



www.ashleymurraychambers.co.uk

Case Update Issue 19

J V J – a Judicial Safari Tour of Ancillary Relief Issues by Charles J. Part 1

Introduction:

1.1. There are certain challenges each of us should attempt in our lifetime and for most these involve a parachute jump, a mountain climb etc. Akin to these in the legal world would be reading a judgment of Charles J. One of his latest is *J v J*, which covers 114 pages, more than fifty of which consist of the most detailed review of the current issues in ancillary relief law, to be found outside any legal textbook. The busy practitioner, of course, does not have the luxury of reading such a work and it is crucial, therefore, that he or she can access some abbreviated analysis of what this experienced ancillary relief Judge has said.

1.2. The facts of *J v J* are not essential reading in this context and this is not intended to be such an analysis. However, it is suggested that Charles J has had in *J v J* much to say upon a whole host of subjects involving the current approach to ancillary relief distribution and lying within are several highly useful comments for the specialist ancillary relief practitioner. What follows is an attempt to summarise his erudite analysis and to make the same more digestible I have divided the same into two Parts. Part 1 follows below and Part 2 will be forwarded as Flyer 20 next week.

General Decided Propositions (see para 288-290):

2.
 - i) Fairness is the objective;
 - ii) The distribution of assets between the parties should be effected on a principled and not on an arbitrary basis;
 - iii) The starting point is the financial position of the parties and s. 25 MCA 1973, with the inquiry being ‘... always in two stages, namely computation and distribution’ (see Sir Mark Potter P in *Charman v Charman* [2007] EWCA Civ 503 para 67 and at paragraph 24 of *B v B* (Ancillary Relief) [2008] 1627; iv) The House of Lords has given guidance as to the approach and principles to be applied in the exercise of the statutory discretion under the MCA 1973 (see *White v White* [2001] AC 596 and *Miller v Miller and McFarlane v McFarlane* [2006] UKHL 24;
 - v) That guidance makes it clear that the court is to have regard to, and apply, the relevant statutory provisions.
 - vi) In doing so the three main principles that inform the second stage of the enquiry (i.e. distribution) and the reasoning to be applied in determining on a principled basis, applying the statute, what is a fair result, are need (generously interpreted), compensation, and sharing (see Baroness Hale at para 144; and see, similarly, Lord Nicholls at paras 10 to 16 in the *Miller/McFarlane case*).
 - vii) The source of assets is relevant.



Need Generously Interpreted (see Paras 292-296):

3.1. This phrase is first used by Baroness Hale in *Miller* at para 144. It is not used nor should it be treated as if it was part of the statute, as was the problem with the former judicial reference to the phrase 'reasonable requirements'.

3.2. Instead, it was intended as a useful shorthand for Baroness Hale's description and explanation of 'the need principle'. It refers to the needs that the relationship has generated and that magnetic factors as to the amount of the award to meet those needs are the standard of living during the marriage, and the choices made by the parties during their life together and such needs can extend to the making of savings and the provision of assets so that they can be passed on to children or grandchildren. In particular, under the statute, the factors of age, health, accustomed standard and style of living and available resources and 'in a..(given)..case there may be other matters to be taken into account as well.' (see Lord Nicholls in *White* at p 608-609).

Sharing (paras 297-302):

4.1. In *Miller*, Lord Nicholls, at paras 20 and 29, referred to the "equal sharing principle" and to the 'sharing entitlement' and Baroness Hale at para 144 to 'equal sharing'. This was, obviously, a development from the yardstick of equality used as a check (see *White*). Further, in *Charman*, The President stated '...we take the 'sharing principle' to mean that property should be shared in equal proportions unless there is a good reason to depart from such proportions, departure is not from the principle but takes place within the principle.'

4.2. The 'sharing principle' is, thus, founded on a non discriminatory approach to contributions to the welfare of the family and a departure from equality takes place within the sharing principle and is not a departure from it (see paras 64-65 *Charman*), enabling the relevant circumstances of a case to be taken into account at all stages of the reasoning in the performance of the statutory task in a principled way.

Departure from Sharing (paras 303-304):

5.1. The 'sharing principle' applies to all property of the parties, but in its application equality can be departed from for "good reason" and the nature and source of an asset can provide such a reason. However, in this process there can be no discrimination between the contributions made by the parties to a marriage based on the roles they have played in their life together. There is, therefore, strong support for the view that property acquired and built up during the marriage through the respective efforts and roles of the couple, being the product of their relationship, should be shared equally.

