

# Enforceability of mahr under a *sharīʿa* law-based contract in New Zealand: a comparison with United Kingdom, Australia, and Canada

Durgeshree Raman <sup>1,\*</sup>

<sup>1</sup>School of Law, Politics and Philosophy, The University of Waikato, Hamilton, New Zealand

\*Corresponding author. E-mail: dee.raman@waikato.ac.nz

## ABSTRACT

Enforcement of *sharīʿa*-based marriage contracts, which contain provisions for the payment of mahr (dowry/dower) upon death of husband or divorce by either party, has proven to be quite challenging in jurisdictions such as the UK, Australia, and Canada. New Zealand courts are currently dealing with their first such case. In undertaking a comparative analysis, this article highlights that a statutory framework for dealing with such claims is better suited than simply enforcing it as a simple contract, which has the potential to produce unjust and inequitable results.

**KEYWORDS:** *Sharīʿa*, Islamic marriage contract, Mahr/dower/dowry

## I. INTRODUCTION

After a long litigation process, recently and for the first time in New Zealand, the Court of Appeal in *Salih v Almarzooqi*<sup>1</sup> ruled that a nikah (marriage contract) is enforceable notwithstanding that it was entered into in the context of a religious ceremony. The fact that it was concluded overseas does not preclude it from being enforced in New Zealand so long as the agreement satisfies the pre-requisites of an enforceable contract and the circumstances justify that the proper law of contract is New Zealand law. Whether the provision of mahr (or deferred dower) under the contract is payable for breach of that contract will depend upon proof of entitlement to the mahr, for which expert evidence may be relied upon. In unpacking the myriad of issues this litigation has gone through to arrive at the Court of Appeal decision, this article provides the background to the litigation, and the matters arising from it and demonstrates how this decision is in line with the approaches taken in other common

<sup>1</sup> *Salih v Almarzooqi* [2023] NZCA 645.

law jurisdictions such as UK, Australia, and Canada. Given that the law is more advanced overseas, this article seeks to shed insight as to how New Zealand law could better address this issue and in doing so, may assist other jurisdictions when confronted with the same issue.

## II. WHAT IS MAHR?

Before this article looks at the New Zealand cases, it is important to understand what ‘mahr’ is. It is notable that mahr across different *shari‘a*-based jurisdictions has various other spellings such as mehr/mehar/meher. In the first precedent English common law case to have recognized mahr, Winn J stated the word ‘dower’ is a rough translation.<sup>2</sup> The New Zealand courts initially called it dowry<sup>3</sup> but later opted for mahr.<sup>4</sup> Despite the different spellings and translations, mahr (as referred to in this article here onwards) has its roots in the Qur’an (the religious text which Islamic/*shari‘a* law is based upon). While in Arabic, mahr in the Qur’an is translated as: ‘And give the women (on marriage) their mahr as a gift’.<sup>5</sup> Hence, it is an essential component of a valid Islamic marriage contract and thus a pre-requisite without which the marriage cannot take place. The Qur’an does not set the amount of the mahr. The mahr in the contract (which may or may not be negotiated) specifies what a wife will receive, usually it is a payment of a sum of money or some other property or beneficial interest, as a nuptial gift from her husband, and this is payable at the time of the marriage, and/or it is deferred to be paid, sometimes ‘on demand’ by the wife, or divorce whereupon the husband will pay the wife or if it is upon the death of the husband, then his family will pay the wife. Although it is treated like a gift, it is in fact an obligation on the husband which the wife receives as of right, being entitled to it as a matter of *shari‘a* legal principle and regardless of whether the marriage is consummated or not. It serves both the purpose of property division and spousal maintenance or support. The amount neither considers the financial position of the parties nor the ability of the husband to make the payments. However, it is not uncommon for husbands to promise an exorbitant amount—as the higher the value of the mahr, the greater the promise to stay married. After all, divorce is not something they have in their minds while getting married. The rationale for a deferred mahr is that it has been a source of financial security designed to provide for a wife, usually with little or no source of income, when she is no longer required under *shari‘a* law to be financially maintained by her husband. However, whether or not the wife is entitled to mahr depends on a multitude of factors such as the different schools of *shari‘a* law, the jurisdiction, the directives of the Qur’an, the Sunnah,<sup>6</sup> juristic opinions by Islamic experts, local practices, with some countries codifying divorce in terms of grounds, procedure and registration and aspects of mahr such as defining the nature, the quantum, and settlement of disputes.<sup>7</sup> Examples of codification include Morocco,<sup>8</sup> Algeria,<sup>9</sup> Pakistan,<sup>10</sup> Iraq,<sup>11</sup> and Iran.<sup>12</sup> The type of divorce; talaq,

<sup>2</sup> *Shahnaz v Rizwan* [1965] 1 QB 390 at [19].

<sup>3</sup> As discussed below.

<sup>4</sup> See *Salih v Almarzoqi* [2023] NZCA 645.

<sup>5</sup> Quran, verse 4:4.

<sup>6</sup> Practice and explanations of Quranic principles by Prophet Muhammad.

<sup>7</sup> See M Afzal Wani, ‘Muslim Women’s Right to Mahr: An Appraisal of the Statutory Laws in Muslim Countries’ (2001) 43(3) *Journal of the Indian Law Institute* 388 at 390.

<sup>8</sup> Moroccan Code of Personal Status 1958.

<sup>9</sup> Algerian Family Code 1984.

<sup>10</sup> Dissolution of Muslim Marriages Act 1939 and Muslim Family Laws Ordinance 1961.

<sup>11</sup> Personal Status Law 1959.

<sup>12</sup> The Civil Code of the Islamic Republic of Iran; Book 7 s 1 Chap 7 on Mahr and s 2, Chap 2 on Divorce.

khul, tafwid, and faskh divorce, and its treatment within a particular jurisdiction also determine the degree to which each party may or may not initiate divorce and its effect on the mahr.<sup>13</sup> Without intending to generalize but to give an idea of the types of approaches to divorce, under talaq, the husband can unilaterally divorce his wife by pronouncing the word ‘talaq’ three times, following which the whole dower becomes payable immediately though in some jurisdictions registration of talaq is legally required such as in Pakistan.<sup>14</sup> A husband seeking talaq is prohibited from compelling his wife to the second type of divorce—khul divorce, which allows a wife to seek divorce with the husband’s prior consent and this has the effect of dissolving the husband’s duty to pay the deferred mahr. Tafwid is a verbal or written divorce issued by the wife if the husband previously transferred his inherent authority over divorce to her. This transfer is revokable though this is disputed among Muslim jurists. Finally, there is Faskh, which literally means annulment or dissolution, and this enables a wife to seek divorce without the husband’s consent before a qadi (Muslim judge). This requires the wife to satisfy one of the recognized grounds which often include mental or physical abuse. If satisfied, the qadi will issue a judicial decree, which entitles the wife to the deferred mahr. Depending on the terms of the contract, the type of divorce, and any legal requirements, the husband may or may not be relieved of his obligations to pay mahr or his obligations may be reduced. Any dispute as to the entitlement to mahr is resolved according to ‘Islamic religious principles’.<sup>15</sup> However, where the divorce provision is not qualified to be initiated by the husband only and the value of the mahr is extravagant, this has the potential to produce financially unjust results, as highlighted in the New Zealand case below.

### III. THE NEW ZEALAND CASE: SUMMARY OF FACTS

The parties to this litigation are Ms Almarzooqi, a citizen of the United Arab Emirates (UAE) with residency status in New Zealand and Mr Salih, a citizen of New Zealand. They are both Muslims and they got married in accordance with *shari‘a* law in Dubai, UAE. This involved a *nikah* (marriage contract), with the required component of mahr comprising two payments by the husband to the wife; an immediate payment of 30,000 dirhams (approximately NZD13,000) and a deferred payment of 500,000 dirhams (approximately NZD215,000) conditional upon the husband’s death or divorce. These were recorded in the Marriage Certificate issued by the Personal Status Court of Dubai (Dubai Court).

The couple lived together in New Zealand for only a month and were married for 5 months in total. Ms Almarzooqi filed for divorce in the Dubai Court. In granting the divorce, the Court also made an ancillary order for the payment of the deferred mahr. Mr Salih did not make any payments and Ms Almarzooqi initiated legal proceedings in New Zealand to enforce the ancillary order. The formation and validity of the contract were not challenged.

### IV. LITIGATION HISTORY: THE JURISDICTIONAL ISSUE

There are two sets of litigation history as one relates to the issue of whether New Zealand courts have the jurisdiction to enforce the ancillary order and the other is whether the

<sup>13</sup> Pascale Fournier *Muslim Marriage in Western Courts: Lost in Transplantation* (Ashgate, Surrey, 2010) at 20 to 23 as cited in *Salih v Almarzooqi* [2023] NZCA 645 at [23]–[26]. Also see Yousef Aly Wahb, ‘Faith-Based Divorce Proceedings: Alternative Dispute Resolutions for Canadian Women’ (2021) 40(2) *Canadian Family Law Quarterly* 109.

<sup>14</sup> See *Muslim Family Laws Ordinance* 1961, s 7.

<sup>15</sup> See *Kaddoura v Hammoud* (1998), 168 DLR (4th) 503 at [15].

deferred payment based on contract law can be enforced, be it based on the law of the UAE or New Zealand.

