vince* [2015] UKSC 14, [2015] 1 WLR 1228, [2015] 1 FLR 972 and *Morris v Morris* [2016] EWCA Civ 812, [2017] 1 WLR 554 this abbreviated approach to the disposal of the variation application is in my judgment justified as a case management decision in the circumstances of this case, and is not in conflict with the requirements of section 31 of the Matrimonial Causes Act 1973.

Some general observations

31. This variation application cannot be nor become a disguised yet further attempt to appeal against or to undermine the conclusions I reached in the course of the main hearing and expressed as my findings in the August 2015 judgment. The principle and the quantum of the periodical payments order apart, these were not challenged in the rebuffed attempts to launch an appeal nor can they be now. It is not open to H to finesse them nor can he (or I) simply ignore them now. I refer of course, prime amongst the others along the way, to the conclusion that H's presentation was an 'elaborate charade' contrived by H in cahoots with TB: see [170], cited above. H is therefore bound by and cannot go behind the fundamentals of the August 2015 judgment.

32. As Cazalet J observed in *Garner v Garner* [1992] 1 FLR 573 (in a passage cited with approval by Moylan J, as he then was, in *Morris* at [88]):

> 'Almost invariably, an application to vary an earlier periodical payments order will be brought on the basis that there has been some change in the circumstances since the original order was made; otherwise, except in exceptional circumstances, the application will, in effect, be an appeal. If an order is not appealed against, or is made by consent, then the presumption must be that the order was correct when made. If it was correct when made, then there will usually be no justification for varying it unless there has been a change in the circumstances.'

33. The haste with which the variation application was launched, three months after finalisation of the judgment, is remarkable. The only change of circumstance during that interval is the SCo contract entered into the previous day. H would have me treat that as conclusive evidence of the reality of his income-producing capacity and corroboratively supportive of his account of the dire straits in which he says he finds himself.

34. Yet he offers in his evidence no explanation whatsoever of the process whereby that employment contract was negotiated, by whom and over what period, and in particular to what extent TB/NHT played a part in the arrangements for him to

recommence remunerative employment for the benefit of NHT's Car Portfolio-owning company Anthology.

35. The lack of clarity about these contractual arrangements, never mind the modality of their formulation, was compounded by some no doubt inadvertently incorrect information which led Mr Daniel Sokol in his opening notes for the 26 May hearing to assert that SCo 'is owned by LCAL which is in turn owned by NHT.'

36. The incorrect information was first included by H's counsel in a footnote to the opening statement made available to DJ Macgregor on 26 April 2016 which described 'the company that employs H' as being owned by NHT; but where it was also accurately said that 'H will work with the classic car collection owned by a company … that is owned by NHT'.

37. I accept that that first description contained an unfortunate elision: SCo is in fact an English-registered company in private hands which makes its employee H available to perform functions for the NHT-owned company Anthology by which I found the Car Portfolio with H's able assistance to have been bought, owned and maintained, raced and sold.

38. The detail of the nature of the contractual and any other arrangements between SCo and NHT/Anthology has never been volunteered, but readily available Companies House and internet searches reveal that SCo's sole registered shareholder is an individual whose Linked-in profile describes his own experience with SCo as 'contracted with the parent company of an English-registered company [XXX] Racing to provide advice on investment opportunities and sourcing, financing, costing high value asset [sic] such as private aircraft and classic cars.' Anthology is listed in the Annual Return for [XXX] Racing filed in May 2016 as the majority shareholder in that company. The company secretary and one of the two directors of [XXX] Racing is an individual, DM, mentioned in oral evidence during November 2014 hearings as being concerned with the movement of a Ferrari owned by Anthology, and described by H as involved in an administrative capacity with the Car Portfolio and indeed with H's earlier aviation activities. All this just goes to support what I understand H accepts as the fact: that, albeit indirectly and at one or perhaps two removes, he works for Anthology.

39. Given his multiple lamentable earlier lapses in his conduct of this litigation H must have appreciated that scrutiny would be directed, in the context of this variation application, upon any arrangements he might make, direct or indirect, with Anthology and with TB and/or others representing the trust corporation which is NHT's trustee, and that his disclosure in relation to any such arrangements should be squeakily fully frankly and clearly deployed from the outset in his evidence in support. Yet, the confusion apart, silence abounds beyond the simple assertion that 'on 30 November 2015 I entered into a contract of employment' with SCo.

