Barristers' Chambers

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Is an earning capacity a marital asset subject to the sharing principle?
Waggott v Waggott [2018] EWCA Civ 727

The Supreme Court's anticipated decision in the variation of periodical payments case of **Mills v Mills** was a bit of a damp squid despite commentators predicting a major shift was imminent in regard to maintenance entitlement periods and the basis of future variation of such orders. However, hidden within the Court's determination are likely to be some future problems for the profession's ability to advise clients of the Court's likely approach and outcome to variation applications.

Facts:

The Supreme Court had granted leave to appeal to H on a narrow basis, namely - , 'whether, in light of the fact that provision had already been made for the W's housing needs in the capital settlement, the Court of Appeal was entitled to interfere with the judge's decision not to increase the periodical payments so as to cover all of the wife's current rental costs'.

H and W each 52 married in 1987. There was an adult son. W had a history gynaecological difficulty. They separated in 2000.

In 2002 within the divorce a consent order provided for the joint Fmh to be sold and the net proceeds divided so W gained £230k and H £23k plus a policy of the same value and he retained two survey company shares. W was to have joint lives spousal periodical payments order of £13,200 pa. All terms were on the basis of a capital clean break.

H had conceded W, who was not employed, did not have a mortgage capacity, but his case was from the £230k settlement she could purchase a suitable home mortgage free. In fact, in 2002, W purchased a home for £345k raising the balance needed over her settlement of (£125k) on mortgage. She claimed she could not find anything suitable for less. By then W had returned to part time beauty therapy employment.

In 2006, W then sold her home to acquire a Wimbledon flat for £323k, but in doing so she placed just £45k down as a deposit increasing her mortgage to (£275k). The first instance judge found W unable to satisfactorily explain this increase or her expenditure giving rise to the same.

In 2007, W again sold her home – this time for a profit and bought a more expensive property in Battersea for £520k now with a deposit of £78k and a (£442k) mortgage. Again c£44k of the Wimbledon proceeds were spent on the new Battersea property. Then in 2009, W moved again selling the Battersea property at a modest profit for £580k achieving an equity of £120k. She then rented successively up to 2015 some six properties.

By the first instance hearing in April 2015, W had no capital and overdrafts, credit card and tax liabilities of (£42k). The Court was presented with cross applications for variation of the W's periodical payments order – the H's to capitalise for a modest £26k/set a term or vary the same downwards and W's to increase the same.

The first instance judge accepted between 2004 and 2010 W had undergone in relation to her gynaecological problems some seven surgical procedures, albeit she had exaggerated their earnings impact. The Court found she had an ongoing net income capacity of £18.5k pa.

H's evidence was found to be reliable and truthful. He had remarried and now had a 9 year old son and adult step daughter living with his second wife and himself. The H's survey companies were now prospering after an indifferent past and the Court found his household had an income of £55k net pa.

W's needs budget was accepted by the Court as 'very modest' and 'basic' being £35,792 pa against which W had a net income of £18.5k pa leaving a shortfall of £17,292 pa of which £10.2k was her rent. The ppo of £13.2k pa left W with £4,092 pa shortfall.

The first Court rejected both variation applications and left the original periodical payments order to stand.

In the Supreme Court Lord Wilson noted [19] the judge's expressed reasoning as being :-

i) the 2002 award would then have enabled W to buy a home mortgage free;
ii) it had however been reasonable for her to be ambitious and to secure a mortgage to buy Weybridge house;
iii) thereafter she had not managed her finances wisely;
iv) like others at that time, she had committed herself to borrowings which were too high; v) it would be wrong to describe her approach to finances as profligate or wanton;
vi) but her needs had been augmented by reason of the choices which she had made.

It was seen that the first instance court had rejected H's contention that the entire rent of £10.2k pa should be removed from her needs, but rather found that it:-

"fair that the husband's contribution to the wife's needs should not include a full contribution to her housing costs."

Hence, the judge stated H's contribution should do no more than to enable W to meet her "bare minimum needs", to which she would have to adjust to live within her means [23]. This meant in effect H was meeting 60% of her £10.2k pa rent. However, the court found W could not adjust without undue hardship to a ppo clean break.

On appeal to the Court of Appeal the H was instead ordered to meet all of W's. In doing so, the Court of Appeal misread the original judgment believing specific reasoning had not been provided for the part provision made. In line with this misdirection the Court also rejected H's application for leave to appeal the first instance order on the basis of there being no prospect of success. In the light of the latter rejection of leave, the Supreme Court proceeded only upon the limited basis of appeal by H as identified above in view of there being no appeal allowable against such a refusal of permission to appeal (see **s 54(4) Access to Justice Act 1999**).

The trilogy of cases of ***Pearce v Pearce*** **[2003] EWCA Civ 1054**, ***North v North*** **[2007] EWCA Civ 760** and ***Yates v Yates*** **[2012] EWCA Civ 532** were considered.