Regarding the first issue, the marriage contract is silent as to jurisdiction. Since the Reciprocal Enforcement of Judgments Act<sup>16</sup> and the Senior Courts Act<sup>17</sup> do not allow for the enforcement of UAE judgments, the High Court turned to common law to assess the enforcement of the ancillary order.<sup>18</sup> This is the first occasion upon which a common law action for the enforcement of a UAE judgment was considered in New Zealand and was contingent upon<sup>19</sup>: (i) that the foreign court had jurisdiction; (ii) that the judgment is for a liquidated sum; and (iii) that the judgment is final and conclusive. As to whether the Dubai Court had the jurisdiction to make the ancillary order for it to be enforceable in New Zealand, Ms Almarzooqi relied upon the fact that the marriage contract was signed by Mr Salih and the fact that he attempted to participate in the proceedings of the Dubai Court. However, the High Court stated that the signing of the marriage contract did not equate to submission to the Dubai Court's jurisdiction. Furthermore, it pronounced that Mr Salih's attempt to file documents opposing the grounds for divorce (which was rejected by the Dubai Court's Registrar) was not to be taken as submission to the Court's jurisdiction either because as per New Zealand law, 'submission to the jurisdiction is a technical term that involves taking some unqualified formal step in the proceeding, usually by entering a defence'.<sup>20</sup> Here, Mr Salih was prevented from doing this and a default judgment was issued, which as per New Zealand law, the Dubai Court did not have jurisdiction over Mr Salih to do so. Significantly, the High Court held that the Dubai Court's judgment in granting the divorce and the ancillary order begs different jurisdictions of the Court. The grant of divorce is a judgment *in rem* (or a judicial pronouncement to the world generally) which it had the jurisdiction for, but not for the judgment *in personam* (as is pronounced against the individual(s) concerned) insofar as it relates to the ancillary order.<sup>21</sup> Hence, while the law in New Zealand allows for the recognition of the overseas divorce,<sup>22</sup> it does not extend to the ancillary order. This was sufficient to dispose of the summary judgment. Had jurisdiction not been an issue, the court expressed that<sup>23</sup>:

New Zealand courts have not yet ... enforced a foreign judgment ... concerning Islamic traditions around marriage and divorce. However, ... I can see no reason why New Zealand courts would not enforce such a judgment. New Zealand places a high value on cultural and religious autonomy. Recognising and enforcing a judgment such as this would reflect this commitment (footnote omitted)

and hence it would have granted Ms Almarzooqi's application to enforce the order.<sup>24</sup> Since that was not the outcome, Ms Almarzooqi appealed.

The essential argument on appeal was that the ancillary order could not be severed from the divorce order and since the Dubai Court had jurisdiction to deal with the divorce, it also had jurisdiction to make the ancillary order. The Court of Appeal, in a unanimous decision,<sup>25</sup>

<sup>16</sup> Reciprocal Enforcement of Judgments Act 1934.

<sup>17</sup> Senior Courts Act 2016.

<sup>18</sup> *Almarzooqi v Salih* [2020] NZHC 2441.

<sup>19</sup> Upon citing *Eilenberg v Gutierrez* [2017] NZCA 270 at [30].

<sup>20</sup> *Almarzooqi v Salih* [2020] NZHC 2441 at [38].

<sup>21</sup> *Ibid*, at [36].

<sup>22</sup> Family Proceedings Act 1980, s 44(1)(b)(ii).

<sup>23</sup> *Almarzooqi v Salih* [2020] NZHC 2441 at [62].

<sup>24</sup> *Ibid*, at [63]; also see *Almarzooqi v Salih* [2021] NZCA 330 at [23].

<sup>25</sup> *Almarzooqi v Salih* [2021] NZCA 330.

rejected this argument and clarified the law: a court's *in rem* jurisdiction over divorce matters can be analysed separately to assess whether there was jurisdiction over *in personam* matters. In agreeing with the High Court that the Dubai Court did not have jurisdiction over Mr Salih, the Court of Appeal dismissed Ms Almarzooqi's appeal. Ms Almarzooqi then appealed to the Supreme Court,<sup>26</sup> which essentially did not find any error with the Court of Appeal's assessment and the application was dismissed.

## V. CURRENT LITIGATION: BREACH OF CONTRACT?

With the issue of jurisdiction put to rest over four court cases,<sup>27</sup> Ms Almarzooqi then brought an action for breach of contract. As with jurisdiction, the marriage contract is silent as to the governing law hence this required determination of the proper law of contract.

In the High Court, Mr Salih accepted the validity of the contract but maintained that Ms Almarzooqi had to prove her allegations of misconduct in a New Zealand court and could not rely on the factual findings of the Dubai Court. The Court considered that the contract was universal to Muslim traditions everywhere in the world. However, given that the couple got married in the UAE in accordance with a particular tradition, and the divorce process and the grounds for it are concepts that are informed by principles of *shari'a* law, the Court determined that 'on balance' the proper law of contract was that of the UAE.<sup>28</sup> If it was the UAE contract law then, as Mr Salih had not paid the deferred mahr, he was in breach of the marriage contract. The High Court opined that the result would not be different if the proper law was New Zealand contract law.<sup>29</sup> Having assessed the evidence of three expert witnesses, the High Court noted that *Nikah* referred to the status of divorce as the triggering event and did not attribute any relevance to the divorce process or the particular grounds for divorce. It also rejected expert evidence adduced by Mr Salih who gave evidence regarding the impact of disentitling conduct which has the effect of reducing the amount of deferred mahr to be payable. In doing so, the High Court concluded that regardless of which process is followed for divorce under the UAE law, the fact of divorce triggered the obligation to pay the deferred mahr. Therefore, the High Court determined that the deferred mahr was owed since the date of the divorce, together with interest. This decision was then appealed to the Court of Appeal.

In the Court of Appeal,<sup>30</sup> Mr Salih asserted, for the first time, that there was no intention to be bound by the marriage contract. In considering whether it should allow new matters to be raised, the Court of Appeal stated<sup>31</sup>:

[13] It is to be expected that the outcome of this case will be significant, not only to the parties, but also to the wider Muslim communities in New Zealand. The issues are not straightforward. However, in a country as diverse as New Zealand law and it is important that civil disputes are able to be determined by the courts in a manner that both reflects the orthodox application of New Zealand law and recognizes the cultural context in which the disputes arise. Unless there would be injustice to Ms Almarzooqi in allowing the new issues to be raised, it would (with one exception) be desirable to address them so as to ensure that the real controversy between the parties is properly identified and considered.

<sup>26</sup> *Almarzooqi v Salih* [2021] NZSC 161.

<sup>27</sup> The first High Court case was *Almarzooqi v Salih* [2020] NZHC 1049, but which was not the substantive decision and hence has been excluded in the discussions.

<sup>28</sup> *Almarzooqi v Salih* [2022] NZHC 1170 at [26].

<sup>29</sup> *Ibid*, at [49].

<sup>30</sup> *Salih v Almarzooqi* [2023] NZCA 645.

<sup>31</sup> *Ibid*, at [13].

The Court of Appeal did not allow Mr Salih to raise the issue of lack of intention not to be contractually bound for several reasons, including that it would have been untenable based on his evidence at the High Court trial. Thus, the Court proceeded to address: (i) whether the High Court Judge erred in finding that the proper law of the contract was the UAE law?; (ii) if so, whether the contract is unenforceable under New Zealand law<sup>32</sup> and/or public policy? or (iii) if it is enforceable under New Zealand law, then is the mahr payable by reason only of the fact of the divorce order made by the Dubai Court or is Ms Almarzooqi entitled to rely on the factual findings of the Dubai Court?

The Court of Appeal first looked into the function of the mahr in Islamic marriages and the general norms regarding talaq, khul, and faskh divorce under *sharī'a* law. The Court noted that in the High Court, the expert evidence was at odds as to whether the reason for divorce was relevant to the obligation to pay the mahr.

In determining the proper law of contract, the Court referred to the relevant legal principles and identify the 'jurisdiction with the closest and most real connection to the contract', it took into account all the relevant circumstances which in this case were: the location and circumstances surrounding the formation of the contract, the form of the contract, the currency in which the mahr was to be paid, the location where the contract was to be performed, enforceability of the contract in the two jurisdictions and any barriers to that process.

Initially, the parties discussed only the immediate mahr of AUD50,000 but due to his lack of affordability, Mr Salih paid Ms Almarzooqi's father approximately 13,000–15,000NZD. There was no evidence that all the legal requirements of marriage in the UAE were fulfilled either. While Mr Salih intended to get married on this trip to the UAE, he was not joined by his family, and he gave evidence that he was simply taken to Ms Almarzooqi's aunt's house on the night of the marriage and introduced to 'the Sheikh' who officiated the marriage. Mr Salih gave evidence that deferred mahr was not discussed with him. The Sheikh was told by Ms Almarzooqi's father to write in the figure of AED500,000 in the nikah, which Mr Salih feeling 'helpless, [and] extreme embarrassment' signed. As is customary, this was not witnessed by Ms Almarzooqi.

The nikah had a Judge's stamp, presumably following certification at a later date. It recorded the 'Deferred Dowry: Five Hundred Thousand only 500,000 AED' payable upon 'The nearest of divorce or death'.<sup>33</sup> It further recorded that 'The two parties were acquainted with the legal implications of marriage and it was verified that they are free and clear from all legal impediments in the presence and testimony of the two witnesses'.<sup>34</sup> Although Ms Almarzooqi gave evidence about what her father said to Mr Salih about the deferred mahr and what the Sheikh said to Mr Salih regarding his ability to pay the same which was at odds with Mr Salih's evidence, there was no affidavit evidence from either the father or the Sheikh. Hence, no significant weight was attached to Ms Almarzooqi's evidence.

In assessing whether the nikah disclosed an express choice for UAE law, the Court of Appeal expressed that 'Sharia may be described broadly as Islamic religious law ... it is not a system of law for the purposes of determining the proper law of a contract ... UAE law is not Sharia law, but rather a system of civil law that is sourced from Sharia law'.<sup>35</sup> Thus, while the contract showed an intention to be subject to *sharī'a* law, it did not equate to an express

<sup>32</sup> Mr Salih argued against the enforceability of the contract on the basis that: (i) it is prohibited by the Domestic Actions Act 1975; (ii) it purports to contract out of the Property (Relationships) Act 1976 but is void for lack of compliance with the requirements of s 21F of the Act; and (iii) it is void at common law.

<sup>33</sup> *Salih v Almarzooqi* [2023] NZCA 645 at [48].

<sup>34</sup> *Ibid*, at [48].

<sup>35</sup> *Ibid*, at [54].

choice of UAE law. The High Court Judge was therefore held to be correct in approaching the issue of proper law by enquiring into ‘which jurisdiction had the closest and most real connection with the marriage contract’.<sup>36</sup> Even though it was obvious to the Court of Appeal that Mr Salih did not put a particular value on having a nikah enforceable in the UAE, where he had never been, did not intend to live and his knowledge of the laws would be limited to that being based on *sharī‘a*, he did travel to the UAE for a traditional wedding where Ms Almarzooqi’s family lived. Factors as to the place where the contract would be performed and the parties’ residency were significant considerations. In addition, the fact that the deferred mahr would only become payable upon divorce did not make the question of residence irrelevant. Given their intention to live in New Zealand permanently, as they intended and as expected by her family, in the event of Mr Salih’s death or divorce, the place of payment was likely to be New Zealand. Hence the mahr being stated in UAE currency was a neutral factor. The Court of Appeal differed with the High Court’s view that since mahr is only payable under *sharī‘a* law, that ‘a Sharia law system is more likely to be the proper law of contract, since those concepts are not, for example, part of New Zealand divorce law and would be unlikely to be recognized’.<sup>37</sup> Instead, the Court of Appeal took into account the widespread practice of Muslim couples marrying in New Zealand by nikah only and also, ‘although Sharia law concepts are not part of New Zealand law, ... in appropriate cases involving contractual disputes, they are capable of being recognised as part of the factual matrix’.<sup>38</sup> Based on the circumstances of the case, the Court of Appeal was satisfied that their decision to marry in the UAE was to meet Ms Almarzooqi’s family’s expectations to have a religious marriage ceremony, not to secure access to the UAE law.

