Neutral Citation Number: [2023] EWFC 141

Case No: FD15F00053

IN THE FAMILY COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/08/2023

Before :

THE HONOURABLE MR JUSTICE COBB

- -

Between :

CATHERINE DE RENÈE **Applicant**

- and –

JASON GALBRAITH-MARTEN **Respondent**

Both parties were unrepresented
Judgment delivered on the basis of written arguments

- -

Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HONOURABLE MR JUSTICE COBB

This judgment was delivered in public.

The Honourable Mr Justice Cobb :

Introduction

1. This is an application by Jason Galbraith-Marten ("the father"), dated 23 June 2023, for an order varying or setting aside in part the terms of a consent order made on 21 December 2022 ("the December 2022 order") in relation to the periodical payments provision for his daughter (A). The order was made within proceedings brought by Catherine De Renée ("the mother") under Schedule 1 of the Children Act 1989 ('CA 1989').

2. The periodical payments provision in the December 2022 order was itself a variation of an order made in June 2018 by District Judge Aitken. Under the earlier order, the father had been required to pay the sum of £1,350 per month. The December 2022 order set the amount of maintenance for the parties child (A) at £2,684 per month (see para.[5]) and thereafter the maintenance would be calculated as follows:

> "[4] Following disclosure by the Respondent of his tax return[1]:
>
> (i) subject to (ii) below, the amount of child maintenance payable will be varied automatically to the figure that is calculated by applying the formula in Part 1 of Schedule 1 to the Child Support Act 1991 to the respondent's gross annual income disclosed in the tax return;
>
> (ii) but the formula will apply to gross annual income from all sources up to £650,000 (in substitution for the figure of £156,000 as provided for in para 10(3) of the said Schedule); and
>
> (iii) the varied figure will take effect from on 6 April of the year immediately following the tax year to which the return relates (so that, for example, the varied figure calculated by reference to the gross income disclosed in the return filed for the tax year 2022-23 will take effect on 6 April 2023)

3. The December 2022 order was the result of *inter partes* negotiations following a hearing before Mostyn J. on 4 October 2022 at which the mother, who was and is the subject of an Extended Civil Restraint Order ('ECRO'), had been given permission to issue a new Schedule 1 application. The father's case in summary is that he agreed the formula for maintenance set out at para.[4] of the order (see §2 above) because this had been expressly promoted by Mostyn J as the proper approach to the computation of maintenance above the Child Maintenance Service ('CMS') level at that earlier hearing, and repeated in his judgment: [2022] EWFC 118 at [44] (see §9 below). It is apparent, from the documents which I have seen, that in the period immediately prior to the making of the consent order, the father was conducting his own litigation, albeit that he had had advice from a direct access barrister.

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1 The father agreed to send to the mother, as soon as it becomes available to him, for each tax year commencing with the 2022/23 tax year and continuing until A's eighteenth birthday, a copy of his submitted tax return showing his income from all sources.

4. On 19 April 2023, Mostyn J delivered a judgment in the case of *James v Seymour* [2023] EWHC 844 (Fam) 675. In this judgment he promoted a different methodology for the computation of child maintenance above the CMS level (see §28-30 below).

5. By this application, brought under Part 18 FPR 2010, the father seeks variation of the periodical payments provision agreed and enshrined in the December 2022 order, to align with the calculation in *James v Seymour*.

6. Given the arguments raised by the father, Mostyn J recused himself from dealing with the father's application, but gave directions (subject to further or other directions of the judge determining the issue):

   i) Dispensing with the need for a Form A;

   ii) That the parties should file submissions on the issue in writing;

   and

   iii) Confirmed that the father's application would be determined on the papers without a hearing.

   The matter was allocated to me on 24 July 2023. Having considered the documents, I gave a further direction permitting one further exchange of position statements earlier this month. Both parties complied. The mother has sent additional e-mails to my clerk, containing further points, which – notwithstanding the absence of leave to adduce further information in this way, and/or lack of formality – I have nonetheless read.

