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Case Update Issue 20

J V J – a Judicial Safari Tour of Ancillary Relief Issues by Charles J. Part 2

Introduction:

What follows is the concluding second Part (2) of the two part legal analysis of Charles J in J v J. The paragraph numbers below follow on from those set out in Part 1 in Flyer 19 forwarded previously.

Post Separation Assets (paras 362-386):

7.1. The issue concerning such assets has been the subject to date of different approaches at first instance, having been acknowledged but not addressed in *Charman (no 4)*.

7.2. There are a number of conceptual differences, in this area, between:-

- i) future earnings (and the earning capacity acquired and developed during the marriage); and
- ii) capital assets such as the shares in a private company.

Further, in respect of changes in the value of capital assets there are also conceptual differences between changes in value that are, and are not, based on effort, work or skill of a party to the marriage, even when the asset has been created by such work etc.

7.3. When dealing with private company shares, Thorpe LJ in *Cowan* had made a number of points, being:-

- i) their identification and valuation was as at the date of trial or appeal;
- ii) rare exceptions to i) above may be confined to where a party has deliberately or recklessly wasted assets in anticipation of a trial and thereby had traded the other party's unascertained share after the separation and so the same had been on risk entitling a share in any increase as a result;
- iii) the holder of the unascertained share, in this context, is not to be equated with the holder of assets under a trust or for that matter as a shareholder or partner in a business because the present matrimonial property regime recognises the initial premise of separate property (see Baroness Hale in *Miller* at para 153). Rather, it reflects the position that as a party who does not work in a business that party is entitled to have their award under s 25 assessed in the light of post separation gains or losses, subject to the above exception.



7.4. However, within that assessment, there may well be grounds to depart from ‘the sharing principle’ when the relevant asset is a business in which one of the parties works (or the product of an earning capacity) and there have been increases in value (other than passive market growth) of capital assets created, acquired or developed before separation. (see *Mcfarlane* in the context of the product of an earning capacity and *Singer J in S v S*).

7.5. Clearly, there was now an accepted principle that independent endeavour after separation of one of the parties which is productive of money or property should be appropriately reflected in the division of assets and the essence of this principle also applies to pre-acquired and gifted assets (see Lord Mance in *Miller and Rossi v Rossi* [2007] 1 FLR 790 and *S v S*). Of course, any such assessment would be fact sensitive and factors such as ‘the springboard effect’ of pre-held assets to any increase in value post separation or the extent to which the party in question is otherwise being remunerated for their independent endeavours and the capital value of the shares held are all relevant.

7.6. However, as was stated in *H v H* [2007] 2 FLR 548 (by Charles J), the position relating to the application of the sharing principle changes when the mutual co-operation between the parties pursuant to their choices as to how to run their lives together, as equal partners making different contributions that fall to be treated as equal, ends (see paragraph 83) and that the assessment of an award by reference to that change is also fact sensitive, and cannot be the subject of a formulaic or arbitrary approach (see paras 60,124, 126, 130 to 144).

7.7. In this context also when dealing with the value of the capital element of private company shares, considerations will necessarily arise as to whether the capital value is realisable or to be realised, the valuation and the funding of any award by reference to the same. When the assets under consideration include such business shares in achieving fairness it was important to re-state there was a need to:-

- i) adopt a commercial approach (see *D v D and B Ltd* [2007] 2 FLR 653); and
- ii) recognise, whilst apparently simple and fair to make an award by reference to an equal, or other percentage sharing, based on the total of the valuations of all the available assets, such an appearance when involving company shares will often be an illusion and such an approach can often carry with it a very high risk of unfairness for a mixture of reasons, be they the hypothetical and assumed nature such valuations, the uncertainties inherent in the process flowing from the range of the reasonable judgments made as to the constituent parts of the valuations, the income and other benefits derived from such a business and the potential for unfairness in requiring the party who works in the business to sell, or to raise money to pay a lump sum by utilising the income it produces and the security for any borrowing that it may provide (see also *H v H* [2008] 2 FLR 2092, Moylan J at paras 5, 99 and 104).

How to Quantify Departure from Equality Where Pre-Acquired Assets, Gifts or Increased Value Post Separation (paras:387-407):

8.1. Any quantification based upon the percentage departure of decided cases is fraught with difficulty and, if applied generally, wrong. However, the range of departure within ‘the sharing principle’ for good reason would be wider than for ‘special contribution’ (see *Charman (No 4)*) and as long as it



satisfied what was fair ‘...pre-acquired and gifted assets could be retained by the person who provided them (and so divided 100%/0%)’, (see Lord Nicholls in *White* at para 610 and in *Miller* paras 26 & 27).