The Court of Appeal then considered the enforceability of nikah in overseas jurisdictions namely, UK, Canada, and Australia. It placed particular significance on the English case of *Uddin v Choudhry*<sup>39</sup> for two reasons: (i) it recognized the enforceability of nikah in a civil court independently of issues regarding the division of relationship property (maintenance) under UK legislation, notwithstanding that the event triggering the contractual obligation was a religious divorce granted by the Islamic *sharī‘a* Council and (ii) the decision that mahr was payable was not only based on the plain wording of the contract but it also took into account expert evidence as to whether the payment was required under *sharī‘a* law, which it was in this case.

The Court of Appeal made a general observation with regard to the enforceability of a nikah<sup>40</sup>:

Provided the nikah satisfies the pre-requisites for an enforceable contract, the mere fact it was entered into in the context of a religious ceremony should not, of itself, preclude it being enforceable as a contract at civil law. It is evidence that the nikah is, by tradition, an agreement reached between parties to an Islamic marriage who understand that it is intended to create a solemn moral obligation. If, however, the requirements of a valid contract are met, there is no reason that this obligation should not also be held to be legally binding at civil law.

With no issues being raised as to consideration, the Court was satisfied that there was an intention to be contractually bound. Furthermore, none of the challenges based on statutory

<sup>36</sup> Ibid, at [55].

<sup>37</sup> *Almarzooqi v Salih* [2022] NZHC 1170 at [24].

<sup>38</sup> *Salih v Almarzooqi* [2023] NZCA 645 at [67].

<sup>39</sup> *Uddin v Choudhry* [2009] EWCA Civ 1205.

<sup>40</sup> *Salih v Almarzooqi* [2023] NZCA 645 at [92].

laws were successful and it was not void based on any public policy reasons either. Thus, the contract was held to be enforceable and New Zealand law was applicable.

The Court of Appeal then considered: (i) whether the wording of the deferred mahr on 'divorce' meant divorce regardless of the grounds on which divorce was granted or divorce on a particular ground and (ii) if Ms Almarzooqi must prove the ground upon which divorce was granted, whether she could rely on the factual findings of the Dubai Court.

The interpretation of the contract is an objective assessment of what the parties intended based on the background knowledge they had. For this, the Court emphasized that 'Great care is needed when courts embark on the task of interpreting a contract made within a particular cultural context'.<sup>41</sup> Thus, any interpretative task will depend on the evidence about the general principles of *sharī'a* law vis-à-vis divorce and the associated mahr. English cases indicate that this approach is not impeded by the fact that *sharī'a* law can be subject to different interpretations. Here, there was insufficient evidence before the Court of Appeal to interpret the *nikah*. The Court noted that the focus of expert evidence of the UAE lawyer in the High Court was on the UAE law who gave evidence that the reason for divorce was irrelevant to the obligation to pay the deferred mahr. This was inconsistent with the general position under *sharī'a* law as described by a New Zealand lawyer with knowledge and experience of *sharī'a* law, who gave evidence that if there is a dispute regarding the harm that is causative of the divorce, then the assessment and outcome of that dispute would dictate whether the mahr is paid in full, in part or not at all. The Court stated that, 'Ideally, the principles of Sharia law, as they would have been understood by the parties and by a reasonable bystander, would have been addressed more extensively, either by an expert jointly engaged for that purpose or by each party adducing evidence'.<sup>42</sup> As the parties' focus has been on UAE law, and not specific principles of *sharī'a* law, meant that the evidence was limited and the Court was unable to give a decision. Hence the matter was remitted back to the High Court. The Court added that, as Mr Salih had not submitted to the Dubai Court's jurisdiction, Ms Almarzooqi was unable to rely on its factual findings of misconduct by Mr Salih. However, Ms Almarzooqi would need to prove misconduct only if the High Court finds that the *nikah* requires Mr Salih to pay mahr upon proof of his misconduct.

As drawn upon by the Court of Appeal, *sharī'a*-based marriage contracts have been enforceable in other common law jurisdictions despite it being a religion-based contract and in some instances, the marriage contract having been executed in another jurisdiction. However, there have also been instances where the common law courts have refused to enforce such contracts. The rest of this article will consider the approaches taken, and the reasons given, in the consideration of such contracts in UK, Australia, and Canada, where like New Zealand, none of the laws make specific provisions for the recognition and enforcement of mahr.

## VI. THE UK APPROACH

The leading English case that first set the precedent for the enforcement of a contract for the payment of dower is *Shahnaz v Rizwan*.<sup>43</sup> In this case, the parties were married in India in 1955 in accordance with Mohammedan law. The marriage was evidenced by a certificate issued by a Qazi (local authority). The marriage contract provided that the wife was to have deferred mahr of £1,400 payable to her in the event of the husband's death, or divorce.

<sup>41</sup> *Ibid*, at [104].

<sup>42</sup> *Ibid*, at [109].

<sup>43</sup> *Shahnaz v Rizwan* [1965] 1 QB 390.

The husband divorced her by the pronouncement of *talaq* ('I divorce you').<sup>44</sup> As per Mohammedan law, once accrued, the right to mahr is enforceable by civil action and is regarded as an assignable proprietary right in favour of the wife against any of her spouse's property that she has possession of or control over. One of the defences pursued by the husband was that the contract was unenforceable since the contract and the dower provision were contrary to the policy and good morals of English law. The Divisional Court stated that while this situation can only arise in connection with a marriage by Mohammedan law, it was not a matrimonial right or obligation and is quite different, in essence, from maintenance. It is 'far more closely' comparable with a right of property.<sup>45</sup> The Court held that it is a 'right *ex contractu*'<sup>46</sup> and it is a right *in personam* which is enforceable by the wife or widow against the husband or his heirs once it is accrued as payable. Hence, the Court characterized the mahr as a contractual obligation upon the husband and held that it was enforceable by the wife in the English courts. The Court also stated *per incuriam* that: 'as a matter of policy ... the law should rather lend its aid to women who come here as a result of a Mohammedan marriage by enforcing the husband's contractual promise than leave them without recourse to legal assistance'.<sup>47</sup>

Subsequently, the principle that mahr can be enforced as purely a contractual right was confirmed in *Qureshi v Qureshi*.<sup>48</sup> In this case, the Muslim couple married in England under English law and also in a Muslim ceremony which included an agreement for the payment of dower of £778 (by agreement) on demand or on the dissolution of the marriage by divorce or death. The parties separated and the wife successfully sought a maintenance order. The husband returned to Pakistan and divorced his wife by *talaq*.<sup>49</sup> The husband stopped paying maintenance and the wife brought a claim that the marriage subsisted, or if the marriage had been validly dissolved, she claimed dower together with maintenance. The husband conceded that if the marriage had been validly dissolved then the wife was entitled to the payment of the dower. The English Court decided that the husband was domiciled in Pakistan and according to the law of Pakistan, the marriage was validly dissolved. Hence the wife was entitled to dower. This case recognized an Islamic marriage contract that was formed within the jurisdiction of England. However, this case was decided prior to the Matrimonial Causes Act.<sup>50</sup>

The UK Matrimonial Causes Act 1973 governs matrimonial matters including dissolution of marriage. Importantly, this removed the enforcement of marriage contracts containing provision of mahr from the purview of the civil courts to the jurisdiction of the Family Court. Section 25 of the Act deals with the settlement of finances post-divorce. It is under this provision that a party can get payment for the deferred mahr but only partial payment, as part of the overall financial settlement between the parties.

*Otobo v Otobo*<sup>51</sup> was determined after the Act came into force. This case involved a couple originating from Nigeria. Although this case did not settle the financial matters between the parties (encouraging alternative dispute resolution instead), the legal principles make it note-worthy. Here, Thorpe LJ considered that if the ancillary relief order were to be determined by an English judge, then s/he must give due weight to the primary cultural/religious factors, while also ignoring the difference between what a wife might anticipate from a

<sup>44</sup> See *Qureshi v Qureshi* [1971] 1 All ER 325.

<sup>45</sup> *Shahnaz v Rizwan* [1965] 1 QB 390 at [31].

<sup>46</sup> *Ibid*, at [31].

<sup>47</sup> *Ibid*, at [33].

<sup>48</sup> *Qureshi v Qureshi* [1971] 1 All ER 325.

<sup>49</sup> Pakistan Muslim Family Laws Ordinance 1961.

<sup>50</sup> Matrimonial Causes Act 1973 (UK).

<sup>51</sup> *Otobo v Otobo* [2002] EWCA Civ 949.

decision in England as opposed to a decision in the alternative jurisdiction.<sup>52</sup> His Honour opined that the cultural factors should be taken into account as one of the ‘the circumstances of the case’,<sup>53</sup> as provided for under the Act. Hence, in determining the enforceability of mahr, justice must be dispensed with in the particular cultural (or religious) context of the case.

*A v T*<sup>54</sup> involved an Iranian couple who got married in Iran but were to live in England. The marriage contract provided for the marriage portion of 1,000 gold coins (about £60,000) which the wife was entitled to retain if the husband divorced or if she initiated it (and there were very limited grounds upon which she could) then she would need to negotiate what percentage of the portion she would forego in order to secure the divorce. The marriage broke down after seven weeks of cohabitation. The wife claimed and the Iranian Court ordered the husband to pay the marriage portion. She returned to England and sought a divorce and claimed the portion in full. The English Court had the benefit of a jointly instructed expert report. It stated that as Iranian nationals, they were both subject to Iranian divorce law. Additionally, it was highly unlikely that an Iranian court would recognize and enforce any ancillary order made by the English court. Furthermore, it was also highly unlikely that the wife would have been able to obtain a khula divorce in Iran which means that for talaq, she would have had to negotiate the portion with her husband and she also would not have been entitled to be maintained by him. In disposing of this case, the English Court took into account the cultural background of the parties. Citing *Otobo v Otobo* (above), the Court considered the wife’s options under Iranian law as per the expert evidence surrounding divorce and the recoverability of the portion in Iran. It also considered the financial position of the husband and the length of the marriage. Although the wife made two applications; one based on contract and the other under the Matrimonial Causes Act, with an objective to achieve fairness, the Court made an ancillary order under section 25 for a reduced sum (£35,000) on the proviso that the husband gave her a religious talak and the wife dropped all proceedings in Iran, otherwise the court would have ordered the full £60,000 in favour of the wife.