In the last of these, **Yates'** case, by the final divorce consent order the wife had received a substantial lump sum on the basis she would use half of it to discharge the mortgage on her home. In fact, she only partly reduced her mortgage investing the other part intended for the discharge in a non income bearing bond. When the wife subsequently had her ppo capitalised the Court of Appeal removed the mortgage interest element the first instance judge had included in his capitalisation calculation. Thorpe LJ said:

"12. ... It seems to me little more than common sense that if a recipient of a lump sum twice the size of the mortgage on the final matrimonial home elects to hold back capital made available for the mortgage discharge in order to invest in a bond that bears no income, she cannot look to the payer thereafter for indemnity or contribution to the continuing mortgage interest payments. That seems to me to be an absolutely self- evident point."

Lord Wilson noted that it had been argued that whereas in the three reported cases, all had concerned the capitalisation of an entitlement to periodical payments and the court involved had therefore rightly disallowed a sum more reflective of an impermissible second claim for capital provision than of a permissible claim for conversion into capital of an income entitlement. His Lordship giving the lead judgment rejected the submission, since as recognised in **Pearce's** case, the first step in the exercise of capitalisation is a calculation of the amount of periodical payments to which, in the absence of capitalisation, the payee would then have been entitled and in all three cases in making that initial calculation the objectionable elements of the claim were disallowed. His Lordship affirmed that even without such capitalisation, those elements would therefore have been disallowed in quantifying the amount of the ongoing order for periodical payments.

In His Lordship's view it, therefore, followed that the Court was entitled under the wide discretion afforded by s 31(1) and (7) of the MCA 1973 rather than obliged in the

circumstances of the present case to decline to require H to fund payment of W's rent. A court would need to give very good reasons for requiring a spouse to fund payment of the other spouse's rent in the circumstances identified. A spouse may well have an obligation to make provision for the other; but an obligation to duplicate it in such circumstances is most improbable. The first instance judge was clearly entitled to decline to vary the periodical payments order so as to require H to pay all of the W's rent. The order of the first instance judge was therefore to be restored.

Comment:

There has been much comment since the Supreme Court's decision that despite the W's poor financial management, H was still required to meet 60% of her rent payments in the restored order – an outcome which would have been avoided had she initially used her settlement prudently in securing a mortgage free home at the time

The emphasis in the Court of Appeal had centred upon the absence of any finding of mismanagement or worse by W of her financial affairs as opposed to general financial imprudence. The Supreme Court's emphasis centred instead upon the wide discretion in the first instance judge under s 31(1) and (7) of the Act to determine on the facts whether in the circumstances it was fair for H to bear any part of the W's imprudent decisions. The Wife had not been found to be wanton or reckless, but by equal measure it had been no fault of H's that she had found herself in a position where she had lost her previous capital housing fund and had now to rent premises to live in. The judge had been entitled therefore only to provide for her 'bare minimum needs'

Commentators have speculated that but for the technical statutory bar to a further wider appeal by H whether he would have succeeded in an argument to terminate the W's periodical payments order at some future point or have had the same reduced

further to extract the rent payment altogether. However, such an outcome would have been contrary to the principle of the 'irreducible minimum' (Lady Hale in **Radmacher v Granatino [2010] UKSC 42)** requiring a claimant's basic minimum needs to be met by a former spouse with the financial ability to do so.

"Marriage is, of course, a contract, in the sense that each party must agree to enter into it and once entered both are bound by its legal consequences. But it is also a status. This means two things. First, the parties are not entirely free to determine all its legal consequences for themselves. They contract into the package which the law of the land lays down. Secondly, their marriage also has legal consequences for other people and for the state. Nowadays there is considerable freedom and flexibility within the marital package but there is an irreducible minimum. This includes a couple's mutual duty to support one another and their children." [**para 132**]

In addition, the judge at first instance had found that this W could not adjust without undue hardship to the termination of her periodical payments, in any event.

The fact that the three earlier reported cases had when capitalising the maintenance orders in question removed the offending expenses linked to previous loss of secure capital provision is not contradictory – since in each of those cases such removal would arguably not have reduced the receiving spouse below such a minimum.

However, what is the irreducible minimum level as a departure from needs generously interpreted? In Mrs Mills' case the judge at first instance interpreted this level as justifying leaving her with her basic expenditure with over £4,000 pa uncovered by either earnings or maintenance provision.

Mrs Mills was found not to have mismanaged her finances let alone acted wantonly or recklessly and the respondent had the means to pay. Is it right therefore that a Court in such circumstances can strip out certain elements which would not have been present had the applicant with the benefit of hindsight been more financially astute. There had been no provision in the consent order made mandating the use of the settlement to obtaining mortgage free accommodation. Mrs Mills had managed her finances against extended ill health and a worldwide recession and had nevertheless made some profit on her property sales.

Without a finding of fault, the basis for exclusion of one form of expenditure as opposed to another may well invite inconsistency in future judicial decision making.

Equally, should the same approach also apply to a party seeking on variation to reduce a maintenance rate because his or her resources have since the original order now diminished. Is a judge to assess whether simply wiser financial decision making would with hindsight have resulted in a better financial standing than the applicant now possesses and so dismiss the application. Fairness is a two way street.