7. This judgment should be read alongside Mostyn J's earlier judgment reported at [2022] EWFC 118, following the 4 October 2022 hearing. In that judgment he referenced my judgment in linked proceedings between these same parties: *MG v FG (Schedule 1: Application to Strike out: Estoppel: Legal Costs Funding)* [2016] EWHC 1964 (Fam)).

The father's case

8. The father recognises that, when granting the mother limited permission (given the effect of the ECRO) to pursue an application under Schedule 1 CA 1989, Mostyn J was particularly influenced by the fact that the level of general maintenance for A appeared to be too low (see [2022] EWFC 118 at [45]).

9. According to the father, Mostyn J had confirmed to both parties at the hearing on 4 October 2022 that the appropriate "guideline" for the calculation of child maintenance payments above the CMS level was the statutory CMS formula up to a gross annual income of £650,000; the father rightly understood that this reflected the law as it then stood: see for example *GW v RW* [2003] EWHC 611 (Fam), *Re TW & TM (Minors)* [2015] EWHC 3054 (Fam) at [9][2], and *CB v KB* [2019] EWFC 78 ('*CB v KB*'). Mostyn J confirmed this view in his written judgment delivered a few days later [2022] EWFC 118 at [44]:

2 "My decision in *GW v RW* makes it clear that where a court is considering issues of child maintenance the formula is not, so to speak, written in marble but supplies only a starting point."

> "When the parties divorced the assets were divided so that the mother received about 40% of their value. The father has been regularly paying maintenance as ordered. However, the mother argues that the present rate of general maintenance of £1,315 per month is too low. She relies on my own decision in *CB v KB* [2019] EWFC 78 at [49] where I stated that when the CMS exigible taxable income ceiling of £156,000 is surpassed, then, as a guideline, the statutory formula should be applied to the surplus up to £650,000. I remain of the view that it is a useful guideline for most cases". (Emphasis by underlining added).

10. The father claims that in light of these clear indications as to the 'guideline', he consented to the terms of the December 2022 Order, and in particular to the specific method for the computation of child maintenance to be varied automatically each year to the figure calculated by applying the CMS formula to his gross annual income up to £650,000 (as disclosed in his tax return for the previous tax year).

11. The father's case, simply put, is that it would now be unfair for him to be held to the formula which the judge had earlier explicitly proposed as the correct guideline, when the judge himself now recognises the inequity (or potential inequity in many cases including this one) in the outcome when this formula is applied. The father points to paragraphs [36] to [39] of the judgment in *James v Seymour* (reproduced in part at §30 below); he draws my specific attention to the Appendix to the judgment, wherein Mostyn J acknowledges that the figures generated by the *CB v KB* methodology can produce "plainly excessive" figures, which are "not reasonably proportionate" in the calculation for a single child compared with a child in a sibling duo or trio.

12. The father states that he is four-square in the 'anomalous' position described by Mostyn J. in the *James v Seymour* judgment. His most recent tax return shows a gross annual income of £640,187. Applying the CMS formula to all sums up to £650,000 produces a figure of c.£60,000 in child maintenance.

13. The father therefore invites the court to substitute a figure which reflects the *James v Seymour* computation for the periodical payments provision, adopting the Adjusted Formula Methodology (or 'AFM') set out in the Appendix to that judgment which gives what Mostyn J has described as a Child Support Starting Point ('CSSP').

The mother's case

14. The mother does not take issue with the underlying facts outlined above. However, she asserts that *James v Seymour* is "an unrelated case of very little financial semblance to our own". She adds:

> "… in *James v Seymour* the material dynamics between the husband and wife involved are markedly different to those of this case. In the other case, the wife has remarried and enjoys with her children the marital and material security of a subsequent husband. Unlike me, she also had the costs of her housing security baked into her settlements as additional settlement components from the husband.... in *James v*

> *Seymour* the first husband pays a separate private school fees sum to the mother - meaning this is also not taken from her own monthly cash flow either. The husband in this case does not pay a school fee sum to me, so I cover £25k + per year in school fees out of the hand to mouth monthly cash flow that [A] and I subsist on. Furthermore, the husband in *James v Seymour* is on a significantly lower level of income / remuneration than the husband in our case."

