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X v X [2012] EWHC 538 – Issue 31
Radical Change to Preparation of Financial Case Preparation and Trial Presentation

Introduction:

1. I readily recognise that in reporting upon yet another significant judgment of Charles J, some may wonder if I have belatedly joined a rather small fan club of the learned Judge. However, I believe my own credentials in this area are well established and recorded both here and in the Court of Appeal's comments in **Jones [2010]** – albeit the Court of Appeal itself has been far from pro-active in providing the sort of guidance which Charles J. valiantly attempts here**.** What the learned Judge suggests in this judgment (and previously in part set out in his first instance decision in **Jones**) is a radical change to preparing and presenting financial cases upon divorce which is likely to stir a number of 'feathered nests' – and as Charles J anticipates there is likely to be a passionate debate as to whether his critical comments are fully justified – his timing is, at least, impeccable, since having set this particular 'hare running', he himself is about to leave the Family Division for pastures new upon another appointment.

The Background:

2. In short, the case before Charles J was an evidential disaster nightmare and many readers will be less forgiving than the learned Judge appears to have been for those responsible. The final hearing had had to be adjourned on its seventh day. On its return, fortuitously for the parties, their legal teams reached settlement over two days of negotiations – but, as Charles J commented, the circumstances revealed:-

'…another example of the endemic failure in this field of litigation to prepare and present cases in such a way that, before the trial starts, the issues have been properly identified, and the evidence has been properly gathered and prepared'. (para 4).

The Judge's Approach:

3. At the heart of the criticism, (as had also been the problem in the **Jones** case at the first instance hearing) was the fact that central legal and factual issues between the parties had not been properly identified and presented by their lawyers (para 10). At its core, this related to the fact that a hotel had been gifted by the husband's father and, therefore, the application of the 'sharing principle' to that property was in dispute. The parties' operated a business within the hotel via a company, which thereby was a tenant of the hotel and it had sub-let the tenancy to another hotel operator. There was a full-on dispute as to whether the hotel was to be treated as 'non matrimonial' or 'matrimonial' property in the circumstances of the parties' treatment of the same. Astonishingly, with this background, the Court was not presented with any valuation of the hotel 'bricks and mortar', as opposed to the business operated within it and it was for the Judge to point out this deficiency to leading counsel within the hearing itself, which, eventually lead to the adjournment (paras 12 to 14).

4. Charles J identified three areas of obvious pre-trial preparation, namely:-

i) disclosure and inspection of the relevant 'gift' transfer and any background documents concerning it and why it was made,

ii) disclosure and inspection of the hotel leases and the books and records of the relevant companies involved in the same, and

iii) by reference to those documents and the instructions on them and generally, an investigation of the manner in which and by reference to what interests in the property, the hotel business was carried on.

Although, the learned Judge was not to find anything but limited information presented upon these matters before the adjournment, it was to later transpire that actually the gift had been made not by the husband's father personally, but by a company owned by the husband's parents and this fact triggered further issues as to the nature of this transaction and the corporate and fiscal consequences thereof – each of which would significantly impact upon the sharing principle (para 19). Indeed, the position got worse, since by the adjourned hearing, it was clear that the leases by which the hotel was tenanted by the parties' company raised other issues relating to conflict of interests and breach of fiduciary duty and the Court still did not have a full picture of the various commercial interests and relationships of the parties before it (paras 20 to 21). Yet the costs of this 'lamentable' position were already near £1m (para 22) and would have been added to by a further adjournment without the settlement.

5. In Charles J's view, a major problem was that the application of the 'sharing principle' (post **White**) had introduced property and commercial issues, which the present system was not designed to deal with and a body of professionals not used to dealing with such matters. And so, such issues have introduced a need:-

(a) to identify property interests by applying property, company, trust and tax law,

(b) to consider commercially and pragmatically viable options, particularly for private companies that are difficult to value, whose shares may not have a market, which it may be unfair to sell and which cannot provide funding to meet a clean break solution,

(c) to consider, on an asset and case specific basis, apportionment and division of assets and their value at various times and

(d) to identify relevant matrimonial choices.

So an approach based on the payee's 'reasonable requirements' had developed a system against that overall approach (found to be wrong in **White**) and now is in need of significant adjustment, including significant changes in the mind set of those applying it, to focus on the legal, commercial and evidential issues that arise and form the essential building blocks upon which the **s. 25** exercise now has to be carried out (paras **30 to 31**).

6. Charles J considered the answer to these problems lay in, at an early stage, by a change of practice, to identify the issues and the facts and factors, which a Court will be required to find and apply in any given case. In so doing this ensured:-

'i) the identification of the documents that need to be produced, inspected and considered; (here the transfer of the hotel, the leases, company documents and documents relating to the transfer and the leases – which it seems were not properly disclosed, sought or considered),

ii) the identification of the expert evidence that needs to be gathered, and so the drafting of appropriately focused instructions to the experts; (here the valuation of the freehold of the hotel – which was not done before trial), and

iii) the identification of the other evidence that needs to be gathered, which will generally need to be served much earlier than is often now the case; (here the husband's explanation of the gift and the wife's case that the freehold of the hotel should be treated as a matrimonial asset – both of which were deficient).' (para 33)

7. The learned Judge suggested that the necessary change to the present practice was required just after the point of the exchange of the Form E's, at which both parties should in writing before the Court identify:-

'i) the relief he or she seeks, or is likely to seek, and why, and
ii) the property (in the sense of ownership) and commercial issues he or she asserts arise, or are likely to arise, and why.

36. The equivalent is done in other types of case where similar property and commercial issues are raised without the benefit of disclosure through a process analogous to Form Es. At that stage, the relief would not have to be quantified, and if it was asserted that assets had not been fully or properly disclosed to enable this step to be completed this, and the reasons for it, could be identified and relief sought to deal with it. Armed with this exchange of information, consideration could then be given to whether there should be a departure from the standard procedure of questionnaires and affidavits (often served very late in the day) and, more generally, to the best procedural route to identify in a sufficiently detailed way:

i) the property and commercial issues and the other factors that need to be taken into account in the s. 25 exercise, and thereby the material that needs to be disclosed and gathered, and the explanations that each party has to give in respect of relevant transactions or marital choices,

ii) the range of options which the court will be, or is likely to be, invited to consider,

iii) the reasoning that will be, or is likely to be, advanced by the parties as to why the solution he or she advances by reference to that range is the correct one, and thus

iv) the facts and factors each party will be, or is likely to be, seeking to prove and invite the court to take into account.'

Commentary:

8. Counsel had at the adjourned hearing in this case made joint submissions at the invitation of Charles J as to the cause of these present problems and identified in this process the following :-

'(a) costs are too high, (b) relevant issues are not clearly defined, (c) the necessary evidence for the issues to be determined is not produced in a timely fashion, (d) in-consistent judicial approach not only within cases but within appellate judgments, and (e) the principles upon which the court determines the issues and quantifies awards are regularly subject to redefinition.' (para 9)

9. The learned Judge considered the first three factors were 'damning' of the present procedural system and acknowledged in regard to the latter two that the law had got itself into 'terrible tangle' since **White**, particularly in regard to the sharing principle.

10. With respect, this all, once again, reflects a far more concerning problem and that is that the 'statutory exercise' under the 1973 Act requires revision so that Parliament and not the Courts can attempt to rebalance factors reflecting matters, which society consider important in divorce now as

opposed to those values, for good or bad, which were considered relevant in the late 1960's and early 1970's. Without it, none of these identified problems will be satisfactorily addressed.

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