In *Uddin v Choudhury*,<sup>55</sup> the case was between the father of the groom and the bride. The parties had divorced some four months after the marriage, which had not been consummated. The wife sought to enforce the mahr of £15,000 as evidenced by the marriage certificate. The London County Court had the benefit of an expert witness on *sharī‘a* law. There was a dispute as to whether there was any binding obligation on the part of the groom’s father to make this payment or at all. If it was payable, then there was also question of whether certain deductions should be made from it to make adjustments for (what was found to be outright) gifts and property (mainly jewellery) that was allegedly taken by the bride and her family but not proven. As to the issue of the mahr, the Judge concluded that as evidenced by the marriage certificate, there was a properly agreed mahr, which based on the expert evidence, was a valid contract and based on the evidence heard, was enforceable by the Court. It further held that there were no applicable case law principles or policy considerations for refusing to enforce the agreement between the parties regarding payment of the dowry. The Court stated that the failure of the marriage was also no reason why the mahr should cease to be payable. Upon appeal, in agreeing with the County Court, the Court of Appeal found that the agreement pertaining to the mahr was enforceable as a matter of contract and the

<sup>52</sup> See *Ibid*, at [57].

<sup>53</sup> Matrimonial Causes Act 1973, s 25(1).

<sup>54</sup> *A v T* [2004] EWHC 471 (Fam), [2004] 1 FLR 977.

<sup>55</sup> *Uddin v Choudhury* [2009] EWCA Civ 1205.

mahr was payable notwithstanding the failure of the marriage. As there were no grounds for making deductions to the amount of the mahr, deductions were refused.

Subsequently, the UK Supreme Court stated that although it was the court, and not the parties to an agreement, which would determine the appropriate ancillary relief under the Act, it should give weight to a pre-nuptial or marriage agreement between parties whereby they determined how their financial affairs would be regulated in the event of separation in circumstances where it was fair to do so and the court could hold the parties to the agreement even where the result would be different from that which the court would otherwise have ordered and that such agreements were not contrary to public policy.<sup>56</sup>

Thus, in the UK, mahr is enforceable as a matter of contract but under section 25 of the Matrimonial Causes Act, a Family Court judge can take particular cultural or religious factors into account in making an ancillary order pertaining to the divorce proceedings, and there are no legal or policy considerations for not enforcing such agreements. As for any associated form of domestic or family violence, there is a push for changes to the law so that the complexities associated with transnational marriage abandonment can be better addressed by the English family justice system.<sup>57</sup>

## VII. THE AUSTRALIAN APPROACH

The leading Australian case is *Mohamed v Mohamed*.<sup>58</sup> Here, the couple had married in a *shari'a* ceremony in 2004, not under Australian law. The pre-nuptial financial agreement ('the agreement'), which contemplated a marriage under Australian law at a future date, provided under clause 11 that in the event the husband initiated separation and/or divorce, he was to pay the wife \$50,000 Moackar Sadak (also known as a type of dowry). Clause 12 of the agreement clarified that Moackar Sadak is not payable to the wife if she initiated the separation or divorce or if both parties mutually agreed to separate or jointly applied for divorce. Having received legal advice, this agreement was executed by the parties in 2005. In the Local Court, the Magistrate made a factual finding that the husband initiated the separation, which triggered his obligation to pay the wife \$50,000 Moackar Sadak. One of the grounds of appeal to the Supreme Court of New South Wales was that the Magistrate erred in finding that the relevant separation did not have to be in accordance with *shari'a* law as it was submitted that: 'What constitutes an initiation of Islamic divorce or separation proceedings is something distinct to Islamic law and could only be determined by an Islamic court.'<sup>59</sup> It was clear to the Supreme Court that the Magistrate had rejected that divorce had to be interpreted as per *shari'a* law and the Magistrate did not consider the *shari'a* law meaning of separation either. The Supreme Court held that had the parties intended the terms to be interpreted under *shari'a* law, the terms could have been so defined in a definition clause. It is notable that no expert evidence was adduced in either Court. Hence it proceeded on the basis that the Magistrate was correct and *shari'a* law did not apply to interpret the meaning of separation. The New Zealand Court of Appeal is of the view that had expert evidence been adduced that it would have been considered.<sup>60</sup>

Nevertheless, as this was the first Australian case, the Supreme Court noted that in enforcing such contractual agreements, courts of common law countries such as the USA, Canada,

<sup>56</sup> *Granatino v Radmacher* [2010] UKSC 42; [2011] 1 AC 534.

<sup>57</sup> See Tahir Khan, 'Islamic Marriage and the English Legal System: Dowry' (Clerksroom, July 2022) available from <[https://www.clerksroom.com/downloads/857-CR-Article-Dowry-TK-\(1\).pdf](https://www.clerksroom.com/downloads/857-CR-Article-Dowry-TK-(1).pdf)>.

<sup>58</sup> *Mohamed v Mohamed* [2012] NZWSC 852.

<sup>59</sup> *Ibid*, at [55].

<sup>60</sup> *Salih v Almarzooqi* [2023] NZCA 645 at [90].

and English have applied common law or the relevant legislation (if any), rather than *shari'a* law.

It first considered the American case of *Aziz v Aziz*.<sup>61</sup> In this case, the defendant's wife had contended that the mahr of \$5,032 under Islamic law, which called for a prompt payment of \$32 by the plaintiff's husband at the time of marriage and a deferred payment of \$5,000 upon divorce, was enforceable as a breach of contract and that the court, as a court of general jurisdiction, may determine the claim. The husband contended that the mahr was a religious document and thus not enforceable as a contract, particularly in a matrimonial action. The Supreme Court of the State of New York considered the marriage certificate, that had been signed by the parties and issued under the signature of a religious leader who performed the ceremony and determined the claim in accordance with common law's general requirements for the enforceability of agreements.<sup>62</sup> Having met those and considering 'its secular terms', the Supreme Court held that the 'document at issue' was 'enforceable as a contractual obligation, notwithstanding that it was entered into as part of a religious ceremony'.<sup>63</sup> It thus called for the immediate payment of the outstanding \$5,000.

The Australian Supreme Court also noted a number of Canadian cases,<sup>64</sup> which pointed towards the general enforceability of such agreements, provided that they complied with the formal requirements of the applicable Canadian law and were not invalid for any other reason.<sup>65</sup>

Finally, the Supreme Court referred to the English case of *Shahnaz v Rizwan*<sup>66</sup> noted earlier and concluded that: 'It is clear that courts in other common law countries have not interpreted these types of agreements in accordance with *shari'a* law but have applied common law or the relevant legislation, if any, governing the relationship between the parties.'<sup>67</sup> It also concluded there was no public policy against upholding such agreements either. Therefore, the appeal was dismissed.

## VIII. THE CANADIAN APPROACH

Canada has experienced mixed results though similar cases where such agreements have been recognized as valid and binding marriage agreements have been enforceable under the applicable Canadian legislation in various provinces.

### 1. British Columbia

In *Nathoo v Nathoo*,<sup>68</sup> the Supreme Court of British Columbia had to consider whether the mahr was enforceable. The parties were married within the traditions of the Ismaili community and signed the marriage contract or 'Mahr' on the day of their marriage for a negotiated sum of \$20,000. This was payable by the husband to the wife in the event of a separation. This obligation was recorded in 'addition, and without prejudice to, and not in substitution of all my obligations provided for by the laws of the land'.<sup>69</sup> Having met the definition of a marriage agreement under the Family Relations Act, the court could vary the terms of the

<sup>61</sup> *Aziz v Aziz* 127 Misc 2d 1013; 488 NYS 2d 123 (1985).

<sup>62</sup> New York General Obligations Law § 5-701(a)(3).

<sup>63</sup> *Aziz v Aziz* 127 Misc 2d 1013; 488 NYS 2d 123 at 124 (1985).

<sup>64</sup> See *Mohamed v Mohamed* [2012] NZWSC 852 at [34]-[43].

<sup>65</sup> Although in *Khanis v Noormohamed* [2009] OJ No 2245 even though the contract did not comply with the requisite legislative formalities, the court refused to set it aside. See at [73].

<sup>66</sup> *Shahnaz v Rizwan* [1965] 1 QB 390.

<sup>67</sup> *Mohamed v Mohamed* [2012] NZWSC 852 at [47].

<sup>68</sup> *Nathoo v Nathoo* [1996] BCJ No 2720.

<sup>69</sup> *Ibid*, at [8].

agreement under section 51 if it found it to be unfair. However, Dorgan J considered that the parties knew full well that the provision for mahr was a condition of a marriage within the Ismaili tradition and the quantum was discussed and having sought advice from the elders, negotiated the agreed sum. Hence Dorgan J did not find any unfairness which required the exercise of his discretionary powers. In enforcing the mahr, His Honour added that<sup>70</sup>:

Our law continues to evolve in a manner which acknowledges cultural diversity. Attempts are made to be respectful of traditions which define various groups who live in a multi-cultural community. Nothing in the evidence before me satisfies me that it would be unfair to uphold the provisions of an agreement entered into by these parties in contemplation of their marriage, which agreement specifically provides that it does not oust the provisions of the applicable law.<sup>71</sup>

*Amlani v Hirani*<sup>72</sup> is also a case that was heard by the Supreme Court of British Columbia where the parties first got married in a civil ceremony followed by another marriage as per the customs of the Ismaili faith some 10 months later. Sinclair Prowse J found that the marriage contract was executed during the religious ceremony and that it constituted a marriage agreement as per the Family Relations Act. The agreement provided for the payment of a mahr (unspecified amount) upon the breakdown of the marriage. For the sake of completeness, the issue of whether the parties did agree that the mahr amount was to be \$51,000.00 or another amount was not addressed in this decision, suffice to say that the mahr itself was enforceable as it qualified as 'other property' under section 61 of the Act.