15. In the Schedule 1 proceedings which culminated in the December 2022 consent order, the mother had sought an increase in the periodical payments for A from £1,350 to £4,350 per month backdated to April 2020, giving rise to arrears of £88,000. By agreeing the figure of £2,684, she points out that she was making a significant concession from her original aspirations, and did so because she was under "great financial pressure". She claims that the father consented to the order in December 2022 in order to avoid the forensic scrutiny of his financial affairs at a contested hearing, which was then imminent.

16. In her submissions to me the mother helpfully indicates that she favoured the "longer-term benefit" of the imposition of a "calculative formula" which would secure the level of maintenance for the balance of A's minority.

17. She nonetheless has argued that the father had not been candid in relation to his financial disclosure, that his dividend drawings had been suppressed, and that he had "broader corporate shareholding solvency". She alleges that the father has been guilty of deliberate concealment of his assets, and asks "the court to apply comprehensive scrutiny to the accounting / tax and financial practises employed by the husband", which suggests (although given the litigation history of the mother, I am extremely wary of this) that she welcomes the opportunity for a review of the parties' finances.

Varying or setting aside an order in the Family Court

18. The Family Court has power to "vary, suspend, rescind or revive" a final order, using its powers under section 31F(6) of the Matrimonial and Family Proceedings Act 1984 ('MFPA 1984'); the power exists "to vary an order with effect from when it was originally made" (section 31F(6)(c)), and operates as an exception to the general rule that "[e]very judgment and order of the Family Court is … final and conclusive between the parties" (section 31F(3)). These powers in turn are given relevant procedural effect by rule 9.9A of the Family Procedure Rules 2010 ('FPR 2010'), in respect of financial remedy orders (including those made by consent). Rule 9.9A(2) provides that "a party may apply under this rule to set aside a financial remedy order where no error of the court is alleged". Rule 9.9A(5) provides that:

> "Where the court decides to set aside a financial remedy order, it shall give directions for the rehearing of the financial remedy proceedings or make such other orders as may be appropriate to dispose of the application."

19. The supporting Practice Direction, PD9A FPR 2010, provides at para 13.5 and para 13.6:

> "13.5: An application to set aside a financial remedy order should only be made where no error of the court is alleged. If an error of the court is alleged, an application for permission to appeal under Part 30 should be considered. The grounds on which a financial remedy order may be set aside are and will remain a matter for decisions by judges. The grounds include (i) fraud; (ii) material non-disclosure; (iii) certain limited types of mistake; (iv) a subsequent event, unforeseen and unforeseeable at the time the order was made, which invalidates the basis on which the order was made." (Emphasis by underlining added).
>
> "13.6: The effect of rules 9.9A(1)(a) and (2) is that an application may be made to set aside all or only part of a financial remedy order, including a financial remedy order that has been made by consent." (Emphasis by underlining added).

20. The four numbered 'grounds' listed in PD9A para.13.5 (reproduced above) are sometimes called the 'traditional grounds' (see Munby J as he then was in *L v L* [2008] 1 FLR 26 at [34], and see *CB v EB* [2020] EWFC 72 at §21 below). The fourth ground above ('subsequent event…'), which is the ground on which the father effectively hangs his application in the instant case, finds its strongest derivation in *Barder v Barder & Caluori* [1988] AC 20, [1987] 2 FLR 480.

21. Mostyn J considered these statutory set-aside provisions, and the accompanying Practice Direction, in *CB v EB* (citation above); this was a case in which a husband sought to set aside two consent orders in financial remedy proceedings. Of PD9A para.13.5, Mostyn J said this at [49]:

> "…saying that the grounds "remain a matter for decisions by judges", and that they "include" the traditional grounds, suggests that its author appears to have contemplated, at least theoretically, a possible expansion of the permitted territory by creative judges".