8.2. The Court has to make an assessment in each case having regard to the factors or ingredients above (and other relevant factors in a given case) relating to the impact of pre-acquired business assets, and events and work since separation, to gauge their impact on the creation and value of the relevant assets and how that should affect the award to be made.

8.3. In a number of reported cases, the approach to be taken to post separation assets or the fruit of post separation endeavour has been considered.

8.4. In *CR v CR* [2007] EWHC 334, [2008] 1 FLR 323, Bodey J, whilst emphasising that the exercise is both discretionary and fact specific, found there had been a ‘...financial continuum, the groundwork for which was laid and the seeds sown during the parties’ married life together, through how they chose their respective marital roles’ and that ‘...the husband’s asset-accruing role has not changed in any way since the separation and where the accruals have not come from any new source of risk, endeavour, or luck’. Whether there has been a ‘financial continuum would thus be an important issue reflecting as it would on any argument of ‘a springboard effect’ on an asset base in place before separation and the increases or decreases in any unascertained share of the other party.

8.5. In *P v P* [2007] EWHC 2877, [2008] 2 FLR 1135, Moylan J at para 123 stated that he adhered ‘to Baroness Hale of Richmond’s approach namely ‘that the marital partnership does not stay alive for the purpose of sharing future resources unless this is justified by need or compensation’, this does not require me to define what is and is not matrimonial property. Further, the weight to be given to the fact that some of the resources have accrued through the husband’s earnings since the separation is a matter for my discretion’. This latter fact was weighed by Moylan J against the fact also that the Husband retained a very significant earning capacity.

8.6. In *H v H* [2008] 2 FLR 2092, Moylan J expressly adopted a broad approach in the search of fairness, stating that “the relevant building blocks have to be assembled in a provisional structure” and a global assessment of fairness is then to be performed (see paragraph 122).

8.7. These authorities establish that:-

- i) in determining the impact of post separation enhancement in the value of assets the court exercises a broad discretion and does so in a principled way by reference to the facts of the particular case, and
- ii) as the exercise involves establishing from the evidence the relevant building blocks and key points, it is not practical or sensible to search for a mathematical or formulaic solution.



Overlap of Principles (408-416):

9.1. ‘Need and compensation..’ are not limiting principles in the exercise of what is fair (see Lord Nicholls in *Miller* at para 34 and Baroness Hale at para 139 and *Charman (No 4)* at para 73 as to whether the greater of ‘need’ or ‘sharing’ are to prevail). However, the flexibility and overlap within the application of the principles must be remembered in assessing whether the proper and fair application of the principles do in fact produce different results.

9.2. Hence, where there exists a good reason to depart from equality, if an application of the ‘need principle’ leads to a result that is less than an equal division of the assets, this can, in some cases, inform or influence the extent of the departure (for good reason) from equality within the sharing principle, and in others dictate such departure and, thereby, found the same conclusion being reached on the application of both principles.

9.3. By way of similar cross check, where ‘need’ based on the standard of living in the marriage may indicate a capitalised award of more than equality, then it may be necessary to decide where there also exist other reasons for a departure within the sharing principle by an award of less than equality, whether the latter course is the still the fair course to take and/or whether there should be a periodical payments order on top to meet the ‘need’ element and/or what is the approach that should be taken to the pre-acquired or gifted assets of the parties.

9.4. In this way, there is potential for the argument that the existence of gifted or pre-acquired assets and reliance upon the same as a factor in a case can reduce the level of a ‘needs’ indicated award to a standard of living level below that enjoyed during the marriage.

The Recourse to Gifts or Inheritance or the Prospect of the Same (paras 417-423):

10.1. The prospects of inheritance are covered by the language of s. 25(2)(a) and a hope or prospect of inheritance can be taken into account, albeit rarely (see *Michael v Michael* [1986] 2 FLR 389). The same can be said of a hope or prospect of a lifetime gift or transfer (see for general discussion *Thomas v Thomas* [1995] 2 FLR 668 (and the comments on it by Mr Mostyn QC sitting as a deputy judge in *TL v ML* [2005] EWHC 2860, [2006] 1 FLR 1263) and Singer J in *H v H* [2009] 2 FLR 494 at paras 51, 63, 64, 68 and 69).

10.2. If for example a child of an extremely rich father has always had a very high standard of living before and during his or her marriage met by gifts from the father, and has not been given a stake in the wealth made or made a beneficiary under trusts, the court can in applying the approach in *Thomas* and *TL* make an award by reference to the history that the father has generously provided funds in the past and will be likely to enable the child to pay the award. This approach is based on history and lifestyle, rather than the hope or prospects of a “one off” lifetime gift or a large inheritance.

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