*NMM v NSM*<sup>73</sup> is yet another case heard by the Supreme Court of British Columbia where the couple got married in accordance with their Ismaili faith, 2 days after their civil ceremony. Prior to the marriage ceremony, the husband signed a marriage contract containing a mahr component for the sum of \$51,250 should they separate. The amount was determined by the husband in consultation with the wife's father. The agreement provided an undertaking by the husband to pay the amount of the mahr 'in addition and without prejudice to and not in substitution of all my obligations provided for by the laws of the land'.<sup>74</sup> He testified that his discussions with the Mosque led him to believe that the mahr was symbolic only and that the applicable laws will govern in the event of a divorce. However, after hearing all the testimonies, Joyce J found that he understood and accepted the mahr as legally binding and, citing the above two cases, concluded that the mahr was enforceable.

All the above cases were determined by the Supreme Court of British Columbia which found that contracts for mahr are enforceable. However, even though the province of Ontario had the benefit of *Nathoo v Nathoo*, in *Kaddoura v Hammoud*,<sup>75</sup> Rutherford J of the Ontario Supreme Court did not share the same view.

## 2. Ontario

In *Kaddoura v Hammoud*,<sup>76</sup> Rutherford J of the Ontario Supreme Court held that the Court should not determine the rights and obligations of the parties under the mahr, as it would

<sup>70</sup> Ibid, at [25].

<sup>71</sup> This sentiment was not shared by the Ontario Supreme Court in *Kaddoura v Hammoud* (1998) 168 DLR (4th) 503 where the court did not feel that the religious principles could be dealt with in a civil court of law.

<sup>72</sup> *Amlani v Hirani* 2000 BCSC 1653.

<sup>73</sup> *NMM v NSM* 2004 BCSC 346.

<sup>74</sup> Ibid, at [26].

<sup>75</sup> *Kaddoura v Hammoud* (1998), 168 DLR (4th) 503.

<sup>76</sup> Ibid.

lead the Court into the ‘religious thicket’.<sup>77</sup> Subsequently, in *Bruker v Marcovitz*,<sup>78</sup> Abella J for the majority of the Supreme Court of Canada (bench of nine Justices with two dissenting) held that ‘the fact that a dispute has a religious aspect does not of itself make it non-judicial’<sup>79</sup> and referenced the three cases determined by the Supreme Court of British Columbia above.<sup>80</sup> The Court held that ‘if a spouse can show that the religious marriage contract meets all the [legal] requirements for a [valid] contract ... , then the courts may order the fulfilment of undertakings to pay the amounts provided for in the contract’.<sup>81</sup>

The second opportunity for Ontario prevailed in *Khanis v Noormohamed*,<sup>82</sup> the Superior Court of Justice of Ontario revisited the issue of mahr post its determination in *Kaddoura v Hammoud*.<sup>83</sup> Having referred to the number of cases including *Bruker v Marcovitz*,<sup>84</sup> it determined the validity of the marriage contract in accordance with the provisions of the Family Law Act.<sup>85</sup> Section 55(1) provides that a domestic contract is unenforceable unless it is made in writing, signed by the parties and witnessed. In addition, there are judicial oversight provisions contained in section 56(4) of the Act which allows a court to set aside a domestic contract or a provision in it, ‘(a) if a party failed to disclose significant assets, debts or other liabilities; (b) if a party did not understand the nature or consequences of the contract; or (c) otherwise in accordance with the law of contract’. In this case, the written contract was executed properly and there was a certificate stating that the parties signed the marriage contract of their own free will and volition.<sup>86</sup> The husband denied having any input into the amount of the mahr, and in the alternative cited duress. The court noted that this was the husband’s second marriage, with him having entered into a contract for mahr in his first marriage. The court held that to say that the marriage would not otherwise have taken place, does not constitute duress. The court made a finding that the husband had agreed to pay the wife \$20,000 for the mahr. While the contract was silent as to when the mahr was payable, the court held that ‘it is common ground that the amount becomes due following marital breakdown’.<sup>87</sup> The court then considered whether the contract should be set aside. Neither party had obtained legal advice, provided financial disclosure, nor retained a copy of the contract. The Court hence considered that it was unconscionable to enforce the mahr in these circumstances. However, the Court noted that its power to set aside the contract was discretionary. It was not a case where the parties were opting out or giving up rights under the Act where understanding the legislative scheme and the other parties’ financial position was critical. The contract was simple in its terms. In addition, the husband understood the promise and that it was binding. Thus, the Court was not persuaded that it should exercise its discretion to set it aside. An appeal to the Court of Appeal for Ontario was unsuccessful as the appellate court saw no basis for interfering with the trial Judge’s analysis or conclusion.<sup>88</sup>

In *Ghaznavi v Kashif-Ul-Haque*,<sup>89</sup> the parties entered the marriage contract a few hours before their wedding in July 2009 in Ontario. The wife remained living in Canada and the

<sup>77</sup> *Ibid*, at [25]–[26].

<sup>78</sup> *Bruker v Marcovitz* [2007] 3 SCR 607.

<sup>79</sup> *Ibid*, at [41].

<sup>80</sup> *Ibid*, at [44].

<sup>81</sup> *Ibid*, at [123].

<sup>82</sup> *Khanis v Noormohamed* [2009] OJ No 2245 (QL).

<sup>83</sup> *Kaddoura v Hammoud* (1998), 168 DLR (4th) 503.

<sup>84</sup> *Bruker v Marcovitz* [2007] 3 SCR 607.

<sup>85</sup> Family Law Act, RSO 1990, c F3.

<sup>86</sup> *Khanis v Noormohamed* [2009] OJ No 2245 (QL) at [69].

<sup>87</sup> *Ibid*, at [71].

<sup>88</sup> *Khanis v Noormohamed* 2011 ONCA 127 at [9]–[10].

<sup>89</sup> *Ghaznavi v Kashif-Ul-Haque* 2011 ONSC 4062.

husband, who was an American citizen, went back to Arizona where he was from. The parties never resided together and they got divorced by consent in the Superior Court of the State of Arizona. Through his lawyer, the husband denied any obligation to pay the mahr but agreed that ‘the more appropriate jurisdiction would be Canada’.<sup>90</sup> The wife commenced the proceedings in the Superior Court of Justice of Ontario in December 2010 seeking to enforce the mahr together with costs. The husband did not file a denial of facts set out by the Applicant. His defence as articulated in the Arizona proceeding but never presented in the Ontario action was that the mahr was a religious document, and thus not enforceable as a legal contract. In the Arizona court materials, he also acknowledged that he signed the marriage contract agreeing to pay his wife a mahr in the amount of \$25,000 in US dollars, payable ‘on demand’, that this was a legitimate marriage, that the parties elected to resolve all issues other than the mahr in Arizona and the parties specifically agreed that the USA was not the proper jurisdiction to decide the mahr issue, and that the wife would be entitled to pursue the claim in Ontario. The Court cited *Bruker v Marcovitz*,<sup>91</sup> *Khamis v Noormohamed*,<sup>92</sup> and *Amlani v Hirani*<sup>93</sup> and concluded that the mahr was enforceable under section 52(d) of the Family Law Act.<sup>94</sup> Although the parties did not obtain independent legal advice prior to signing the contract, in his Arizona materials the husband had admitted that he understood what he signed.<sup>95</sup>

As to the issue of jurisdiction, the Court was satisfied that the wife’s Application should be permitted to proceed. As the Arizona claim was withdrawn, there was no attempt to relitigate any issue determined by the Court in Arizona and hence there was no abuse of process. There was a real and substantial connection between the Applicant and Ontario as the marriage contract was executed and the marriage performed in Ontario. Both parties agreed in writing (within the context of the Arizona proceeding) that the USA was not the appropriate jurisdiction to deal with the matter, and that the Applicant could proceed with her claim in Ontario. There was no issue as to conflict of laws either because the husband had specifically acknowledged that the matter should not be determined in the USA. Significantly, the Court held that the fact that the parties obtained a foreign decree of divorce does not prevent the Applicant from dealing with her property or contractual entitlements pursuant to the Family Law Act in Ontario.<sup>96</sup>

Most recently, in *Bakhshi v Hosseinzadeh*,<sup>97</sup> the Court of Appeal for Ontario referred to cases dealt with by Ontario courts involving obligations to pay mahr pursuant to a religious marriage contract.<sup>98</sup> The Court of Appeal stated that:

These cases treat Mahers like any other contract that may impose a variety of different legal obligations. The outcome of each case depends, just as in any other case of contractual interpretation, on the objective intentions of the parties as ascertained through the particular wording of the Maher when read as a whole and considered in light of its factual matrix. As such, evidence about the religious and/or cultural significance of the Maher to the

<sup>90</sup> *Ibid*, at [12].

<sup>91</sup> *Bruker v Marcovitz* [2007] 3 SCR 607.

<sup>92</sup> *Khamis v Noormohamed* 2011 ONCA 127.

<sup>93</sup> *Amlani v Hirani* 2000 BCSC 1653.

<sup>94</sup> Family Law Act, R.S.O. 1990, c. F.3.

<sup>95</sup> Recently, the Superior Court of Justice has held that ‘in the context of [a] religious marriage, the absence of independent legal advice is not a bar to the enforceability of the contract’; *Hesson v Shaker* 2020 ONSC 1319 at [28].

<sup>96</sup> *Ghaznavi v Kashif-Ul-Haque* 2011 ONSC 4062 at [29] referring to *Okmyransky v Okmyransky* 2007 ONCA 427, [2007] OJ No 2298 Ontario Court of Appeal.

<sup>97</sup> *Bakhshi v Hosseinzadeh* 2017 ONCA 838.

<sup>98</sup> See *Ibid*, at [20].

parties could conceivably be relevant to the factual matrix in determining their objective contractual intentions.<sup>99</sup>

### 3. Alberta

*Nasin v Nasin*<sup>100</sup> was the first case heard by the Court of Queen's Bench of Alberta. Here, the parties were married in accordance with the Muslim tradition. The pre-nuptial agreement provided for the mahr whereby the husband verbally agreed to pay his wife \$10,000 in the event of the failure of their marriage. The parties separated after 9 months of their marriage. The husband suggested that the religious obligation should not be legally enforced. Moreover, he stated that he did not agree to pay the mahr amount in addition to the obligations under the Act, having noted the three cases; *Nathoo v Nathoo*,<sup>101</sup> *Amlani v Hirani*,<sup>102</sup> and *NMM v NSM*,<sup>103</sup> where the agreements were in writing and expressly indicated that the mahr amount was in addition to the obligations under the law. Justice Moen referred to *Bruker v Marcovitz*<sup>104</sup> and held that: 'Persons can transfer their moral obligations into legally binding ones. Therefore, the promises in such an agreement must be considered to determine whether they are valid and binding under the relevant law'.<sup>105</sup> Here, that law was the Matrimonial Property Act,<sup>106</sup> section 38, which spelled out the formal requirements around such agreements. In this instance, not only was the writing requirement not met but independent legal advice was also not taken by either party before the oral agreement was made. Hence the court refused to enforce the mahr. Had the legislative requirements been met, it is likely that the agreement would have been enforced by the court.