Factors relied upon by H to justify variation

40. If the issue I had to determine were whether (given the terms of my August 2015 judgment) as at the date of institution of his variation application in December 2015 changed circumstances should lead to any change to the periodical payments order the answer would, I suggest self-evidently, be 'no'.

41. If though, as for present purposes I am prepared to accept, the issue falls to be determined as of July 2017, what further changes have there been and what is their effect?

H's income and his personal loan liabilities

42. The €120,000 annual income for which the SCo contract provides nets down after deduction of UK income tax to about €80,000 (about €6,650 per month). H is expected to work only one week in two as the children spend alternate weeks or fortnights with him and with W under the arrangements which presently subsist. His salary would therefore be €240,000 annually (or near enough the £200,000 a year I had postulated as his potential worth in terms of basic salary at [178] of the August 2015 judgment). It is a term of the employment contract that he shall not receive any further remuneration including any commission or bonus payment.

43. H's job designation is Representation and Sponsorship Manager. The duties and objectives of his task are contained in a Schedule to the agreement and would seem indistinguishable from the duties and objectives he performed direct for Anthology before (and to a largely undiminished extent after) the fall from grace he describes as his 'day of reckoning', save that he performs at at least one remove from Anthology. Nevertheless his promotion of specialist car business, the negotiation of potential terms of Collector and Classic cars and so on are for the benefit of clients of SCo (namely Anthology) rather than for Anthology direct.

44. H continues to live at Château T. His salary from his employment is drained to an immediate deficit by his commitments to his staff there and (when he honours them) to his wife and the children and in respect of their rent. These commitments total €8,800 per month and thus would leave him with an immediate shortfall of over €2,000 per month, without paying any of the balance of the £10,000 per month for which my order sought to make provision.

45. H has therefore lived from hand to mouth, reliant upon loans from what he says is a now dwindling list of prospective supporters. Such too was his situation before I made the order. By October 2015, the month before he started work for SCo, his personal loans totalled €154,000. That was quite apart from the $7 million claimed against him by TB and NHT to recoup what was said to be the Trust's loss on the abrupt termination of the EFG financing arrangements, a claim which the Trust has seemed intent to pursue against every last item of his personal worth. Those personal loans also do not reflect the hundreds of thousands of pounds which he owes in legal fees here and abroad to his own advisers and to W.

46. By February 2017 however his personal loans had gone up from €154,000 to €433,000, an increase of €280,000 over 16 months, on average €17,500 per month.

47. H's response has been to reduce his monthly outgoings to €16,300 (including child maintenance and rental payments when fully honoured) from the level a year previously of €18,100 per month. On the face of it, therefore, H's average rate of monthly borrowings roughly equates with his outgoings in those months when he fully complies with those obligations.

48. H's suggested solution to this impasse is that he should pay W no periodical payments for herself whatsoever (a nominal order apart) and that she and the children should move to accommodation costing between €800 and €1,200 rather than €2,200 per month to rent.

49. I am however not persuaded any more than I was in 2015 that H faces the current and seemingly continuing dilemma he depicts. I have read nothing in H's written evidence nor heard anything in the submissions made on his behalf to dissuade me from the unchallenged and now unchallengeable conclusions regarding his bad faith at which I arrived in August 2015. I refer again to [170], [172], [177] and [178] of the August 2015 judgment, all already replicated herein. In particular I am not persuaded by any of this evidence or those submissions that some epiphany has overtaken H so that he should now be trusted as a man whose evidence and overall presentation can be accepted as gospel.

50. I have already referred to the total lack of his transparency in relation to the genesis of the SCo arrangements. Quite how or when H might hope to repay all or any of the €433,000 in personal loans he has received between July 2013 and February 2017 is not just problematic but inconceivable on his case unless his fortunes change dramatically for the better. That will predictably remain the dilemma unless at some stage funds flow in his direction from his connection with Anthology or some other NHT-related enterprise.

51. I therefore see no reason to dissent from the prognosis at which I arrived in [170] and [172] of the August 2015 judgment. I remain of the view that H's apparent difficulties will be resolved at some point (including resolution of the $7 million debt TB claims he owes NHT and as to which I made some trenchant findings at [45], [48], [49], [73 to 83] and [143 to 148]). I am unpersuaded by the considerations that his SCo income is less than I found to be his faculty; that on the face of it bonuses will not come his way directly from that employment; that his overall indebtedness has increased by leaps and bounds; and that he has suffered hardships amongst which have been the interruption of the electricity supply to Château T and the limitations imposed on the use of his French bank account and credit card.