But he went on vigorously to dismiss the possible expansion of the "permitted territory". Insofar as there could be any suggested relaxation of the 'subsequent event' ground, he also rejected this in the following paragraph:

> "[50] FPR PD9A para 13.5 was considered by Gwynneth Knowles J in *Akhmedova v Akhmedov & Ors (No. 6)* [2020] EWHC 2235 (Fam). At [128] she stated:
>
> > "The language of r. 9.9A and the Practice Direction does not signal a relaxation of the rigour of the principles in *Barder v Calouri* [1988] AC 20, [1987] 2 WLR 1350. Lord Brandon's four conditions must still all be met before any application on the basis of new events can succeed. Those conditions are:

> a) New events have occurred since the making of the order invalidating the basis, or fundamental assumption, upon which the order was made.
> b) The new events should have occurred within a relatively short time of the order having been made. It is extremely unlikely that could be as much as a year, and in most cases, it will be no more than a few months.
> c) The application to set aside should be made reasonably promptly in the circumstances of the case.
> d) The application if granted should not prejudice third parties who have, in good faith and for valuable consideration, acquired interests in property which is the subject matter of the relevant order."
>
> I agree fully with this. If the challenge relies on "new events", i.e. a change of circumstances, then Lord Brandon's criteria must be complied with to the letter." (Emphasis by underlining added).

And at [55] and [57] he added:

> "[55] My historical excursus above demonstrates that the set aside power in section 31F(6) was not a brand new break with the past. It did not usher in a brave new world. It was no more than a banal replication of a power vested in the divorce county courts from the moment of their creation in 1968. That power had been confined by the law to the traditional grounds for decades.
>
> [57] In my judgment the language of FPR PD9A para 13.5 is misleading. It should not be read literally. There is no lawful scope for imaginative judges to unearth yet further set aside grounds. The available grounds are the traditional grounds, no more, no less." (Emphasis by underlining added).

22. I would like to make a few miscellaneous but important points to those discussed above:

i) To the *Barder v Barder & Caluori* list cited above there must be added a further condition, namely that the applicant must demonstrate that no alternative mainstream relief is available to him which broadly remedies the unfairness caused by the new event (*BT v CU* [2021] EWFC 87);

ii) It is undesirable to allow litigants two bites at the cherry; I should be wary not to allow a litigant to re-litigate afresh a matter which has already been decided (or in this case, agreed);

iii) The court's power under section 31F(6) of the 1984 Act (and I suggest, by analogy, rule 4.1(6) FPR 2010) is not "unbounded": per Baroness Hale

in *Sharland v Sharland* [2015] UKSC 60 at [41];

iv) The discretion afforded to a court to vary/set aside should (as I said recently in *Re D (Costs of Appeal: Application to Vary or Revoke Order)* [2023] EWHC 1244 (Fam) at [39]) be exercised in accordance with the overriding objective (rule 1 FPR 2010), that is to say, "enabling the court to deal with cases justly, having regard to any welfare issues involved".

James v Seymour

23. The father's case (although he has not exactly put it this way) is that the judgment in *James v Seymour* is a 'subsequent event', 'unforeseen and unforeseeable' at the time his order was made, which 'invalidates the fundamental assumption' on which the consent was given and the order was made (see PD9A FPR 2010, para 13.5, and *Barder v Barder & Caluori*, cited at §21 above).

24. Before looking at the judgment in *James v Seymour*, it is important to set the scene with reference to three other recent decisions which bear upon the issues arising on this application. All of these post-date Mostyn J's judgment in this case ([2022] EWFC 118) which was delivered on 19 October 2022, namely:

i) *CMX v EJX (French Marriage Contract)* [2022] EWFC 136 (2 November 2022) (Moor J);

ii) *Collardeau-Fuchs v Fuchs* [2022] EWFC 135 (14 November 2022) (Mostyn J);

and

iii) *Re Z (No.4)(Schedule 1 award)* [2023] EWFC 25 (7 March 2023) (Cobb J).