### 4. Reasons for non-enforcement

There are, however, instances where the marriage contract has not been enforced, even where such agreements have been enforced within the particular province previously. The following looks at examples of cases determined by the Supreme Court of British Columbia post its decision to enforce such an agreement in *Nathoo v Nathoo*.<sup>107</sup>

In *Aziz v Al-Masri*,<sup>108</sup> the parties entered a Jordanian marriage contract for the payment of a deferred mahr. The wife sought to enforce it as a matter of simple contract law. The Supreme Court of British Columbia was referred to a number of cases where Canadian courts have upheld similar contracts and where '[i]t is clear that our courts have striven to be flexible in cases of this kind, seeking to recognize and accommodate the traditions of other countries and cultures where it is feasible and appropriate to do so'.<sup>109</sup> The Court proceeded on the premise that this was the correct approach, generally, except that in this case, the parties to the contract were the husband and the wife's uncle, not the wife (as the court understood is stipulated under *sharī'a* law). Also, it was not clear from the translated wording of the contract that the wife was the intended recipient of the deferred dowry. What made adjudication difficult in this case was the lack of proper expert evidence. This meant

<sup>99</sup> Ibid, at [22].

<sup>100</sup> *Nasin v Nasin* 2008 ABQB 219.

<sup>101</sup> *Nathoo v Nathoo* [1996] BCJ No 2720.

<sup>102</sup> *Amlani v Hirani* 2000 BCSC 1653.

<sup>103</sup> *NMM v NSM* 2004 BCSC 346.

<sup>104</sup> *Bruker v Marcovitz* [2007] 3 SCR 607.

<sup>105</sup> *Nasin v Nasin* 2008 ABQB 219 at [13]. Here the relevant law was the Matrimonial Property Act, RSA 2000, c M-8.

<sup>106</sup> Matrimonial Property Act, *ibid*.

<sup>107</sup> *Nathoo v Nathoo* [1996] BCJ No 2720.

<sup>108</sup> *Aziz v Al-Masri* 2011 BCSC 985.

<sup>109</sup> Ibid, at [3].

that the court was also unable to conclude with confidence whether the contract was valid or enforceable under Jordanian law. Hence the application was dismissed.

In *Delvarani v Delvarani*,<sup>110</sup> Justice Powers of the Supreme Court of British Columbia refused to enforce an Iranian marriage agreement as it did not constitute a valid marriage agreement under the Family Relations Act<sup>111</sup> as the parties did not reach an agreement as to payment upon dissolution of the marriage. The relevant document containing the 'Marriage Portion' simply made reference to 3,000 gold coins. It did not explain its purpose and it was not clear why it was included. The Court took into account that its intention is to protect the wife and children in the event the marriage fails as *sharī'a* law does not entitle one to child or spousal support, or property division. The husband contended that the Marriage Portion was not in the document when the parties signed it, and the document was not dated either. There was also no clear evidence that it was discussed by him with his wife's family. Notably, Powers J held that the evidence must support that the parties agreed that the husband would pay the wife a sum of mahr in the event of a divorce in each case.<sup>112</sup> Here, His Honour was not satisfied that such an agreement had been reached and added that even if the marriage agreement in this instance was valid under the Act, it was clearly unfair because although the wife asserted that the gold coins were worth totalling \$750,000.00 but she was willing to accept \$450,000.00, there was no evidence to prove the value of the gold coins. The Court also noted that in other cases, the amounts of mahr varied between \$10,000 and \$25,000<sup>113</sup> and found it difficult to accept that the husband here would have committed himself to paying such a large amount in addition to any other obligations that he may have under the British Columbia laws.

In *Mohammadi v Mohammadi*,<sup>114</sup> the couple's Iranian marriage contract included a 'Marriage Portion' of 700 gold coins which are 'the husband's liability and payable to the Wife upon her demand'.<sup>115</sup> The term did not stipulate divorce but both parties agreed that it had to be either paid or waived in order to register their Iranian divorce. The wife gave evidence that the value of this would be approximately \$276,000. While she never claimed the mahr and did not intend to claim it in Iran, at the same time she asserted that she never gave up her right to claim it. The husband testified that the Marriage Portion was purely symbolic. That he never had the equivalent of 700 gold coins and that the number was based on a numeric calculation of his wife's name. His understanding of the mahr was that it was a security for housewives in Iran who did not work. The court referred to *Amlani v Hirani*<sup>116</sup> and *NMM v NSM*<sup>117</sup> and stated that the term of mahr was clear and the amounts claimed in those cases were in the range of \$50,000. Here, Fisher J held that: 'I find it difficult to accept that he would have undertaken to be liable for such a large mahr that he had no ability to pay had he understood that the respondent intended to claim it from him.'<sup>118</sup> The Court felt that the evidence here was not clear as to the wife's intention to enforce it until the point of litigation and no expert evidence was adduced about the traditions of mahr or its enforceability in Iran. The court expressed that even if the mahr constitutes a valid marriage

<sup>110</sup> *Delvarani v Delvarani* 2012 BCSC 162.

<sup>111</sup> Family Relations Act, RSBC 1996, c 128.

<sup>112</sup> *Delvarani v Delvarani* 2012 BCSC 162 at [202].

<sup>113</sup> *Khamis v Noormohamed* 2011 ONCA 127—\$20,000.00; *Ghaznavi v Kashif-UI-Haque* 2011 ONSC 4062—\$25,000.00; *Nasin v Nasini* 2008 ABQB 219—\$10,000.00.

<sup>114</sup> *Mohammadi v Mohammadi* 2016 BCSC 1873.

<sup>115</sup> *Ibid*, at [53].

<sup>116</sup> *Amlani v Hirani* 2000 BCSC 1653.

<sup>117</sup> *NMM v NSM* 2004 BCSC 346.

<sup>118</sup> *Mohammadi v Mohammadi* 2016 BCSC 1873 at [54].

agreement under the Act,<sup>119</sup> it is subject to being set aside if the court determines it to be unfair. Being of the view that the agreement was indeed unfair 'given the substantial amount involved and the claimant's limited financial resources, both at the time of the marriage and presently',<sup>120</sup> the court refused to enforce the mahr in this case.

This case was referred to in *AM v MS*,<sup>121</sup> where the problem for the Supreme Court of British Columbia was even greater. Not only was the agreement an oral one but there was no evidence that the parties agreed or even discussed the value of the mahr. The husband referred to Iranian law which provides that where an Iranian court finds that a husband is not able to pay the mahr then the court will order the husband to pay the least amount as set out in Iranian law which is 110 gold coins or its equivalent. The husband calculated the mahr of 110 coins (not gold) was valued at \$45,100 but the wife stated that 110 gold coins are a mandatory payment and claimed \$270,000 based on calculations from the internet. So essentially the court was being asked to determine between two valuations with the difference between them being \$224,900. The court declined to make a decision given that there was no proper evidential basis for the decision-making process here as the evidence being relied upon was based on translations of unknown people and online sources. The court stated that if the parties wish a decision on how a mahr is treated in Iranian law in the case of a divorce and the value of the mahr, they would have to provide legitimate expert evidence on Iranian law on the two issues which were the valuation gold and Iranian divorce law, in particular, the valuation of a mahr as part of a divorce. Hence the claim was dismissed.

Most recently, in *El-Jaroudi v El-Mikati*<sup>122</sup> the Supreme Court of British Columbia dealt with a marriage contract that was entered into by the parties at the commencement of their marriage in Lebanon. The claimant was a bank employee and the respondent was a practising lawyer. Under the agreement, the deferred dowry was specified as 'one hundred fifty English Gold Lira, First Class'. Although the agreement was silent as to when the deferred dowry was payable, the parties agreed that it was payable to the wife upon the death of the husband or in the event of a divorce. The Supreme Court referred to the legislative definition of a 'marriage agreement'<sup>123</sup> and stressed that the 'existence of an enforceable marriage agreement must be supported by the evidence in each case'.<sup>124</sup> Here, the marriage contract fit the criteria for a marriage agreement. The Court further held that the deferred dowry was properly characterized as 'other property' within section 61(2)(b). However, the Court was of the view that the marriage contract was unenforceable (alongside a claim for civil remedies). This is because, with the assistance of an expert witness, the Court took into account that the 'deferred dowry acts to extinguish any claim the wife has to assets held by the husband beyond that which is provided for in the Marriage contract'.<sup>125</sup> Thus, the Court concluded that 'it provides a religious remedy for the division of family and debts, as an alternative to, rather than ancillary to, civil remedies'.<sup>126</sup> The Court distinguished this case from *Amlani v Hirani* on the basis that in that case, the marriage contract contained a declaration from the husband that his undertaking to pay the mahr to his wife 'shall be in addition and without prejudice to and not in substitution of all my obligations provided for by the laws of the land'.<sup>127</sup> Even if the agreement in this case was enforceable, the Court opined

<sup>119</sup> Family Relations Act RSBC 1996, c 128.

<sup>120</sup> *Mohammadi v Mohammadi* 2016 BCSC 1873 at [60].

<sup>121</sup> *AM v MS* 2017 BCSC 2061.

<sup>122</sup> *El-Jaroudi v El-Mikati* 2020 BCSC 868.

<sup>123</sup> Family Relations Act, RSBC 1996, c 128, s 61(2).

<sup>124</sup> Citing *Mohammadi v Mohammadi* 2016 BCSC 1873 at [48].

<sup>125</sup> *El-Jaroudi v El-Mikati* 2020 BCSC 868 at [35].

<sup>126</sup> *Ibid*, at [35].

<sup>127</sup> *Amlani v Hirani* 2000 BCSC 1653.

that it would be unfair to enforce it. This is because the amount being claimed relative to the parties' assets and the impact that enforcement of the agreement would have on the parties' respective financial positions and legal rights would have produced an unjust result.