The decision of the Court of Appeal of the Eastern Caribbean Supreme Court

52. Mr Pointer suggests (as was suggested in the appeal documentation which was before King LJ in December 2015) that the rationale of my August 2015 decision is affected by the success scored by the NHT trustees in their appeal launched against the decision of Bannister J (Ag.) sitting in the Commercial Court of the British Virgin Islands whereby he had declined to sanction the execution of a deed by the NHT trustees which purported to exclude H permanently and irrevocably from any benefit under that Trust, of which he was the settlor. The first instance decision refusing to sanction the proposal was reached in October 2013. But the Trustees went ahead and executed an equivalent power of appointment (or should that be disappointment) three weeks later, no doubt comforted by Bannister J's closing observation that 'If the Trustee considers that the reasoning in this judgment is fallacious, there is nothing to prevent it from executing a deed in the form of the draft and arguing for its effectiveness as against any party concerned to attack it. If it succeeds, no harm will have been done by this Court's refusal of sanction.'

53. The appeal was heard on 2 May 2014 but the judgment allowing the appeal only became available 18 months later, on 26 October 2015, and thus after the August 2015 judgment and order.

54. It was H's case in the 2014 and 2015 proceedings before me that the November 2013 deed was valid and effective irrevocably and for ever to preclude H from being readmitted to any prospect of benefit from NHT. I explained at the time why it made no difference to my reasoning and the terms of my judgment and order - whether that stance was correct or not. There is therefore no merit whatsoever in the submission now made that the Court of Appeal judgment materially affected or affects my judgment and order. I need do no more than refer again to the relevant passages at [170 to 172] of that judgment. From these it is crystal clear that my conclusion was in no way dependent on the question whether or not the deed might be satisfactorily challenged in the BVI court or (as has transpired) retrospectively sanctioned by the Eastern Caribbean Court of Appeal.

55. I am fortified in this in any event emphatic opinion by the fact that King LJ made precisely that point in her 9 December 2015 written reasons for refusing H permission to appeal. She referred to the same paragraphs of the judgment and observed that 'the judgment of the Eastern Caribbean Supreme Court does not affect the prospects of successfully appealing the order for periodical payments, the judge having said in terms that those "issues did not affect my conclusions about the underlying realities of H's case".'

W's circumstances

56. H points out that W has not, despite his requests, supplied any form of budget to demonstrate her needs or reasonable requirements. True it is that she has not. Such budgets are conventionally but not universally compiled and usually if not universally subjected to painstaking analysis and often cheese-paring but sometimes substantially justified complaint. They are often wildly aspirational and sometimes woefully defective and inadequate. But I am not aware of any rule that makes a budget a prerequisite to an order. A broader brush can sometimes do at least as satisfactory a job in painting in the target for a fair balance between the financial needs of both parties in the light, amongst other factors, of available resources and the standard of living enjoyed by the parties before their marriage broke down.

57. It was indeed a broad brush which I applied, expressly, in [179] of the judgment. H seeks to argue that £10,000 per month is more than W needs. It was however the periodical payments level at which I held she should be maintained (on the basis that it comprehended the French child maintenance order and the rent on her and the children's home with her). This was the global amount which I determined was 'a figure which it would be very reasonable for H to pay'. H's attempts to reduce that figure on appeal failed, notwithstanding his case then as now that he had and has not the means to meet that liability. But for the reasons previously given and in the exceptional circumstances of this case that is not a consideration which swayed me then (see [177]) nor does it now.

58. H raises the separate point that W should use her own earning capacity during the two weeks each month the children in present circumstances are in his care. He

maintains that she could readily obtain employment for instance as an English teacher or an English-speaking tourist guide. He does not suggest what might be her earnings from such employment. I do not know how practicable the suggestion is but I doubt that anything she might earn from such sources would be significant enough for it to be reflected in any than the most modest reduction in his overall maintenance obligation.

59. There is one striking feature to which in fact no reference was made on 3 July. The periodical payments order is framed in sterling, but is to be paid to W's French bank account. The living expenditure she has to meet costs euros.

60. Since August 2015 the euro has strengthened significantly against sterling. Thus the monthly spot rate in August 2015 was €1.37 to the pound so that £120,000 would by that measure then produce €164,000 over a year. H would be entitled to an annual credit of €69,600 in relation to child maintenance and rent. That would leave W over the year with €94,800 (or €7,900 monthly) available to spend in addition to the child maintenance.

