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Case Update Issue 18 B v B [2010] EWHC 193

1.1. There remain a number of areas in ancillary relief law, which require better clarification and not least of these is the appropriate treatment of post separation resources and to what extent, if at all, it is fair to bring the same into the **section 25** assessment. This is the result of now five cases in which the approach to such resources have been treated differently to date, namely **Rossi (2007) 1 FLR 790, H v H (2007) 2 FLR 548, P v P [2007] EWHC 2877, H v H [2008] 2 FLR 2092** and **CR v CR (2008) 1 FLR 323**.

1.2. In **Rossi's case** Nicholas Mostyn QC as the Deputy High Court Judge, as he was then, suggested a 12 month period after separation as a mantra for what would be included and what would not, in **H v H (2007)**, Charles J maintained that such a fixed or formulaic approach was contrary to the principle of **section 25**, in **P v P [2007]** Moylan J in this case and again in another **H v H [2008]** applied a the broad discretion and in **CR's case**, Bodey J, whilst agreeing with Charles J, considered that there should not be any distinction drawn between resources gained post separation to the date of trial, if there had merely been 'a continuum' of financial receipt similar to that which had been gained during the parties' relationship together. These cases are themselves the subject of extensive review and explanation by Charles J in the more recent decision of **J v J [2009] EWHC 2654 (Fam)**.

1.3. The present case returns to this area and Moylan J again deals with the extent to which substantial post-separation income should be brought into account in assessing the wife's award.

Facts:

2.1. The parties started living together around 1993 and married in 1996. There were 3 children (ages 5, 6 and 11). They separated in 2007.

2.2. The parties had at the start of their relationship relatively few assets. They originally worked for the same employer. The wife had taken on the care of the children and left employment c 2000. However, there had been a substantial increase in the husband's income from 1998 when he became a city trader, with increases as he was promoted in 2001 and then again in 2008. Indeed, his income in 1998 was £40k pa gr and in 2006 £4m gr and again in 2008 over £9m gr. He was paid a modest basic salary but was entitled to potentially huge bonuses related to his performance, which if gained would, in part, be paid the following year in cash with the balance being deferred and paid in cash and/or shares over a three year period thereafter.

2.3. Upon separation the wife and children remained in the FMH and there was ample contact.

The Issues:

3.1. It was argued for the wife that she should receive half of the parties' asset value, including the post 2007 separation bonuses earned by the husband up to and including 2009. Hence, her claim was for c £9 million, based on estimated total resources by her counsel of c £18.4 m.

3.2. The husband's case was that the wife's award should reflect the fact that a significant part of the resources had accrued post separation and consisted of bonuses earned by him in this time. In essence, the husband contended for the position whereby any resources he earned after separation should be his and his alone. He further argued that there should be a separate education and housing fund set up for the children of £800k. Once this sum was deducted from the parties' resources, he was offering the wife, broadly, half of everything which the parties' held, inclusive of his bonuses earned but only up to and including their year of separation (2007). Thereafter, he offered her by way of concession to his main stance, a decreasing proportion of the bonuses he earned in 2008 and 2009, being 25% and 12.5%, respectively.

3.3. The parties were agreed as to sharing their pensions and the provision of ongoing child maintenance subject to school fees.

Assets:

4.1. The Judge assessed, at trial:-

(a) of the currently available resources totalling £12.3 million, some £8.7 million reflected sums earned up to and including the year of separation of 2007 and £3.6 million earned in 2008;

(b) of the additional deferred instalments and prospective bonus payments of just over £6m, £870,000 reflected sums earned up to and including 2007 and just over £2.3 million was earned in 2008 and £3 million represented the husband's estimated bonus for 2009. Of these amounts, it was estimated that the husband would receive £2.7 million by 2010 (£445,000 from 2006, £155,000 from 2007, £630,000 from 2008, and £1.5 million from 2009).

4.2. Hence, in all, the husband would receive and/or the parties would hold by 2010, current reasonably foreseeable resources for the years up to and including 2009 of c £15m (ie £12.3m plus the £2.7m).

4.3. After 2010, the Judge estimated in the above figure of just over £6m that there could be up to another c £3.5m in potential yet to be confirmed bonuses for the years up to 2010, payable after 2011 and, therefore, there were overall resources foreseeable of up to c £18.5m (i.e. £15m plus £3.5m).

Decision:

5.1. The Judge held that, whilst there may have been grounds for arguing 'compensation' for the wife, based upon her 'loss of career', in any other circumstances, in fact this factor was irrelevant on the facts of this case as the size of the final award to her would exceed anything the Wife could have earned had she still been in full time employment.

5.2. The Wife should not, on a clean break, recover half of everything, since that would not give due recognition to the fact that a substantial part of the wealth found at trial had accrued directly as a



result of the husband's contributions to those resources post-separation. In the absence of "needs" or the 'compensation' principle, the Judge re-stated that sharing ends at the point the marital relationship ends (see Baroness Hale *Miller/McFarlane*). But, despite this principle:-

'...The search is for "... the division of property which best achieves the fair overall outcome": [67] Charman v Charman (2007)...' (para 48: Moyan J)

5.3. Accordingly, in the circumstances, it would be fair for the Wife to receive her needs, which were estimated at £1m capital and £6m in capitalised income and a further 15% of any potential future deferred instalments, which the H might receive in relation to his bonuses earned after separation up to 2009/10 (the date of trial) but payable from 2011 onwards and which might total £3.5m. The Judge expressly found that the award he made would have been the same, in this case, whether the route had been the Wife's needs or her fair share. *So assuming 15% of £3.5m represented £525k in due course – she, therefore, recovered with her 'needs budget/fair share' provision, of a potential £18.5m potentially earned by 2010 but in part not payable until after 2011, some £7.5m overall or 40.5%.*

5.4. In addition, given the unequal division of capital, the Court ordered that the husband should continue to pay not only child maintenance, but also the school fees, even if he was not to be in full time employment in the future, subject, of course, to the court's power to vary should these circumstances change.

Commentary:

5.5. What does this tell us as to the current thinking on post acquired asset cases:-

- First that the post separation 12 month cut off (a la **Rossi**) is, probably, not an appropriate guillotine period in most cases;
- The 'sharing principle' will apply generally to the resources generated up to the point of separation, but not thereafter in relation to wealth produced only by the efforts of one of the parties, unless 'need' requires it;
- It appears in this case from the above figures that strictly:-

i) the asset worth up to and including the year of separation amounted to c £8.7m plus £870k = £9.57m – this was to be, clearly, divided equally – thus providing £4.78m each;

ii) the post separation 2008 monies represented another £5.9m and the 2009 monies another £3m (total £8.9m in deferred payments), however, £3.5m of these monies would only be received from 2011 onwards. - making up with the monies at sub para i) above, the eventual total pot found of £18.5m. Hence, in providing the Wife with £7m of the pre 2010 amounts in making up the total award to her of £7.5m as above, then she actually recovered c another £2.22m above her equal share shown in i) above. This £2.22m represented her share of those deferred monies to be received by 2010 (date of trial) which would be (£8.9m less the £3.5m to be paid after 2011) £5.4m – i.e. she recovered, therefore, broadly 40% of the post separation to trial date enhancement occasioned by the husband's part paid deferred bonuses within the assessment made by the Judge.



iii) Of course, those monies (i.e. £3.5m after 2011) further deferred in payment past the date of trial (2009/10) were specifically shared as to 15% to the Wife.

- We are to be cautioned in applying any set arithmetical approach in such cases – but this broad approach of Moylan J is a useful guide, it is suggested, when advising upon such post separation asset enhancement issues currently.

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