Thus, while the Supreme Court of Canada has made it clear that mahr is recoverable under valid marriage contracts, the above cases show that courts can refuse to enforce marriage contracts where the terms of the contract are unclear or unsupported by expert evidence or where enforcement will produce unjust results especially if there are claims for civil remedies in addition to it. Even if it is not in addition to any other claim, statutory powers enable a court to put the agreement aside even if it is a valid agreement if it would be unfair to enforce it. Such powers are not available under New Zealand statutory laws.

## IX. DIVORCE AS A TRIGGER FOR THE PAYMENT OF THE DEFERRED MAHR

There is no doubt that *shari'a*-based marriage contracts contemplate the payment of deferred mahr upon (death or) divorce. If the contract is silent as to who needs to initiate the divorce then that would present no issues for the courts, and particularly the spouse seeking divorce and deferred mahr. However, issues have arisen in situations where the wife has left the husband but the husband has refused to divorce so as not to trigger the contractual obligation to pay the deferred mahr where the contract specifically states that the mahr is payable where the divorce is initiated by the husband. New Zealand laws allow for divorce on a no-fault basis, so a party simply needs to prove that they have been living apart for at least two years<sup>128</sup> and that one of them resides or is domiciled in New Zealand.<sup>129</sup> However, there can be challenges getting a divorce where the wife has chosen to leave the marriage and it is up to the husband to file for divorce.

The English case of *Brett and Brett*,<sup>130</sup> though involving a Jewish couple and concerned an application for an additional capital order, is of assistance. Here, the wife managed to obtain a legal divorce, but the husband did not grant her a *Get* from the Beth Din (religious divorce), which would have enabled the wife to re-marry if she so wished and allow another man to financially maintain her. To address this issue, it was decided by the English Court of Appeal, that it did have jurisdiction to make an additional capital order in circumstances where a wife would be disadvantaged by the failure of a husband to grant the religious divorce. It was then up to the husband to opt to grant the religious divorce to his wife by a certain date if he wished to avoid paying the extra capital. Thus, the court used its power to make an additional capital order to 'compel' the husband to grant the religious divorce. This is similar to *A v T*<sup>131</sup> already discussed, where the court made an ancillary order for a reduced sum of mahr provided the husband filed for a religious divorce and the wife dropped all proceedings in Iran.

Where a husband has signed an agreement to obtain a *Get* but then refused to do so, has resulted in an award of financial compensation to the wife. A good example is the Canadian Supreme Court in the case of *Bruker v Marcovitz*.<sup>132</sup> This concerned a Jewish couple whereby the wife, who was free to divorce her husband under Canadian law, wanted a Jewish divorce except that under Jewish law, *Get* can only be given by a husband, with the wife's consent. However, in order to settle their matrimonial dispute, the couple had signed

<sup>128</sup> Family Proceedings Act 1980, s 39(2).

<sup>129</sup> *Ibid*, s 4(a).

<sup>130</sup> *Brett v Brett* [1969] 1 AER 1007.

<sup>131</sup> *A v T* [2004] EWHC 471 (Fam), [2004] 1 FLR 977.

<sup>132</sup> *Bruker v Marcovitz* (Canadian Civil Liberties Association intervening) 2007 SCC 54.

an agreement to obtain a Jewish divorce. The wife sought to enforce that agreement after the husband had refused to obtain a Jewish divorce for 15 years. The issue was whether the agreement to obtain a Jewish divorce was enforceable under Quebec law and if so, whether the husband was able to rely on freedom of religion to avoid damages being awarded against him. The majority of the Court agreed with the trial judge that it was a civil contract, notwithstanding its purpose to partly compel religious obligations and that a breach of a civil obligation under the contract, was within the domain of the civil courts. The wife was entitled to damages for the husband's violation of a civil contract in obtaining a Get. The approach of courts conferring protection to Jewish women whose husbands refused to provide religious divorces in other jurisdictions was reviewed. The use of damages to compensate someone whose spouse refused to provide a Get has been upheld by the European Commission of Human Rights<sup>133</sup> and similar approaches have also been taken in France,<sup>134</sup> Australia,<sup>135</sup> the USA,<sup>136</sup> and Israel.<sup>137</sup> Having reviewed these cases, the Supreme Court concluded that the 'international perspective reinforces the view that judicial enforcement of an agreement to provide a Jewish divorce is consistent with public policy values shared by other democracies'.<sup>138</sup>

While these cases focused on compensating a woman for her right to re-marry, similar policy considerations would be just as applicable where a woman simply wanted a divorce and closed the chapter on her marriage. The fact that divorce may trigger the payment of a deferred mahr is a consideration that cannot be ignored but should not be an overriding consideration to the extent that the woman then remains married as per her religion. While it is yet easier for courts to enforce marriage contracts and/or agreements to divorce, it is even more challenging where the marriage contract itself is an oral one.

## X. ENFORCEMENT OF ORAL CONTRACTS

So far, the courts in the UK have dealt with mahr in written contracts. The case of *Brishty*<sup>139</sup> was going to be the first one involving an oral contract that was to be determined by the London County Courts but there was no report of its decision at the time of writing this article. If the claim was successful, then this would have been the landmark decision that would have become precedent for the full recovery of mahr based on an oral contract and outside the purview of the Family Court. However, given the 3-year time lapse since the case was first reported, it may well be that the case was either not pursued or settled out of court.

As demonstrated in *AM v MS* (discussed above, and below),<sup>140</sup> the Canadian courts will look to enforce oral agreements provided that the matters in which the court is required to make a determination are proven with proper evidence, including, any expert evidence.

<sup>133</sup> *D v France* (App no 10180/82) (1983) 35 DR 199.

<sup>134</sup> *Trib civ Seine*, 22 February 1957, Gaz Pal 1957.1.246.

<sup>135</sup> *Re Shulsinger's Marriage* (1977) 13 ALR 537; and *Re Steinmetz's Marriage* (1980) 6 FLR 554 where the Family Court of Australia awarded the wife a greater amount of spousal maintenance in order to 'encourage' the husband to give her a religious divorce.

<sup>136</sup> *Avitzur v Avitzur* (1983) 59 NYS 2d 572.

<sup>137</sup> *Doe v Doe* (21 December 2004, Jerusalem 19270/03).

<sup>138</sup> *Bruker v Marcovitz (Canadian Civil Liberties Association intervening)* 2007 SCC 54 at [90].

<sup>139</sup> Amelia Hill, 'Landmark UK Court Ruling Due in "bride price" Dispute' (*The Guardian*, 16 August 2021) <<https://www.theguardian.com/law/2021/aug/16/landmark-uk-court-ruling-due-in-bride-price-dispute>> (accessed 3 November 2023).

<sup>140</sup> *AM v MS* 2017 BCSC 2061.

## XI. USE OF EXPERT EVIDENCE

In the New Zealand case of *Almarzooqi v Salih*, as a closing remark, the High Court stated that Mr Salih's 'case was dependent upon ... findings as to the requirements of *shari'a* law ...'. In preferring the expert evidence of practitioners in Dubai over one who had no specialized training in *shari'a* principles, the Court conveyed that a 'witness with appropriate authority to assist the Court is to be expected'.<sup>141</sup> The Court of Appeal had the same issue where the parties' expert witnesses' testimony were at odds with each other and the Court acknowledged that its knowledge of *shari'a* law was limited. It is clear that the Court needed to be informed of all the applicable *shari'a* legal principles pertaining to the applicable grounds of divorce and its impact on the mahr. For this expert evidence is critical. The importance of expert evidence was reinforced by the New Zealand Supreme Court's recent pronouncement regarding the use of expert evidence to view a legal matter within a cultural context.<sup>142</sup> Even though culture did not have a bearing on the outcome of the matter before it, the Supreme Court took this opportunity to issue guidelines to assist Judges with cases in the future where the social and cultural context may be of greater significance.<sup>143</sup>

The use of expert witnesses needs particular care in such cases to enable the courts to dispense with justice with all the information it needs to do so. Judges may well rely on expert evidence the most. The Supreme Court of British Columbia in *AM v MS*<sup>144</sup> was asked to determine the value of the mahr based on *shari'a*-based Iranian divorce law given that there was no evidence that the parties agreed or even discussed the value of the deferred mahr and so it was not quantified in the parties' oral agreement. They referred to Iranian law except that they significantly differed on the meaning of the Iranian law and the value of the mahr. The husband relied on an affidavit by a lawyer specialized in family law presumably in Iran who stated that where a husband does not have the requisite funds to pay a mahr and an Iranian court finds this to be so, then the court will order the husband to pay 'the least amount set out in Iranian law, which is 110 gold coins or its equivalent amount'. The husband submitted a copy of a Google translation of an Iranian press release about Iranian law which included a reference to 'coins', not gold coins. He husband stated that he is entitled to be released from the mahr by the payment of 110 gold coins, each valued at \$410 and for a total of \$45,100 of mahr. The Google translation was rejected by the Court as unreliable hearsay and opinion evidence. Also, the basis of the valuation of Iranian gold coins as being \$410 each was not explained. Counsel for the husband also offered his own interpretation of Iranian law based on someone else's translation but the Court declined to accept that submission. The wife's evidence was better but also problematic. She stated that 110 gold coins were a mandatory payment. To calculate the value of the mahr, she used an online site for a value of a kilogram of 24-carat gold of \$54,236 (as of 12 June 2017). Using this figure, she claimed the value of the 5 kilograms referenced in the mahr as \$270,000. This calculation was based on an on-line source and it was not known how reliable that source was. In effect, the Court was asked to choose between two valuations of the mahr, with the difference between them being \$264, 900. The Court expressed that it did not have all the information that was 'necessary to fully or properly assess' each valuation. That the evidence presented by both sides was unsuitable for the kind of determinations sought and hence the Court declined to make those determinations. The Court stated that if the parties wished a decision on how a mahr is treated in Iranian law in the case of a divorce and the value of the mahr, then they ought to make an application to that effect. Given the wide differences between

<sup>141</sup> *Almarzooqi v Salih* [2022] NZHC 1170 at [48].

<sup>142</sup> See *Deng v Zheng* [2022] NZSC 76.

<sup>143</sup> See *Ibid*, at [78]-[81].

<sup>144</sup> *AM v MS* 2017 BCSC 2061.

the parties about the valuation of the mahr and in light of the need for legitimate expert evidence on Iranian law, any evidence on these issues must comply with the applicable rules on expert evidence. The expert evidence required here was the valuation of a kilogram of gold and Iranian divorce law, in particular, the valuation of a mahr as part of a divorce. The Court added that an expert witness and his/her report may be subject to cross-examination as per the applicable Rules. In other words, an affidavit, even though by someone with expertise, who is not available for proper scrutiny would be insufficient.