25. Precisely two weeks after judgment in the instant case, when delivering judgment in *CMX v EJX*, Moor J said at [86]:

> "I have to decide on periodical payments for C. I have jurisdiction as there has been a maximum CMS assessment of £15,288 per annum. Mr Boydell refers me to a decision of Mostyn J in *CB v KB* [2019] EWFC 78 in which he suggested that the easiest way to calculate the top-up maintenance was to apply the same rate as the CMS to the Husband's income, namely 9.8% between the CMS maximum of £156,000 and an income of £650,000. This would give a total award of £63,804 per annum in this case. I do, of course, accept that the beauty of the decision of Mostyn J is that it makes it easy to calculate the figure, so avoiding dispute. There are, however, <u>significant disadvantages</u>. There were four children in *CB v KB* so the Wife got £12,600 per annum per child. Given that I have to apply section 25, it is impossible to see why the Wife in *CB v KB* gets £12,600 per child but this Wife receives £63,804 for one child just because the two eldest children in this case

> are no longer part of the calculation. If they were, the figure would reduce to £21,268 each." (Emphasis by underlining added)

26. Two weeks later, the judgment in *Collardeau-Fuchs* was published; in that judgment, Mostyn J was dealing with a claim under the Matrimonial Causes Act 1973 ('MCA 1973') which focused to some degree on financial provision for the children of the family. He qualified (at [32]) his views about the general application of the CMS formula (from *CB v KB*), indicating that it would not be appropriate where the court was considering a 'HECSA' (a Household Expenditure Child Support Award). He referenced a number of differences between a claim for unsecured child periodical payments mounted under Schedule 1 CA 1989 and a claim mounted under the MCA 1973 or the MFPA 1984. Included among the differences was that:

> "… under the former statute [CA 1989] the child support claim will be front and centre in the litigation. Along with the claim for a home for the child it will be the centrepiece of the litigation. In contrast, a claim for unsecured child payments mounted under the 1973 or 1984 Acts will be distinctly subsidiary to the primary claim made by the parent as a spouse. A child periodical payments claim made as part of a routine financial remedy claim by a spouse following a divorce will generally be dealt with perfunctorily. Indeed, the court will have no jurisdiction in the majority of cases to deal with child support unless there has been an agreement between the parties under the terms of the Child Support Act 1991. I suggested in *CB v KB* at [49] that the child support formula should apply to gross annual incomes in excess of £156,000 up to £650,000. <u>That pragmatic, and I believe useful, guideline is obviously intended to apply forcefully to those cases where the court is considering child support as a subsidiary claim within a wider financial remedy claim. It will be a rare case where the court in a financial remedy claim between divorcing spouses will spend much time and forensic energy analysing a child maintenance budget. In contrast, in a case under Schedule 1 the child maintenance budget is the principal litigation battleground</u>." (Emphasis by underlining added).

27. In March 2023, in my judgment in *Re Z (No.4)*, I said this at [21]:

> "In arriving at the fair figure for periodical payments in a Schedule 1 claim, where the father's gross income exceeds the statutory maximum for the CMS calculation (as here), I think <u>the result given by the formula is unlikely to be relevant</u>; I can make clear now that I regard it as irrelevant on the facts of this case. Indeed, I do not read Mostyn J's comments in *CB v KB* [2019] EWFC 78 as doing any more than offering <u>guidance in a *marital* child maintenance claim that a helpful starting point in fixing the level of periodical payments could, subject to an overall discretionary review,</u>

> be the result of the CMS formula" (Emphasis by italics in the original; emphasis by underlining added).

28. Then in April 2023, came *James v Seymour* [2023] EWHC 844 (Fam). In this case, Mostyn J was hearing an appeal against a maintenance award (on a variation application) made by a Circuit Judge in Oxford. He extensively reviewed the relevant authorities on the calculation of child maintenance payments in excess of the statutory maximum. He confirmed that in *CB v KB* (at [49]) he had indeed suggested that for incomes up to £650,000 the statutory formula would give useful "guidance". He said this at [34]:

> "I continue to believe that the formula provides a useful and logical starting point in a child maintenance case, whether heard under the Matrimonial Causes Act 1973 or under Schedule 1 to the Children Act 1989, where
>
> i) the income of the father for child support purposes is more than the statutory ceiling of £156,000 but less than £650,000; but
>
> ii) where the application does not seek a HECSA[3] but a conventional assessment of the in quantum of CSM; and
>
> iii) where it is not a variation application".

29. He continued at [35]:

> "It obviously makes sense to seek to have simple, clear and logical guidelines to help parents settle such cases, and where they do not settle, for the Financial Remedies Court to be able to decide them consistently and efficiently".

