Barristers' Chambers

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Issue 11
Hvorostovsky v Hvorostovsky [2009] EWCA 791 and McFarlane v McFarlane [2009] EWHC 891

Introduction:

1. It would be remiss of this service, when leaving 2009 behind, not to make mention of these two cases as both have moved the jurisprudence on in relation to the **section 25** exercise, albeit their individual facts are less important. The latter case was reported much earlier in the year, but the length of the reported judgment (again by Charles J as a serial offender) caused many of us to put its reading on our 'to do' list. In case that list has now become for some their New Year resolution list, then below I concentrate not on the detail of either case, but rather on the impact of certain dicta from the two decisions on everyday advice to relevant clients.

The Decisions:

2. Touching base only on the facts, therefore;_

Hvorostovsky's case was a variation application involving an original order from 2001 in which the opera singer husband had been ordered, after a marriage of 10 years, to pay his wife and twin children a total of c.£113k pa from a gross income of c.£552k pa. By the variation hearing, the husband's income had grown to c.£1.86m. The first instance judge awarded the wife and children an increase to a total of £145k pa plus school fees direct. On Appeal: the Court of Appeal increased the award to a total of £170k pa plus school fees direct. In doing so, the Court, specifically, accepted that the award would leave the wife with c £37k pa more than her 'reasonable needs'.

Mcfarlane's case, clearly, needs less introduction on the facts. Again, now as a variation application from the original award in 2006, Charles J agreed with the wife that an increase in her maintenance was called for. The husband's income, having been £750k pa in 2006, was now £1.1m pa net. Having regard to the fact that the wife's original award had included 'compensation', he determined that it was possible to make a fair provision for a possible clean break by the husband's anticipated retirement at 55 in 2015, by awarding the wife 40% of his net earnings up to the first £750k pa net of his income, another 20% up to the £1m pa level and 10% of any net income over £1m. At the husband's probable retirement date, the wife, herself, was expected to have gained a 'Duxbury' income of c £120k pa, which he determined 'would be a strong pointer in favour of no extension being ordered' at that stage.

Commentary:

3. In **Hvorotovsky's case**, where, for the wife, it was argued that she was entitled to an award based on 'compensation' for having sacrificed her own career, the Court of Appeal first of all, upon such a

submission, recognised that the wife was here a life long maintenance claimant (see para [37]), as envisaged in the dicta of The President in **VB v JP [2008]:-**

> '**[59]…***Where it is necessary to provide ongoing periodical payments for the wife after the division of capital assets insufficient to cover her future maintenance needs, any element of compensation is best dealt with by a generous assessment of her continuing needs unrestricted by purely budgetary considerations, in the light of the contribution of the wife to the marriage and the broad effect of the sacrifice of her own earning capacity upon her ability to provide her own needs following the end of the matrimonial partnership…*'

4. However, their further approach was that the claim for compensation for the wife's alleged 'loss' had been 'a departure from reality' and could and should have been kept simply to submissions based upon her 'contributions' alone. They emphasised that the language of **section 25** refers to 'contributions' and not to 'relationship generated disadvantages', in any event. They added:-

> *'**[39]** Of course, compensation for relationship-related disadvantage may be a very important ingredient in many cases, particularly in the assessment of the original division of capital and foreseeable income. If reflected at that stage it will find its continuing reflection on a variation hearing without fresh assessment.'*

5. Hence, as compensation arguments did not apply, then:-

> *'**[40]** The fundamental changes of circumstances that must be weighed in the judgment are the changes in the wife's budgeted needs and the changes in the husband's circumstances, here principally his hugely increased earnings and a newly acquired second family. The exercise must be guided by the language of the statute. The single factor of greatest significance is the husband's greatly increased income.'*

6. In such an application, therefore, the Court of Appeal expressly approved of the words of Charles J in **Cornick v Cornick [2001] 2 FLR 1240,** namely:-

> *''It is therefore logical that a payee is not precluded from deriving benefit from an increase in the payer's fortunes <u>even if this results in the payee enjoying a higher standard of living than she or he did during the marriage</u>.' (my emphasis)….(and so on either first application of subsequent variation)…(the following) points (apply), namely <u>that (a) the court should not rely on the judicial concept of "reasonable requirements" as a determinative or limiting factor in cases where a payer has, or acquires, an ability to pay more than the payee's financial needs even when they are interpreted generously and called "reasonable requirements", and (b) the court should exercise its discretion by applying the words of the statute.'</u> (my emphasis).*

7. In **<u>Mcfarlane's case</u>**, Charles J voiced what we have all privately observed, namely, that the House of Lords gave the profession no guidance as to how compensatory awards should be quantified [**para 98**]. After **H v H (2007),** then **CR v CR (2008)** and **VB v JP (2008)**, at least, three different methods had, subsequently, been adopted ranging from a reducing fraction of the last three years of the husband's income (**H's case)**, to the less than helpful 'generous assessment' of the ordinary award (**VB's case**), to the 'old chestnut' of the length of the individual judge's foot – a general discretion! (**CR's case**).