(a) Pre-acquired or gifted assets (paras 305-311):

5.2. The rationale of no discrimination between the contributions made by parties to a marriage does not apply to property acquired before the marriage (or commencement of the relationship) or to gifted property (see Lord Nicholls in *White* page 610, and again in *Miller* paras 16-25, Baroness Hale and



Lord Mance in *Miller* at paras 147-152 and 169-170, Munby J in *P v P (Inherited Property)* [2005] 1 FLR 576 paras 37-38, Baron J in *N.A. v. M.A.* [2007] EWHC 2900 paras 173-174).

5.3. These citations of authority show that pre-acquired and gifted assets supply a “good reason” for departure from equality within the sharing principle, and that when considering that reason and its effect, both the source and the nature of assets (e.g. whether it is the matrimonial home) are circumstances to be taken into account.

5.4. In addition, the same citations show that the length of the marriage and the period that pre-acquired or gifted assets have been enjoyed by the parties during their relationship is relevant and that the weight to be given to such matters is fact sensitive (see an example in *Vaughan v Vaughan* [2007] EWCA 1085, [2008] 1 FLR 1108 at paragraph 49 and *C v C* [2009] 1 FLR 8 at para 36) and by this route the way in which such property has been treated, enhanced, damaged and regarded are all factors that can be taken into account.

(b) Unilateral Assets (paras 312-316):

5.5. These are the ‘the fruits of a business in which only one of the parties had worked’ (see *Charman* para 82) and it was argued in *Charman* that the ‘sharing principle’ should not apply to such assets based upon what had been said by Baroness Hale in *Miller* at paras 149-152, in which she had suggested, obiter, that there is a distinction between “family assets” and the fruits of a business (or occupation) in which only one of the parties worked (i.e. unilateral assets) and that the sharing principle applies to the former, but not to (or not with full force to) the unilateral assets as so defined.

5.6. *Charman* had rejected this argument and made it clear that it is only in the case of a short marriage that the House had indicated that the ‘unilateral assets’ argument can provide a basis for departure from equality under the sharing principle.

5.7. However, *Charman* had indicated that there is potential for development of the ‘unilateral assets’ argument in cases of the “dual career” couple, referred to by Baroness Hale and which would apply the argument to the respective products of the separate careers.

5.8. In this context and with a view to future further argument being advanced in other cases, *Charman* had not dealt, on its facts, with the impact of pre-acquired assets, because it was not an issue, nor did it identify what is, or is not, to be treated as a short marriage for the purpose of the unilateral assets argument.

5.9. Further, *Charman* did not expressly deal with whether, and if so in what circumstances, a ‘unilateral assets’ argument can be deployed in respect of a case where there are pre-acquired or gifted assets and thus an established good reason within the sharing principle for departing from equality. Again, *Charman* did not cover the linkage (if any) between the “fledgling or seed corn arguments” in respect of property identified as matrimonial property (see Lord Mance in *Miller*) when other property is identified as non-matrimonial property or other cases (including therefore a case where there is a good reason for departing from equality within the sharing principle). Again,



Charman did not address in any detail what approach should be taken to pre-acquired and/or post separation assets in assessing a departure from equality within the sharing principle for “good reason”.

5.10. Charles J considered that the argument in *Charman* based upon Baroness Hale’s suggestion in *Miller* as to a difference of approach to ‘unilateral assets’ demonstrated of importance that the suggested approach in that case was in direct conflict with the non-discriminatory approach to contributions established by the House of Lords, especially as in *Charman*, where in general measure the ‘sharing principle’ applied with full force, the departure from equal sharing called for was based solely on the point that the husband had worked in the business and the wife had not.

5.11. *Charman*, for this reason, therefore, establishes on this issue only that it would be in exceptional circumstances alone that the ‘unilateral assets’ argument, as presented in that case (i.e. an argument based solely on the fact that one party had worked in the business during the marriage), could be a relevant factor in any case (including ones where there is a good reason for departing from equality within the sharing principle). There, obviously, remain open other aspects of the ‘unilateral asset’ issue as canvassed by Baroness Hale that may yet be further developed in other cases.

(c) Date of Quantifying and Identifying Assets (paras 324-325):

5.12. The date is the date of trial (see Thorpe LJ in *Cowan* (2001) 2 FLR para 70 & *Charman* (no 4) above at paras 65 & 66). The date of separation and any events before and after are not relevant at this stage although they may be relevant to the second stage as to whether it is appropriate to depart from the sharing principle.