30. However, at [36] Mostyn J explicitly went on to accept the "criticism" of Moor J (at [86] in *CMX v EJX*: see §25 above) of his approach in *CB v KB*, and continued:

> "[37] While the formula does make adjustments for the number of children, its primary driver is the percentage of F's adjusted gross income to be paid in child support maintenance. This leads to the per capita anomalies identified by Moor J. The amount that would be payable under the formula where the father's income is £650,000 (and there is no shared care, and no other child living with him) is (when rounded to the nearest £1,000) £60,000 for a single child, £40,000 for each of two children, and £33,000 for each of three children. While it is true that there will be economies of scale where there is more than one child in a family unit, it is obvious, at least to me, that a single child does not cost anything like 50% more to rear than each of a

3 Household Expenditure Child Support Award: see *Collardeau-Fuchs v Fuchs* [2022] EWFC 135 at [120] – [121], and *Re Z (No 4) (Schedule 1 award)* [2023] EWFC 25 at [21]

> pair of children, let alone 80% more than each of a trio of children.
>
> [38] The second, and arguably more important criticism, which I also acknowledge having subjected the data to intense scrutiny, is that the amounts generated by an extension of the formula to incomes up to £650,000 are consistently higher, in my fairly considerable experience, than the levels of awards typically made by the court, whether by consent or otherwise, in conventional (i.e., non-HECSA) cases. It is true that the figures would be reduced if there was a degree of shared care but that mitigation does not alter the fact that the headline figures produced by an extension of the formula to incomes in the range £156,001 - £650,000 are unrealistically high and are in my opinion unhelpful as starting points. In the Appendix to this judgment, I have included a table **…** This shows that at every level the figures produced are plainly excessive and that the calculation for a single child is not reasonably proportionate to the calculation for a child in a sibling duo or trio.
>
> [39] In my opinion, the reconciliation of these criticisms with the "beauty" (as Moor J put it) of having a formula-based starting point is achieved by making an adjustment to the functioning of the formula for the income range £156,001 - £650,000. I have set out the adjustments and how they might work in the Appendix to this judgment. The Appendix describes what might be called an Adjusted Formula Methodology (or AFM) to give a Child Support Starting Point (CSSP).
>
> [40] I would like to think that this AFM, or something like it, might be used to help settle, or to help decide, what I suspect will be an increasing number of child support cases where the income of F lies between £156,001 and £650,000." (Emphasis by underlining added)."

Has the case for variation/set aside been made out?

31. There can be little doubt that Mostyn J at [44] of his judgment delivered on 19 October 2022 (see again §9 above) had steered the parties towards adopting the 'useful guideline' of the CMS formula to the father's gross annual income disclosed in the tax return to the surplus up to £650,000; this had become a well-known approach over many years deriving most recently from *CB v KB*, and adopted in other reported cases subsequently. It is reasonable to conclude that this materially influenced the father to consent to an order which adopted that guideline.

32. There can also be little doubt that the 'guideline' earlier promoted by Mostyn J has effectively been abandoned by his judgment in *James v Seymour*. This happened within a relatively short time (less than 4 months) of the consent order, and the father

has acted reasonably promptly in making this application (see *Barder v Barder & Caluori* above). The seed of doubt about this methodology had almost certainly been sown by Moor J's comments in *CMX v EJX,* where he referred to the 'significant disadvantages' of the *CB v KB* approach to topping up child maintenance. This led Mostyn J in *James v Seymour* to recognise the "anomalies" which it throws up, and accept the "criticisms" of it, given that:

> "…. the amounts generated by an extension of the formula to incomes up to £650,000 are consistently higher, in my fairly considerable experience, than the levels of awards typically made by the court, whether by consent or otherwise, in conventional (i.e., non-HECSA) cases." (*James v Seymour* at [38]).

Mostyn J accepted that the headline figures produced by an extension of the CMS formula to incomes in the range £156,001 - £650,000 were "unrealistically high and … unhelpful as starting points".