61. By April 2017 the monthly spot rate had dropped to €1.19 to the pound. £120,000 would over a year produce €142,800 and leave W with €73,200 (€6,100 per month) from this source. That is an approximately 20% reduction over 21 months. As I write this the spot rate hovers around €1.1 to the pound. Applying the same calculation, this would leave W with €62,400 over a year, or two thirds the August 2015 level of maintenance for herself.

62. The impact on H's net salary of this currency profile is neutral as he is paid in euros, save to the extent that the increasing sterling equivalent of his salary presumably gives rise to a larger deduction of tax at source.

Whether H has abided by the pre-conditions for the stay on the periodical payments order imposed in April 2016

63. I do not propose to delve into the detail of this issue. It is not necessary for present purposes to decide whether H's improbable stance, if pursued, makes good. This is perhaps a question which may need resolving in the context of W's enforcement application, if that is pursued.

64. But the fact is that H has not, since the next month after the stay was ordered, complied with the requirement that he would, as he agreed he would, meet the current rental payments on the property occupied by W and (while they spent time with her) the children and pay her the €3,600 per month child maintenance obligation imposed by the French court. The stay was expressly conditional upon them paying the children's maintenance and the current rent (unchanged throughout the period in question at €2,200 per month) 'in full as it falls due'.

65. H is not in dispute with W over her account of his short and non-payments since May 2016, but does not agree that he has breached these conditions. The validity of his reasons for maintaining the position that the stay has been effective since April 2016 does not, I must say, shine out for me, as presently advised. But (as is clear from paragraph 8 of the April 2016 order) the stay in any event ceases upon the final determination of this variation application.

Whether the SCo employment contract is a sham

66. Here H tilts at a windmill not in fact set turning by W, who as I understand it has not asserted that the 30 November 2015 document should be categorised as a sham contract any more (in the legal sense of the phrase) than had W's advisers at the main hearing run an argument that NHT was a sham trust. I hope I dealt clearly with the question at [214 and 215] of the 2015 judgment. In my judgment it is unnecessary for the purpose of these proceedings at this stage to embark upon an enquiry whether SCo and its owner and operatives were engaged in some collusive arrangement with TB and/or H. If I assume for this purpose that no whiff of SCo's involvement would be established, that does not detract from nor affect the likely continuing existence of the 'sham' I did then find had been built up by those two: 'that the case collusively advanced by H and TB was a rotten edifice founded on concealment and misrepresentation and therefore a sham, a charade, bogus, spurious and contrived. I do not shrink from applying to it the description fraud, a deliberate design to deceive, inflicted on W and on the court, and found by the court so to be.'

67. Not only was a finding of 'sham contract' not sought by W at this point, it is not necessary to support W's opposition to any variation, nor to my reasons for deciding to dismiss the application.

68. In their written submissions H's advisers suggest that there is no evidence that the contract is other than genuine, and that it sets a reasonable level of remuneration for a man of H's age (he is now 59) and in his position.

69. At the risk of repetition, this ignores the thrust of my unchallenged findings implicating H and TB in a dishonest attempt to contrive a situation in which they hoped to defeat W's claims. Nor does the existence of this contract detract from my conclusion that there will be a second day of reckoning sometime, somewhere, somehow whereby H's allegedly disastrously deflated fortunes will be repaired and he will, in particular, be relieved of what I found to be the artificially contrived obligation to pay $7 million or thereabouts to NHT.

70. At some stage, and one hopes it may be sooner rather than later, it must make commercial and pragmatic sense for W to offer to accept a much more modest sum than she tilted at in the main hearing, and for H and for TB to find a means to make that available and thereafter to be free to dismantle the cumbersome and no doubt the distracting protective façade which has been erected.

71. One might also reasonably anticipate that H (and why not also W: a matter for the trustees) may shortly find the burden of meeting monthly expenditure to some extent alleviated. The period revocably fixed when the family moved to France in 2010 for the children (and their father, the settlor) to abstain from benefit from NHT runs out this September (see [29] and [51] of the 2015 judgment. The trustees have asserted that the welfare of the children (currently, so far as one knows, the only potential beneficiaries of this multi-million pound trust) is their prime concern, and so it would be entirely normal and natural for the trustees to permit the children's parents to receive some allowance or contribution to assist with their subsistence (including their accommodation costs and overheads): and that notwithstanding that H is no longer a permissible recipient of such bounty from NHT in his own right. Indeed it

might be difficult for them to justify withholding such benefits from the children if they credit H's presentation of his apparently irremediable plight. A matter, again, for the trustees.

My abbreviated treatment of the variation application

72. Although H's advisers pay lip service, as they must, to the proposition that H cannot continue to seek to go behind the damning findings I made about him in August 2015, H himself does not seem to recognise their impact on the court's approach to this application.

