Barristers' Chambers

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N v F [2011] EWHC 586 Fam – Issue 26

The Facts:

1. The parties' marriage had lasted 16 years and there were 2 children (15 and 8). On marriage, the husband was worth £2.116m. On divorce, the parties' entire assets, including the husband's pre-marital assets, amounted in net value to £9.714m.

The Central Issue and Parties' Stances:

2. The way the pre-marital wealth should be treated.

3. The husband (58) contended that in the light of his pre-marital worth, which if uprated for inflation to the date of trial could be increased from the £2.116m to £3.4m or if uprated with an allowance for some passive growth, then to £4.2m [para 2 of Judgment], this was a case where it would be fair for the wife to receive less than equality by a division of the available capital worth, which represented to her some 43% or £4.17m of the total. A sum which he also submitted met her reasonable needs. [para 3].

4. The Wife (46) maintained that equality at £4.857m represented the fairer outcome and 'barely' met her reasonable needs. The fact of the husband's pre-marital wealth should not justify departure from equality because the contribution was now historical and had been subject to an intermingling with the matrimonial property representing the husband's agreement to share the same with the wife. In any event, the husband, she claimed, had 'alienated' certain asset values during the marriage, had more recently (2007) avoided maximising his earning potential in the financial sector in favour of employment in education and had incurred costs by his litigation conduct [para 4].

The Decision:

5. Mostyn J emphasised that the Court's approach to such pre-acquired wealth had to be fact specific and highly discretionary. However, in a review of the cases both within this

jurisdiction and in Australia, he demonstrated that the tension had always been between exercising the wide discretion in this area and showing some consistency of approach and outcome in similar cases (i.e. the avoidance of a 'lawless science').

6. He repeated the well known excerpt from Lord Nicholls' speech in **White [2000]** that pre-marital wealth was a contribution by one spouse unmatched by the other but the value and nature of the wealth and the timing and circumstances when introduced were all relevant as to how it would be treated by the Court. To this, **Miller/McFarlane** had added the consideration of the duration of the marriage and the extent to which there had been an intermingling of the finances. But, at all times, the factor of pre-marital wealth would have to submit to the consideration of the 'needs' of the other party, where relevant. [paras 5 to 9].

7. Mostyn J stated that there are two schools of thought as to how pre-marital property should be reflected in an award for ancillary relief. The first is the simple technique of a percentage adjustment from 50% (see **Charman [2007]**) and the second is to identify the scale of the non-matrimonial property to be excluded and, thereafter, to divide the matrimonial property in accordance with the equal sharing principle (see **Jones [2011]**) [paras 10 to 11].

8. Mostyn J considered that the authorities permitted a two stage approach, being first the technique adopted in **Jones** followed by the cross check of the **Charman** percentage thereafter. The Judge stated:-

> *'[14] ...It seems to me that the process should be as follows:*
>
> *i) Whether the existence of pre-marital property should be reflected at all. This depends on questions of duration and mingling.*
>
> *ii) If it does decide that reflection is fair and just, the court should then decide how much of the pre-marital property should be excluded. Should it be the actual historic sum? Or less, if there has been much mingling? Or more, to reflect a springboard and passive growth, as happened in Jones?*
>
> *iii) The remaining matrimonial property should then normally be divided equally.*
>
> *iv) The fairness of the award should then be tested by the overall percentage technique.*
>
> *[15]. Of course all of this is subject to the question of need..'*

9. Assessing the level of the Wife's 'needs' within this approach, the question arose to what extent, if any, could the measure of a party's 'needs' be informed by factors other than the size of the pot available and the marital standard of living enjoyed. Having referred to the huge money cases of **McCartney [2006]** where the wife's 'needs' recovery reflected the vast wealth there involved and of **Radmacher [2010]**, where the fact of the ante-nuptial agreement limiting the husband's claims against the wife's family's non matrimonial wealth had significantly impacted on the husband's recovery; the Court asked, rhetorically, why cannot the presence of pre-marital property simpliciter not have an equivalent or similar effect? [paras 16 to 19].

10. In advance of applying the two stage approach to the facts of the case, the Court rejected the husband's attempt to maintain there had been even more wealth than the Wife accepted he had held at the start of the marriage. The burden of proof was on the husband in this respect and without supporting documentation he had not discharged the burden upon him [para 24]. However, Mostyn J also rejected the wife's allegations that the husband had alienated other resources or had failed to maximise his earning capacity by leaving the financial sector for a position as a school master. He also rejected her claims that he had been responsible for litigation misconduct. Indeed, he found the presentation of both cases less than ideal when set against the amount of legal costs incurred, which almost matched the amount in dispute between the two cases [para 42].

11. In dealing with the fair division to be made, on the facts of the case, the Judge stated:-

> '[*44]. I conclude that it would be wrong and unfair for none of H's pre-marital wealth to be excluded from the sharing principle. It was the bedrock on which this marriage was founded. As against that are the undoubted facts that the marriage was long and the monies were well and truly mingled with marital funds, signifying an acceptance by H that to a great extent the monies, or at least their growth or earnings, would be shared with (or to use the words of the marriage service "endowed on") W. I have concluded that £1,000,000 should be excluded. This satisfies the justice of the sharing principle, and as I will show below, the residual sum will meet W's needs. Any greater excluded sum would not permit W's needs to be reasonably met. But for this factor, I would have excluded more. If W's needs suddenly had come to be met or had disappeared by virtue of an unexpected event, such as a windfall, remarriage to a rich man, or death … then I would have excluded £2.116m being the actual value of H's pre-marital wealth…*

[45]. The actual percentage that W receives of the divisible whole is 44.7%. It is as high as this because of the impact of needs. Had I excluded £2.116m then W would

have received 39% of the divisible whole. This is the "pure" percentage. In ***Jones [2011]*** *the overall percentage granted to the wife was 32% after a 12 year childless marriage (see para 52). I am therefore satisfied that my pure percentage is fair*.'

Commentary:

12. This decision is a breath of fresh air for practitioners. The Judge, himself the leading counsel in many of the cases cited before the Court, emphasises that whilst ancillary relief law may well be a highly discretionary area, the courts cannot lose sight of the need for a consistency of approach in this area. Indeed, this is especially so when a simple reading of s 25 denies the litigant an understanding of the likely outcome of an ancillary relief claim – a position which remains unaddressed by consistency of adjudications alone and overdue for statutory reform.

13. Mostyn J recognises that simply telling a litigant that 'the feel of justice' requires a reduction from 50% to another lower percentage point is scant explanation when significant awards are at stake. The better approach, as outlined, when dealing with pre-acquired resources is first to decide whether it is fair to exclude any pre-acquired resource and if it is, then, provisionally, to exclude the non matrimonial amount and equally divide the matrimonial property balance. At this stage, the Court can look back to the excluded sum and reflect as to what proportion, if any, it would be fair to add back in, having regard to e.g 'needs', the relationship use of the funds, and any intermingling etc. This approach can then be cross checked against the percentage view to ensure some consistency.

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