33. Two important points emerge from the suite of recent cases discussed above:

    i) The value of applying a 'formula' in a Schedule 1 case is perhaps more limited than earlier authorities had indicated: see *Collardeau-Fuchs* and *Re Z*;

    ii) Insofar as Mostyn J advances a new 'starting point' formula in *James v Seymour*, if applied in *this* case, it will yield a very different outcome from that advanced in *CB v KB*. That is to say that if the AFM were applied even 'loosely' here, the father would be obligated to pay a significantly lower figure in maintenance than he would under the figure which he agreed, believing this to be in accordance with the 'guideline'.

34. This is a most unusual situation. I have considered carefully whether it can be said that the judgment in *James v Seymour*, in which the judge effectively rescinded the guidance which he himself had first formulated more than 20 years ago in *GW v RW* [2003] EWHC 611 (Fam) and expanded in 2020 in *CB v KB*, and which he had explicitly proposed to these parties, and which – crucially – had in my assessment led to settlement of the claim in the precise terms set out at [4] of the order, can truly be said to have "invalidated" the "fundamental assumption" on which the consent order was made. Having reviewed the material, I am satisfied that this development does indeed "invalidate" that "assumption"; in my judgment this father can be absolved from the mother's accusation that he is attempting a second bite at the cherry (see §22(ii) above). There are not likely to be many litigants in a financial remedy case who would have felt comfortable in ignoring the clearest of steers from this most distinguished and pre-eminent of financial remedy judges; this litigant accepted the advice, adopted the 'useful guideline', and the subsequent consent order was founded upon it. The subsequent *James v Seymour* judgment has steered the court's approach in a different direction; this change of direction was plainly unforeseen and unforeseeable at the time of the consent order.

35. If I have stretched the 'traditional grounds' (§20 above) beyond comfort, then I fall back, alternatively, in relying on the language of para.13.5 of PD9A. This appears to contemplate grounds for set aside of a financial remedy order *other than* the

'traditional grounds' ("…a matter for decision by judges. The grounds include…."). While there is controversy at first instance about whether grounds *other than* the 'traditional grounds' can be relied on to achieve the set aside of an order (Gwynneth Knowles J in *Akhmedov* thought that other grounds could be relied on, albeit with 'great caution', although Mostyn J disagreed with this in *CB v EB* (citation above) at [56]), it seems to me that *if* as yet undefined grounds can be relied on beyond the 'traditional grounds' for setting aside a financial remedy order (and I incline to Gwynneth Knowles J's view on this), then in order to achieve a just and fair result in this case, in fulfilment of the overriding objective, I can 'with great caution' assert them here. In this regard, I am satisfied (see §22(i) above) that the father has no alternative mainstream relief available to him.

36. Therefore, for either of the reasons set out in §34 or 35 above, I am satisfied that the father has made good his case, and that paragraphs 4 and 5 of the December 2022 consent order should be set aside, and a new order made.

Should I replace the order with a new order?

37. When Mostyn J gave directions on the father's application for variation of the consent order (see above), he plainly contemplated a reasonably summary process, which would be conducted – as it has been – on the papers. His directions did not explicitly focus on what is sometimes called the 'disposition' phase (i.e., whether the court would go on to consider what substitute order should be made).

38. Having acceded to the father's application for variation, I have considered whether I can or indeed should simply substitute the AFM described in the *James v Seymour* judgment. There is an obvious attraction in doing so:

    i) Rule 9.9A(5) permits me, when setting aside a financial order, to make such other orders as may be appropriate to dispose of the application;

    ii) Para.13.8 of PD9A provides that the court has: "considerable discretion as to how to determine an application to set aside a financial remedy order, including where appropriate the power to strike out or summarily dispose of an application to set aside. If and when a ground for setting aside has been established, the court may decide to set aside the whole or part of the order there and then… if the court is satisfied that it has sufficient information to do so, it may proceed to re-determine the original application at the same time as setting aside the financial remedy order";

    iii) There will inevitably be a delay, and some additional cost, in a further hearing;

    iv) In December 2022, the parties agreed a formula for computation of maintenance; both agree that a formula is useful;

    v) The December 2022 order formally recorded that:

> "The intention of this order and the disclosure provided by the Respondent above is to avoid the need for any future litigation concerning the child support that he is to pay to the Applicant for the benefit of [A]".

vi) Mostyn J, in extending the ECRO declared himself "satisfied that the father needs the maximum protection from prospective unmeritorious claims by the mother".