73. H does show a propensity to close his eyes to the consequences of his actions, and sometimes of his evidence, and to remain deaf to adverse findings by the court. A striking example is the remarkable volte face he performed in his evidence in 2014 to explain why he had not been lying (as in April 2013 he had admitted he had been) about when he had last met the witness AC: see [156 to 159] of the August 2015 judgment.

74. I refer to that in the section of the judgment dealing with costs and what I categorised as H's 'blatant dishonesty'. The passage in question deserves explicit incorporation into this judgment:

> 208 It did seem to me, as I listened to many of the submissions as to costs made on his behalf that this message, and the inferences and conclusions that might be drawn from it as to H's conduct of these proceedings, were being ignored or brushed aside. His counsel, for instance, in written submissions made what looks on the face of it this generous concession:
> "Naturally, we accept the findings made by the court that in a number of respects H's evidence was unsatisfactory. (We accepted in closing that H was a poor witness, at least in the sense of not properly addressing the questions that were put to him, in a way that is frustrating for judge and advocate alike.) But the critical question is as to his actual carriage of the proceedings. Thus:
> (a) It cannot be said that H has been guilty of a failure to disclose assets.
> (b) H has been vindicated in his case as to his ability to have access to the funds within the trust. That was always true up to 2017; and became true because of his permanent exclusion from the trust in the course of the case.
> (c) It has not been demonstrated nor found that H failed to disclose documentation that was available to him. Of course it was the case that the trustees were reluctant to provide documentation to H (as they said, pursuant to the judgment of Bannister J) or to the court. However, when they were produced by the trustees to H, he made them available promptly."
> 209 It would be tedious were I to give even half an explanation why those three suggested virtues are not, in my view, even half-truths rather than the whole truth and nothing but. Who would think that my underlying conclusion was that there was throughout this case corrosive collusion between H and TB to distort the reality of the relationship between H and the millions in the Car Portfolio and elsewhere within NHT, and that that conclusion could be dissipated by such bland assertions. One would think that H had throughout been meticulously compliant with the fundamental obligation to give full, frank and clear exposition of his financial situation: whereas the reality as I have found it to be is that from the very outset he has deliberately set about obscuring the true situation as to past, present and future.
> 210 H's blatant dishonesty in relation to these proceedings cannot so easily be finessed away. The brazen declaration in 2015 (for the first time) that not only had the witness AC been confused and mistaken in April 2013 as to when they had last met before that

moment, but that he too had been so confused and mistaken as to admit that AC's evidence was correct and thus that he had lied, was breathtaking.

75. The continuing impact of those findings is a significant factor in the approach I have taken to the management and resolution of the variation application.

A magnetic factor

76. This helpful and instructive concept was, so far as I can ascertain, first introduced by Thorpe LJ in the landmark case of *White v White* [1999] Fam 304 as it passed through the Court of Appeal en route to the House of Lords. Referring to the factors to which the court (as directed by Matrimonial Causes Act 1973, section 25) is to have regard in exercising its powers to make ancillary relief orders, he observed (at page 314):

> Although there is no ranking of the criteria to be found in the statute, there is as it were a magnetism that draws the individual case to attach to one, two, or several factors as having decisive influence on its determination. The proposition is almost too obvious to require examples from the decided cases.

77. Thorpe LJ developed the notion further in *Crossley v Crossley* [2007] EWCA Civ 1491, [2008] 1 FLR 1467 when making the following observations in a case which concerned the weight in the section 25 scales to be accorded to a prenuptial agreement:

