Precedent & family law judicial hierarchy

David Burrows offers some insight on interim capital relief, precedent & the *per incuriam* exception

IN BRIEF

- Interim capital provision: rare or impossible pending final financial relief hearings.
- When is a judgment the ratio (reasoning) of a decision; or obiter dicta (said by the way)?
- What is the status—as law—of parts of a judgment not part of its reasoning?

This article aims to highlight a number of common law leitmotifs:

- How rules of precedent work.
- How *stare decisis*—with its mirror *per incuriam* doctrine—and judicial comity works.
- Procedural rules cannot create, only regulate, substantive law.
- Judicial guidance can be no more than that.

At the end of February 2018, Cobb J dealt with 'the important issue' of sale of a couple's home in *WS v HS (appeal: sale of matrimonial home)* [2018] EWFC 11 (28 February 2018). A district judge had ordered sale of the parties' former home at an interim stage in financial relief proceedings. H had lost his job and had only Jobseeker's Allowance (JSA). Both parties agreed that the house should eventually be sold; but W wanted their middle child to be able to sit her A Levels before the sale.

Cobb J allowed the appeal. He summarised the context of his decision thus:

'[5] The appeal requires me to re-visit the important issue of when, and in what circumstances, a court can order the sale of a former matrimonial home by way of interim relief. I recognise that this has been the subject of relatively recent consideration by Mostyn J in *BR v VT* [(below)]. With due deference to his experience and undoubted expertise in this field, and cognisant of the responsibilities I owe as a judge of co-ordinate jurisdiction (see *Willers v Joyce & another (in substitution for and in their capacity as executors of Albert Gubay (deceased)) (2)* [2016] UKSC 44 at [9]), I take a different view in part as to the jurisdictional basis for such a claim.'

Precedent

In *Willers v Joyce*, Lord Neuberger said of the rules of precedent: '[4] In a common law system, where the law is in some areas made, and the law is in virtually all areas developed, by judges, the doctrine of precedent, or as it is sometimes known *stare decisis*, is fundamental. Decisions on points of law by more senior courts have to be accepted by more junior courts. Otherwise, the law becomes anarchic, and it loses coherence, clarity and predictability. Cross and Harris in their instructive *Precedent in English Law*, 4th ed (1991), p 11 [(Cross)], rightly refer to the "highly centralised nature of the hierarchy" of the courts of England and Wales, and the doctrine of precedent is a natural and necessary ingredient, or consequence, of that hierarchy.'

To define what exactly is the precedent, it is necessary to define the *ratio decidendi* (reasoning) of a judgment. Cross defines this as 'any rule of law expressly or impliedly treated by the judge as a necessary step in reaching [the judge's] conclusion' (p 72). The rest, as Cross goes on to explain, is comment said by the way (obiter dictum).

The scope of obiter dicta can be seen in *UL v BK (Freezing Orders: Principles and Safeguards)* [2013] UKHC 1735 (Fam), [2014] Fam 35 where Mostyn J decided a wife's freezing order application. He refused to renew an order: '[71] Concentrating therefore on the application for the ex parte freezing order I conclude that it was fatally flawed in numerous respects and must be discharged. My reasons in summary [include]: (1) The wife seriously breached her duty of candour in not mentioning that she had accessed the husband's safe illegitimately. (2) The wife failed to provide any sufficient evidence of an unjustified dealing by the husband with his assets which gave rise to a serious risk of dissipation to her prejudice.'

This represents the ratio of the decision. However, the judge spent para [9]-[56] considering, obiter: (1) the basis of grant of freezing orders in the family jurisdiction, and (2) what constraints should operate on spouses who take their spouse's private documents. Of (1) the law reporter says coyly: '*Roche v Roche* (1981) 11 Fam Law 243, *CA and Shipman v Shipman* [1991] 1 FLR 250 not followed'; or as the judge says:

'[27] It is noteworthy that in *Roche v Roche* 11 Fam Law 243 none of the *Mareva* (see *Mareva Navigation Co Ltd v Canaria Armadora SA* [1977] 1 Lloyd's Rep 368) jurisprudence was referred to by the Court of Appeal in its judgments. With some trepidation I conclude that the judgment was *per incuriam* the many principles governing *Mareva* injunctions, which even

by then had been developed.'

He went on to conclude that Anthony Lincoln J was wrong in *Shipman*. He said that the freezing order (*Mareva*) jurisdiction was subsumed by jurisprudence under Matrimonial Causes Act 1973 (MCA), s 37(2); but the *Shipman* inherent jurisdiction order went further than s 37(2) could, as Anthony Lincoln J had explained in *Shipman* (where a husband was planning to take his money to the US, and Anthony Lincoln J felt he should be told to wait till his wife's ancillary relief claims had been dealt with). *Shipman* remains good law where the certainty required by the courts under s 37(2) is thought not to be there.

At [56] Mostyn J gave guidance (ie again, it cannot be law) on how *Imerman* documents—private documents unlawfully obtained by one spouse from the other—should be dealt with. He did not consider rules as to when disclosure applies, save where ancillary relief proceedings are issued by Form A (as the Court of Appeal explained in *Imerman v Tchenguiz and ors* [2010] EWCA Civ 908, [2011] Fam 116). For example, what happens where no proceedings are issued save for a consent order (see eg *Livesey (formerly Jenkins) v Jenkins* [1985] AC 424, [1985] FLR 813)? Or suppose undisclosed documents are discovered long after a final order by a losing party (*Lifely v Lifely* [2008] EWCA Civ 904)?