39. However, I consider that there should be a summary form of hearing at which the parties should be given a chance to address me further as to the proper award of maintenance in this case. I say so because:

i) Child support can only lawfully be awarded if the discretionary balancing exercise mandated by para 4(1) of Schedule 1 CA 1989 has been undertaken. I do not have sufficient information to do this exercise (see para.13.8 PD9A FPR 2010). The parties ought to have an opportunity to address me on the wider discretionary factors of the CA 1989, in the context of the AFM proposed in *James v Seymour*;

ii) In that regard (i.e., of (i) above) I am aware that the mother may wish to argue that *James v Seymour* is distinguishable on its facts and that if the AFM is applied here this will be unfair to her; she may well also want to point out (see §14 above) that she is paying school fees out of her monthly maintenance. While I shall of course consider carefully the mother's representations on quantum, I would like to take the opportunity to quash these specious arguments now:

a) there is nothing in the mother's point that *James v Seymour* is of no relevance because the cases are factually distinguishable; the formula (AFM) proposed in *James v Seymour* is *plainly* of wider application and was not specific to the facts of that case;

and

b) Mostyn J has already explicitly rejected as "untenable" the mother's claim for school fees (see [2022] EWFC at [43]), on the basis that there was no case made out for private education for A.

I nonetheless ought to consider more fully whether the application of the AFM would indeed be unfair to the mother;

iii) In the absence of agreement between these parties that it should be accepted, I ought to receive specific submissions on why the guideline should, or should not, be followed in this case;

iv) The AFM in *James v Seymour* is (per [43] ibid.) only a 'loose' starting point which I "can summarily choose to accept or reject".

40. I propose to direct that in the interim, pending further hearing, the father shall pay periodical payments in accordance with AFM proposed in *James v Seymour*. I am not sure of the father's relievable pension contributions, and I only have his word for what his current tax return reveals; I know that he has two other children living in his household, so must reduce the exigible income by 14%. But on the basis of the information available to me, and having regard to the table (Table 2) appended to the

James v Seymour judgment, I assess the father's maintenance obligation as £24,900pa (or £2,075pm).

41. I shall therefore make the following order:

i) Paras.4 and 5 of the Order of 20 December 2022 are hereby discharged;

ii) The father's application will be listed for further hearing for the court to determine the substitute order (i.e., the current award of maintenance, and the methodology for computing ongoing maintenance) on the first open date after 2 October 2023; time estimate ½ day.

iii) The hearing referred to in (ii) above shall be conducted on written evidence and oral submissions. There shall be no oral evidence.

iv) The electronic bundle shall be prepared by the father and shall comprise only this judgment, the order giving effect to this judgment, the two Forms E2 and any further disclosure authorised by me.

v) Pending the hearing provided for in (ii) above, the father shall pay periodical payments to the mother in accordance with the *James v Seymour* computation (see Table 2 appended to that judgment) in the sum of £24,900pa (or £2,075pm);

vi) No later than 16:00 on 12 September 2023 the parties are to exchange Forms E2 together with the prescribed documents. In addition to the prescribed documents the father must produce under paragraph 6 of the Form E2 his most recent practice accounts, and the most recent full accounts of Assurety Ltd. The Forms E2 and the prescribed documents are to be prepared as PDFs and shall be exchanged electronically.

vii) No further disclosure may be sought. If either party considers that the disclosure given by the other party's Form E2 and the prescribed documents is insufficient for me to be able to determine the variation application fairly, then that party shall set out in no more than 200 words, within seven days' of service on him/her of the other party's disclosure, the further disclosure that is sought. I will then deal with that application without a hearing as box work.

viii) The parties shall be permitted to file and exchange position statements – limited to 5 pages of A4, no later than 2 days before the hearing.

ix) This being a fast-track application (rule 9.9B FPR 2010), no FDR is mandated, and I confirm that one shall not take place.

x) Costs reserved.