> 14 … Mr Turner *[leading counsel for the husband]* accepts that the court must conduct the section 25 exercise by reference to all the statutory criteria. He accepts that the existence of the agreement cannot oust the court's obligation to apply section 25. He accepts that a prenuptial agreement is one aspect of the case. However, he emphasises that this is a childless marriage of very short duration, for a substantial portion of which the parties were living apart. The marriage was between mature adults, both of whom had been previously married and divorced; both parties have and had prior to the marriage very substantial independent wealth. The prenuptial agreement provides for the retention by each of the parties of their separate properties and division of joint property if any, and finally that there is no such joint property. Upon those facts Mr Turner, correctly in my view, adds that the combination of these factors gives rise to a very strong case that a possible result of the section 25 exercise will be that the wife receives no further financial award.
>
> 15 All these cases are fact dependent and this is a quite exceptional case on its facts, but if ever there is to be a paradigm case in which the court will look to the prenuptial agreement as not simply one of the peripheral factors in the case but as a factor of magnetic importance, it seems to me that this is just such a case. As to the second and third grounds that the judge was bound by the provisions of Rule 2.61*[Explanatory note: in this context the reference is to Rule 2.61B of the Matrimonial Causes Rules 1991 as amended, and in particular the requirement for the exchange of Forms E prior to the First Appointment]*, I am quite unpersuaded, as was the judge, that these individual rules were intended to be some sort of straitjacket precluding sensible case management. I would particularly stress the overriding objectives that govern all these rules, carefully and fully drafted in Rule 2.51D *[the formulation of the Overriding Objective then prevailing]*. It is easy to attach this case on its facts to a number of the objectives there articulated. It is very important that the judge in dealing with the case should seek to save expense. It is very important that he should seek to deal with the case in ways proportionate to the financial position of the parties. It is very important, more so today than it was when these rules were drafted, that he should allot to each case an appropriate share of the court's resources, taking into account the need to allot resources to other cases. In his general duty of case management he is required to identify the issues at an early date and

particularly to regulate the extent of the disclosure of documents and expert evidence so that they are proportionate to the issues in question.

78. After referring to these earlier manifestations Sir James Munby P connected the concept with pre-nuptial agreements, and with agreements entered into by parties to be bound by the decision of an arbitrator, in *S v S (Arbitral Award: Approval)* [2014] EWHC 7 (Fam), 2014] WLR 2299, [2014] 1 FLR 1257 thus at [11]:

> 11. … We see this approach, though not the label, carried forward in the fundamentally important statement of principle by the Supreme Court in *Radmacher (formerly Granatino) v Granatino* [2010] UKSC 42, [2011] 1 AC 534, para 75:
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> "The court should give effect to a nuptial agreement that is freely entered into by each party with a full appreciation of its implications unless in the circumstances prevailing it would not be fair to hold the parties to their agreement."

79. The President continued at [18]:

> 18 The starting point in every case, as it seems to me, is that identified in characteristically arresting language by Sir Peter Singer in '*Arbitration in Family Financial Proceedings: the IFLA Scheme: Part 2'* [2012] Fam Law 1496, 1503:
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> "I suggest that the 'magnetic factor' perspective provides an appropriate analogy, and illuminates how applications (whether or not by consent) for orders to reflect an IFLA award should be viewed by the court: through the wrong end of a telescope rather than through a wide-angle lens. Such an approach respects the court's jurisdiction, but gives full force and effect to party autonomy by treating the parties' agreement to be bound by the award as the magnetic factor which should lead to a reflective order. Thus an arbitral award founded on the parties' clear agreement in their Form ARB1 to be bound by the award should be treated as a lodestone (more then than just a yardstick) pointing the path to court approval".
>
> 19 While respectfully questioning whether it can ever be appropriate for a judge to look through the *wrong* end of a telescope, I agree with that approach. Where the parties have bound themselves, as by signing a Form ARB1, to accept an arbitral award of the kind provided for by the IFLA Scheme, this generates, as it seems to me, a single magnetic factor of determinative importance. As Sir Peter Singer said ([2012] Fam Law 1496, 1503):
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> "The autonomous decision of the parties to submit to arbitration should be seen as a 'magnetic factor' akin to the pre-nuptial agreement in *Crossley v Crossley*".
>
> I agree. This, after all, reflects the approach spelt out by the Supreme Court in *Radmacher* in the passages I have already quoted. In the absence of some very compelling countervailing factor(s), the arbitral award should be determinative of the order the court makes. …

80. Precisely the same principles and precepts must apply with equal force to a variation as to an original application for a financial remedy, given the requirement parallel to MCA 1973 section 25(2) replicated in section 31(7) that 'the court shall have regard to all the circumstances of the case … and the circumstances of the case shall include any change in any of the matters to which the court was required to have regard when making the order to which the application relates…'

81. This approach seems to me to be entirely in line, in a case which demonstrates one or more 'magnetic factors', with the way in which a court can and should exercise case management powers for all the solid reasons enunciated by Thorpe LJ in [15] of *Crossley* cited above.

82. This thread has been expressly carried forward in the two Supreme Court and Court of Appeal decisions I referred to at [30] above, and to which I finally turn.