Precedent: decisions per incuriam

The meaning of the *per incuriam* rule, and the reasoning behind it, was explained by the Court of Appeal in *Crown Prosecution Service & Anor v Gohil* [2012] EWCA Civ 1550, [2013] 1 FLR 1095: '[30] There is a general rule that a court is bound by previous decisions of other courts of coordinate jurisdiction. [This rule] was the subject of close examination in the leading case of *Young v Bristol Aeroplane Co Ltd* [1944] KB 718. The judgment of the court, which was delivered by Lord Greene MR, emphasised the limited scope of the per incuriam exception to the general rule. This has been repeated… see, for example, per Lord Diplock in *Davis v Johnson* [1979] AC 264, [1978] 2 WLR 553, 326F where he cited what Scarman LJ said in *Tiverton Estates Ltd v Wearwell Ltd* [1975] Ch 146, [1974] 2 WLR 176 at 172–173 and 196 respectively, viz: "If, therefore, throwing aside the restraints of *Young v Bristol Aeroplane*, one division of the [Court of Appeal] should refuse to follow another because it believed the other division of the court to be wrong, there would be a risk of confusion and doubt arising where there should be consistency and certainty. The appropriate forum for the correction of the Court of Appeal's errors is the House of Lords, where the decision will at least have the merit of being final and binding… .'

Davis v Johnson was an important non-molestation order case. Lord Denning MR had taken the view, in the Court of Appeal, that his court could disagree with its own earlier decisions. The House of Lords said firmly, 'No it could not', unless an earlier decision—the *Young v Bristol Aeroplane* exception—'was given in ignorance of the terms of a statute or a rule having the force of a statute'.

> *"Mostyn J is in the red corner & Cobb J in the blue; but Cobb J has Wicks v Wicks at his shoulder as trainer"*

Lord Greene continued: 'It cannot, in our opinion, be right to say that in such a case the court is entitled to disregard the statutory provision and is bound to follow a decision of its own given when that provision was not present to its mind. Cases of this description are examples of decisions given per incuriam. We do not think that it would be right to say that there may not be other cases of decisions given per incuriam in which this court might properly consider itself entitled not to follow an earlier decision of its own. Such cases would obviously be of the rarest occurrence and must be dealt with in accordance with their special facts.'

Interim order for sale of matrimonial property

Substantive law & procedural rules

Back then to *WS v HS*: in that case Cobb J reviewed a variety of statutory provisions which might be said to impact on the case before him: Married Women's Property Act 1882, s 17, Matrimonial Causes Act 1973, Pt 2, Family Law Act 1996, s 33 and Trusts of Land and Appointment of Trustees Act 1996, ss 14 and 15, and FPR 2010, r 20.2(1)(v) (sale of property subject to an application) applied. In *BR v VT (Financial Remedies: Interim)* [2015] EWHC 2727 (Fam), [2016] 2 FLR 519, Mostyn J had found that s 33(6) enabled him to order vacant possession to enable a sale to proceed. However, said Cobb J, the propositions considered by Mostyn J had been considered by the Court of Appeal in *Wicks v Wicks* [1998] 1 FLR 470, [1998] 3 WLR 277. The inherent jurisdiction cannot be used to fill gaps in an extensive statutory scheme. Rules of precedent closed off that course.

In *BR v VT*, Mostyn J had said: '[36] I therefore make an order that the wife's rights of occupation be terminated and that her rights notice be vacated. I make a positive order for the sale of the home under r 20.2(1)(c)(v) of the FPR 2010. I am wholly satisfied that it is desirable to sell it quickly, for the very good reasons which I have given. The wife must give vacant possession on completion of the sale.'

With his apology at [5] (above) Cobb J disagreed. He explained that FPR 2010 r 20.2(1)(c) can only be procedural. It is not substantive: that is, it does not create a remedy. Only statute can do this. Rules operate to regulate substantive remedies (see eg *Dunhill v Burgin (Nos 1 and 2)* [2014] UKSC 18, [2014] 1 WLR 933). Statute in the form of MCA 1973, s 24A has created a substantive power to order sale; but that only can operate after a property adjustment order (s 24). Cobb J therefore concluded (in disagreement with Mostyn J):

'[45] Given that s 24 and s 24A MCA 1973 is a barred route to relief at an interim stage, I am unable to conclude that an application brought under a generic procedural rule (rule 20 FPR 2010) can deliver a result which is specifically prohibited within the claim before the court. The FPR 2010 regulate the practice and procedure of the court; they cannot extend the court's jurisdiction which, in the absence of the rules, the court would otherwise lack (see generally [35] above). Nor, as McFarlane LJ recently confirmed in [*Goyal v Goyal* [2016] EWCA Civ 792, [2017] 2 FLR 223] can the inherent jurisdiction fill the "perceived gap".'

Precedent lives. Statute rules (and overrides precedent in the narrow circumstances where the per incuriam rule applies). The inherent jurisdiction can be called upon only where a High Court judge perceives there to be a gap which no other part of the existing law can reach. And as to an interim sale of family assets pending a final financial relief hearing: Mostyn J is in the red corner and Cobb J in the blue; but Cobb J has *Wicks v Wicks* at his shoulder as trainer. **NLJ**

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