## XII. SUBJECT MATTER OF THE PROMISE

Usually, the value of the promise is stated in monetary terms and if that is the case then there is no issue in enforcing the amount of the promise, unless the court dealing with it has jurisdiction to alter the amount as has been seen in some cases in Canada. If the subject matter is not cash then usually any type of property that can be owned and possessed can be designated as mahr.<sup>145</sup> However, if the promise involves property like gold coins or kilos of gold, then that might present issues as noted above. In such cases, the court should seek assistance from the foreign *sharī'a* law jurisdiction that at least one of the parties has a connection to. Indeed, if the subject matter was not permissible or lawful in accordance with *sharī'a* law such as alcohol, pork, etc. which is considered haram, then the marriage contract would be invalid. If the subject matter is not haram but was not able to be satisfactorily identified or resolved as to the nature or quantum even in the context of the relevant foreign jurisdiction then the parties would have less hope, unless the matter could be resolved through the use of expert witnesses and if the jurisdiction allows, then based on what would achieve a just and equitable result. This would (ideally) be a discretionary exercise.

## XIII. FLEXIBILITY IN THE MIDDLE EASTERN COURTS

It is not inconceivable that in some instances, the husband would not be financially well placed to meet his contractual obligation to pay the deferred mahr rather than simply refusing to do so. Even where the husband is simply unable to meet the payment, the previous approach of the Middle Eastern courts was to hold the husband in contempt for not paying and imprison him until such time that he came up with the money, for example by borrowing the sum.<sup>146</sup> Discretion and flexibility are important mechanisms in such circumstances that should be available in enforcing a claim for deferred mahr. While not all *sharī'a* law jurisdictions offer flexibility in enforcing payment for the deferred mahr, some do. The Iranian approach is one such example. In 2013, Iran passed an amendment to its Family Protection Act<sup>147</sup> to address the high incarceration rate of husbands who were unable to pay dowry. The amended law enables the Court to not impose imprisonment for non-payment of deferred dowry and also enables the court to impose a capped minimum as was discussed in the Canadian case of *AM v MS*<sup>148</sup> noted above.

<sup>145</sup> See, for example, the Iranian Civil Code, Article 1078.

<sup>146</sup> Leena Yousefi, 'Family Law: Judge Refuses to Grant Dowry for Lack of Proper Expert Evidence—here we go Again ...' (24 December 2017) CanLII Connects <<https://canliiconnects.org/en/commentaries/54201>> (accessed 3 November 2023).

<sup>147</sup> Family Protection Act 2013.

<sup>148</sup> *AM v MS* 2017 BCSC 2061.

#### XIV. CROSS-OVER WITH FAMILY LAW IN NEW ZEALAND?

The governing legislation for dealing with relationship property post-divorce (and separation) in New Zealand is the Property (Relationships) Act (PRA).<sup>149</sup> This Act provides for (generally) the equal division of relationship property where the marriage was of 3 years or more, and if less than 3 years then (generally) based on the contributions of each party to the respective relationship property. The Act provides that spouses in contemplation of entering a marriage may contract out of the Act (a pre-nuptial agreement)<sup>150</sup> in respect to the division of property including future property.<sup>151</sup> However, as the Court of Appeal has stated, not every contract between domestic partners relating to property will be subject to the PRA and the Act does not cover *sharī'a*-based marriage contracts such as that being considered here as it is not an agreement that was concluded ‘for the purpose’ of contracting out of the PRA.<sup>152</sup> So while a New Zealand court has the power to set aside a pre-nuptial agreement that it considers would cause ‘serious injustice’,<sup>153</sup> it does not have the power to set aside a marriage contract that is not subject to the PRA. If it was subject to the PRA, then the court would have had the power to consider any misconduct, provided it was ‘gross and palpable’ and had a significant effect on the value of the relationship property.<sup>154</sup>

There is the provision under the Family Proceedings Act, section 182, which allows a court discretionary powers to make orders in relation to any property settled as per any agreement between the parties to the marriage, including ‘ante-nuptial or post-nuptial’ for the benefit of either party as the court thinks fit.<sup>155</sup> Should Mr Salih be liable for the mahr, the court may be able to use its discretionary power under this provision to make an order it considers just and fair between the parties. While this is yet to be tested, it is notable that the Supreme Court recently allowed the use of this provision to address a property claim subject to a family trust by recognizing it as a nuptial settlement. In allowing this, the Court held that ‘there is no restriction to s 182 on the form of a nuptial settlement, and the need for some flexibility—in order to preserve the court’s power to deal with the diverse range of circumstances that may come before it—is an important aspect of the approach to s 182’.<sup>156</sup>

However, discretion around nuptial settlements is not the only relevant consideration. Also important is the ability of the courts to consider whether a spouse needs to be financially maintained by the other spouse post the relationship breakdown. In terms of assessing the economic needs of a spouse requiring maintenance by the other after separation or the dissolution of marriage, the court is able, to the extent that maintenance is necessary to meet the reasonable needs of the other spouse, to take into account any ‘relevant circumstances’.<sup>157</sup> This could extend to not just the economic needs of the husband having paid out a hefty sum but also the rationale behind the obligations to pay deferred mahr which included providing for the wife’s future financial security. Also, the court must have regard to the means of each spouse, including their potential earning capacity as well as their reasonable

<sup>149</sup> Property (Relationships) Act 1976.

<sup>150</sup> *Ibid*, s 21.

<sup>151</sup> *Ibid*, s 21(1).

<sup>152</sup> *Salih v Almarzooqi* [2023] NZCA 645 at [97]–[98].

<sup>153</sup> Property (Relationships) Act 1976, s 21J.

<sup>154</sup> *Ibid*, s 18A.

<sup>155</sup> See Family Proceedings Act 1980 s 182(1). Note that although s 182 contemplates the making of an order under Part 4 of the Act which relates to orders pertaining validity or lack thereof or presumptions of death or dissolution of marriages and civil unions, the same Part provides for recognition of overseas orders as well.

<sup>156</sup> *Preston v Preston* [2021] NZSC 154 at [31].

<sup>157</sup> Family Proceedings Act 1980, s 64(2)(a)(iii).

needs, their financial and other responsibilities, and any other circumstances that make one spouse liable to maintain the other.<sup>158</sup>

As recently stated by the Supreme Court of British Columbia<sup>159</sup>:

the Marriage Contract provides for payment of a deferred dowry to the wife as part of a specific legal remedy within the context of ... Islamic marriage traditions, which are governed by Sharia Law. Under those traditions, the parties to the marriage contract agree to govern their affairs in accordance with Sharia Law, which dictates how and when the deferred dowry is to be paid. The deferred dowry acts to extinguish any claim the wife has to assets held by the husband beyond that which is provided for in the Marriage Contract. ... it provides a religious remedy for division of family property and debts ... ’

usually as an alternative to civil remedies, unless there is scope for the application of other types of laws and remedies.<sup>160</sup> Under UK laws, it has been some time since the Supreme Court ruled that the claim for the payment of dower can be in addition to any entitlement to spousal maintenance.<sup>161</sup> Both the UK and Canadian jurisdictions have the flexibility to determine outcomes which are equitable in the circumstances of the case. Given the laws of New Zealand as it currently stands, even though a court may consider the terms of a marriage contract to be seriously unjust, as stated by the English Court in *Shahnaz v Rizwan*,<sup>162</sup> it is not a marriage right but a right *ex contractu*, which gives rise to contractual obligations that come under the civil jurisdiction of the court. So unless and until the Property (Relationships) Act<sup>163</sup> is amended, it cannot be dealt with as part of relationship property settlement under the jurisdiction of the Family Court but there are provisions under the Family Proceedings Act that may provide some relief to Mr Salih should he be liable to pay the mahr.

## XV. CONCLUSION

Looking at experiences overseas and noting that issues of divorce and/or mahr are codified in some countries and are dealt with under Personal/Family Law, it is clear that the matter is best dealt with under the jurisdiction of the Family Court in a common law legal system, rather than simply as a matter of contract law. The advantage of doing this is to allow a Family Court judge discretionary powers to have regard to a number of relevant factors such as the age (and maturity) of the parties, the duration of the marriage, the financial situation of the husband both at the time of the formation of the contract and when the mahr became payable, whether the amount of the mahr was negotiated and by whom, their respective understanding of the terms of the contract, their familiarity with the concept of mahr, any (legal) advice received, whether the mahr was clearly stipulated to be paid upon divorce and the grounds for it are satisfied if applicable, any expert evidence presented and whether enforcement or variation of the terms of the contract would achieve a just and equitable outcome.

<sup>158</sup> Ibid, s 65(2).

<sup>159</sup> *El-Jaroudi v El-Mikati* 2020 BCSC 868 at [35].

<sup>160</sup> See Ibid, at [35]–[40] and *Amlani v Hirani* 2000 BCSC 1653.

<sup>161</sup> *Mohammed Ahmed Khan v Shah Bano Begum* AIR 1985 SC 945.

<sup>162</sup> *Shahnaz v Rizwan* [1965] 1 QB 390.

<sup>163</sup> Property (Relationships) Act 1976.

*Almarzooqi v Salih*<sup>164</sup> has highlighted a gap in the law in New Zealand. This opportunity should be taken to amend the Property (Relationships) Act<sup>165</sup> to ensure that future cases in New Zealand are dealt with having regard to all the circumstances of the case, and not treat the marriage contract just like any other contract, and to ensure that the amount of the deferred mahr is taken into account in the settlement of all the other relationship property issues (if any) and in making any spousal or childcare support orders. Until that is done, given the divergent interpretations of *shari'ah* law, the New Zealand courts should be able to rely on expert evidence and apply such Islamic interpretations which favours an equitable outcome in the circumstances of the case. The same approach could be adopted in other jurisdictions where the ideal statutory framework is not in place.

<sup>164</sup> *Almarzooqi v Salih* [2022] NZHC 1170.

<sup>165</sup> Property (Relationships) Act 1976.

© The Author(s) 2024. Published by Oxford University Press.

This is an Open Access article distributed under the terms of the Creative Commons Attribution License (<https://creativecommons.org/licenses/by/4.0/>), which permits unrestricted reuse, distribution, and reproduction in any medium, provided the original work is properly cited.

International Journal of Law, Policy and The Family, 2024, 38, 1–25

<https://doi.org/10.1093/lawfam/ebae020>

Article