83. In *Wyatt v Vince* [2015] UKSC 14, [2015] 1 WLR 1228, [2015] 1 FLR 972 the Supreme Court overruled the Court of Appeal decision to strike out a former wife's claim for financial orders launched just short of 20 years after the parties' decree absolute dissolved their two-year marriage. When considering the future progress of her resuscitated claim Lord Wilson JSC (with whom the other Justices agreed) made observations pertinent to the present situation. At [29] he pointed the way, signposting the court's duty under the family rules actively to manage cases. The paragraph reads:

> 29. Although, however, the wife's appeal against the strike-out should succeed and her application should proceed, it is essential at this stage to conduct a provisional evaluation of the issues. For, by Rule 1.4(1) of the family rules, the court must further the overriding objective by actively managing cases, which, by Rule 1.4(2)(b)(i) and (c), includes promptly identifying the issues, isolating those which need full investigation and tailoring future procedure accordingly. This exercise will dictate the nature, and in particular the length, of the substantive hearing. No doubt the High Court judge who, in the present case, directed, even prior to the filing of evidence on either side, that the wife's application should be fixed to be heard for three days was seeking to help the parties to procure an early fixture. But, by so doing, he was not discharging his duty under Rule 1.4. Family courts have developed specific procedures for the determination of certain types of financial application. The obvious example is the determination of an application on a summons to a respondent to show cause why the order should not be in the terms with which, prior to an attempt to resile from them, she or he had agreed either following the separation (*Dean v Dean* [1978] Fam 161) or prior to the marriage (*Crossley v Crossley* [2007] EWCA Civ 1491, [2008] 1 FLR 1467). In both cases, however, the court stressed that the show-cause procedure did not obviate the need for the court to discharge its duty under section 25 of the 1973 Act, powerful though the effect of the agreement would, within that exercise, probably prove to be. Indeed Sir James Munby, President of the Family Division, has recently directed that a spouse attempting to reject an award made following her or his submission to arbitration by a member of the Institute of Family Law Arbitrators should also be subject to the show-cause procedure: *S v S (Arbitral Award: Approval)* [2014] EWHC 7 (Fam), [2014] 1 WLR 2299. I do not suggest that the wife's application is suited to the show-cause procedure but, in the light of the analysis of the issues to which I now turn, it may well be suited to tight directions pursuant to Rule 1.4.

84. After analysing a series of case-specific considerations which arose, drawing one way or the other upon the history of this family Lord Wilson endorsed the 'magnetic factor' approach in appropriate circumstances, and concluded with these observations at [36]:

> 36. In my view this court should direct the swift referral of the wife's application to a Financial Dispute Resolution ("FDR") appointment before a judge of the Family Division, who, in the absence of settlement, will indorse or impose the time estimate of the substantive hearing and, in accordance with Rule 9.17(9)(b) of the family rules, will direct the fixing of dates for it. Subsequently, at the Pre-Trial Review, the allocated trial judge will decide "which issues need full investigation and hearing" for the purposes of Rule 1.4(2)(c)(i) and, in the light of his decision, will insert the time for cross-examination of each party (to be measured, surely, in hours rather than days) into the template prepared in accordance with the Statement on the Efficient Conduct of

> Financial Remedy Final Hearings issued, in relation to the High Court, by Mostyn J, with the authority of the President, on 5 June 2014. It may however be helpful to suggest that the major issues requiring limited investigation by way of oral evidence seem at this stage to be the wife's delay on the one hand and the disparate contributions to the care of the children on the other. These are, to my mind, the two magnetic factors. They pull in opposite directions and the question may ultimately prove to be whether, in the light also of the five difficulties identified in para 30 above, the wife's delay is so potent a factor as not just to reduce but even to eliminate what might otherwise have been awarded to her by reference to contributions and possibly also to needs. …

85. A final hearing was averted when the parties reached a negotiated settlement after a failed Financial Dispute Resolution Appointment but before what would have been the final hearing.

86. In *Morris v Morris* [2016] EWCA Civ 812, [2017] 1 WLR 554 the context was a husband's appeal against what he regarded was too modest a downward variation in a periodical payments order. The original order had been made in August 2014 at the conclusion of 'bitterly contested' proceedings, and he commenced his variation application just eight months later in February 2015. The court was faced with an argument on behalf of the husband that the first instance Judge had not complied with the section 25 / section 31 factor-evaluation required of him, but had isolated one alone and used it as the entire basis for the decision appealed against. Whereas, it was argued, established authority dating back to the 1980s and 1990s required the court on a variation application to consider the case 'de novo', and again to carry out the entire evaluation process. Moylan J (as he then was) gave the leading judgment with which Black LJ (as she then was) and Floyd LJ both concurred, and on this issue concluded at [87]:

> 87 On a variation application is the court required to consider the matter de novo? In my view, the simple answer is that it is not. The court must conduct an exercise which is proportionate to the requirements of the case. They might warrant a complete review but they can also justify, what Mr Duckworth *[counsel for the husband]* refers to as, a light touch review. In this respect, Mr Duckworth was right to acknowledge that the court can confine its consideration to factors relevant to the variation application.