8. Of some interest is the correction [para 38] by Charles J of the general misinterpretation of the observation by Lord Nicholls [92] in the original decision that the wife here had foregone "*a*

professional career as successful and highly paid as the husband's". Charles J accepted that the same had been intended as a *'description of the past and the position before the husband was made a partner and not a prediction as to the (wife's) future'.* In fact, he found [para 41], whilst she would have been successful and well paid, she would not have been paid as well as the husband.

9. Charles J, himself, not only repeats the now oft cited mantra that there is no formulaic approach to the compensation assessment, but, on the basis of the authorities now decided, his **H v H** approach of percentage formula is also to be avoided. Instead, each case is fact sensitive **[para 47].** He went on:-

> *'**[48]** Rather, it seems to me that the overall assessment should be informed by the points mentioned in* **H v H** *that there are a number of factors that have gone to make up the husband's earning capacity (a number of which will have been factors in the choice made during the marriage to rely on his abilities as the breadwinner eg his talents, energy and dedication to hard work) and that the effects of the platform created (and the spade work done) during the marriage will be likely to reduce as time passes and be replaced by other factors (for example the contribution of a second wife).*
>
> ***[49]** To my mind these quantification points relating to the earnings the wife would have been likely to have made, and the continuing effects on the husband's earning capacity of the marriage partnership after it has ended are truisms that comprise relevant factors in the discretionary exercise required by the* ***MCA 1973*** *and, by their nature, create problems for the courts (and advisers) because they do not lend them themselves to a formulaic approach.'*

10. In setting out to determine the relevant compensation aspect of the Wife's claims on variation, Charles J reminded himself as follows:-

> *'**[123]** ...what is important is to remember when assessing the award to be made that the wife gave up her well paid career. To my mind this provides a solid foundation for an award that provides that by reference to what they both (but in particular she) gave up financially for their long term financial security (whether they were together or apart) the wife is to continue to share in the product of the husband's success and thus the main (or only) source of income that they would rely on to fund their lifestyle (together or apart) before and after retirement.'*

11. Having at all times in his sights the basis of the original decision and the anticipation therein of a future clean break at some stage, he determined, as 'building blocks' to the exercise, to assess what was likely to be the parties' surplus income net of their individual day to day expenses and the costs of maintaining their children and what was the amount that would be needed by the wife by the time of the husband's expected retirement (2015) to enable her to be independent of his support at that point and the level of capital provision required by her then, taking account of her own resources also [see **paras 120 to 126**].

12. Assessing in this way the overall spend required pa by the two parties' households, Charles J estimated, inclusive of the parties own personal lifestyle needs of £150k pa each, that some £440k pa overall would be used, adding in the cost of the husband's second family also [see **para 157**]. He concluded, as based upon the specific facts of sacrifice and contribution in this case, that:-

> *'**178]** In my view a fair income in retirement for the wife has to be judged by reference to the lifestyle chosen by the parties during their marriage, and thus its benefits and sacrifices and the product of the husband's career which as a result of the choices made represents*

the main source of finance. The lifestyle spend used to identify the surplus available for making provision is a helpful guide as to that appropriate level of income. As the reasoning relating to the lifestyle spend shows the sum chosen of £150,000 allows for the wife to live at her present standard, be generous and make some savings.'

13. Using the Duxbury tables [**para 179**], he then estimated by reference to the likely future earnings of the husband to 55 and the wife to 60 and the savings the wife was likely to make up to her retirement at that stage and what capital she may release from certain reasonable age related economies, that the subsequent Duxbury capital available to her would be likely to provide her with an income in retirement of between £120k pa and £150k pa, which he considered as fair to her in the circumstances of the case and therefore a reason for now limiting her maintenance claims to 2015, albeit without, at this point, a **section 28** cut off provision, but with clear indications spelt out as to how a future Court should approach the same.

14. In justifying his conclusions he stated:-

*'**[201]** The approach is likely to result in the wife having capital that is lower than the husband's on his retirement on the basis of my approach for present purposes to their capital (and that of the second wife) and a wider divergence will be created if he maintains his present level of earnings. But that level represents a very high level of success that is to a large degree based on his talents and hard work. If his income drops the disparity will be less and this would in my view be a factor in favour of an award which by its result provides less for the wife.*

***[202]** In my view the benchmark and bracket I have used meets the wife's needs (generously interpreted) for her lifetime. Also in my judgment, by reference to what she gave up and thus decided should be the main financial resource for the family, it sets her income and capital at a fair level when compared with that of the husband.*

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