87. The judge then analysed the authorities counsel had relied upon and concluded that they did not support the proposition that all the relevant factors must be subjected to evaluation afresh on every variation application. He continued:

> 90 Further, although not referred to during the course of the hearing, the overriding objective requires the court to deal with cases proportionately. Thus, although section 31(7) requires the court to have "regard to all the circumstances of the case", this is not the same as requiring the court to undertake the section 25 exercise de novo. It is instructive to see what the Supreme Court said recently in respect of case management in a financial remedy claim. In *Wyatt v Vince (Nos 1 and 2)* [2015] 1 WLR 1228 Lord Wilson JSC (with whom the rest of the court agreed) said (para 29):
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> > "… by rule 1.4(1) of the family rules, the court must further the overriding objective by actively managing cases, which, by rule 1.4(2)(b)(i)(c), includes promptly identifying the issues, isolating those which need full investigation and tailoring procedure accordingly. This exercise will dictate the nature, and in particular, the length of the substantive hearing."

> 91 In *Sharland v Sharland* [2015] 3 WLR 10170, Lady Hale (with whom the other six Supreme Court Justices agreed) said, at para 43:
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> > "This court recently emphasised in *Wyatt v Vince (Nos 1 and 2)* [2015] 1 WLR 1228 the need for active case management of financial remedy proceedings, "which … includes promptly identifying the issues, isolating those which need full investigation and tailoring future procedure accordingly": para 29. In other words, there is enormous flexibility to enable the procedure to fit the case. This applies just as much to cases of this sort as it does to any other".
>
> 92 The court has "enormous flexibility" to determine the "nature" of the substantive hearing. This includes, as Mr Duckworth accepts, focusing on the relevant factors and in my view also, where appropriate, conducting a light touch review. Specifically, to *require* the court to undertake the exercise de novo would be contrary to the overriding objective and the obligation for a case to be dealt with proportionately.

88. The draft of the proposed directions sought by H on 26 May sought absolutely nothing specifically in relation to the variation application. In oral submissions at that hearing, however, he maintained that H is entitled and should be allowed to develop his case and thus no doubt, as is conventional in most cases, to file further evidence, to expand and be cross-examined upon it in oral evidence, and en route to go up the procedural steps which normally lead up that path.

89. However, the proposed directions presented for W invited me to list the variation application for a 2-day final hearing on 3 and 4 July and meanwhile to impose a compressed timetable for questionnaires and responses on both sides (with provision if need be for consequential asserted deficiencies to be formulated and answered); each party to serve narrative statements in response to the evidence last filed by the other; and for SCo to be joined and to respond to a questionnaire filed on behalf of W – and all this within the 5 intervening weeks. The programme did not provide for nor, it would seem, envisage any judicial control nor scope for objection in advance to be taken about the appropriateness and range, the relevance and proportionality, of the questionnaires. The timetable was in my view impracticably tight and the endeavours on both sides would no doubt have produced bundles of documentation but little if any illumination. Quite who was to underwrite the costs which SCo might incur, or how, was a question left unaddressed. Quite how such issues as emerged from the exercise could within 2 days have been ventilated and decided and the variation application concluded was not explained. This seemed to be impossibly unlikely: this aspect of the parties' disputes would linger on into the next legal and quite likely into the next calendar year. I declined therefore to set the battlewagons rolling down these tracks.

90. Each party plainly envisaged something in the nature of a State Trial. I took a different view. However much, if at all, I were to decrease H's spousal maintenance obligation at this juncture there is unlikely to be any perceptible effect upon the circumstances of either party. Whoever were to succeed in such a full-blown conquest would sustain the disadvantages of a Pyrrhic victory: an extra significant number of tens of thousands of pounds in currently irrecoverable costs. In no way, in the very particular circumstances

which I have found exist here, would such a process be justifiable in terms of proportionality, expense and the use of court and judicial time.

91. Accordingly I dismiss H's variation application. That leaves outstanding any costs applications, and any application H may canvass for permission to appeal. As to the latter I extend the time for appeal to 2 October 2017 which has regard to the restricted availability during the current vacation of H's advisers. I will deal with any permission application on paper meanwhile.