(d) Issues Left Open by Charman (paras 317-323):

5.13. These were identified as:-

- (i) how is a departure under the sharing principle from equality to be quantified when good reason for such departure exists because of pre-acquired assets which have been introduced by one of the spouses, who thereafter has developed the same by daily work both before and during the marriage and after separation;
- (ii) can a good reason for departure from the sharing principle be the choices and arrangements made by the parties and thereby the way in which and the principles by which they have run their married life;
- (iii) the extent to which (ii) has an additional influence upon the Court when there is already an established reason for departure from the sharing principle (eg. as a result of pre-acquired assets or gift).



Conduct and Choices (para326-361):

6.1. The current test of conduct is such that ‘...it would be inequitable to disregard’ (s25(2)(g) MCA1973) if it is ‘grave, gross and truly exceptional’ (see *S v S* [2007] EWHC 1975, [2007] 1 FLR 1496, *McCartney v Mills McCartney* [2008] EWHC 401, [2008] 1 FLR 1508) and Lord Nicholls in *Miller* paras 59 to 63).

6.2. Hence, before conduct can be brought into account, it has to be a) of the nature described in the statute and b) it cannot simply be indirectly raised ‘under all the circumstances of the case’ or otherwise. It follows also that it must be clearly and formally raised (see Coleridge J in *Charman v Charman* [2007] 1 FCR 33).

6.3. Under the definition of conduct, it is permissible, however, to introduce evidence of the choices and arrangements the parties made as to the way in which and the principles by which they ran their lives (see Baroness Hale in *MacLeod v MacLeod* [2008] UKPC 64, [2009] 1 All ER 851 para 25 and again in *Miller* at paras 138 and 153 and *Charman (no 4)* and para 5.13 (ii) above). Furthermore, the evidence of such choices and arrangements etc can be relevant at each of the stages of consideration of ‘needs, compensation and sharing’ and is, thereby, part of the section 25 exercise generally and need not be confined to the more limited introduction test of the conduct gateway alone. Indeed, the ‘grave, gross and truly exceptional’ test is drawn as to allegations of fault or misconduct linked to the breakdown of the marriage and choices and arrangements made by the parties as to the way in which and the principles by which they ran their married life are of a different character and can be classified and considered as conduct of a different kind which ‘...it would be inequitable to disregard’ (see Lord Nicholls in *Miller* at paras 64 and 65 and Lord Mance at para 164). Clearly, the relevance of such a presentation will be case sensitive and will require precise definition by the asserting party.

6.4. There was a cautious movement of the law towards a more frequent distribution of property upon divorce in accordance with what, by words or conduct, the parties appear previously to have agreed (see Baroness Hale in regard to ‘dual career families’ and Lord Mance in *Miller* and *Charman (no 4)* and see also the Privy Council in *Macleod* and the Court of Appeal in *Radmacher v Granatino* [2009] EWCA Civ 649). Hence, as it would be unfair to leave out of account evidence of an express and formal agreement made between them in their marriage which set out those choices and arrangements etc when considering ‘needs compensation and sharing’, so, it not being necessary in the context of family relationships to think in formal legal terms (see Ormrod LJ in *Edgar* and *Macleod* para 42), it would be unfair, in the same context, to leave out of account more informal agreements, understandings and arrangements or conduct which evidenced the same .

6.5. In *Charman*, by way of example, reference was raised by the husband to the wife’s alleged failure to support him in his business endeavours and her alleged refusal to move to Bermuda. Coleridge J had rightly concluded, in that case, that, as argued, these were aspects of misconduct which could only be introduced under the more limited gateway test of such behaviour within s25(2)(g). However, had it been capable of being presented otherwise, namely that it was common ground or it had been established that the parties had made a choice or had ran their lives in a particular way (by the



husband going to Bermuda and the wife staying in England) and thereby this was a choice made or accepted by the parties as a way of life, then either:

- i) this would be something that 'it would be inequitable to exclude', albeit that it could not be said to be 'gross, grave or exceptional', because it reflected a choice or arrangement as to the way in which the parties ran their married life together, or
- ii) it is a relevant circumstance.

However, in most cases, the non-discriminatory approach that must be applied will probably mean that the result of the choices and arrangements etc made by the parties will be that their contributions to the creation and development of assets during that period will be treated as being equal.

6.6. The resolution of grey areas and difficulties in establishing (a) what factors are relevant and what are irrelevant, and (b) in measuring the effect of the relevant ones should be greatly assisted by a change in practice to identify clearly:

- i) the facts that a party is seeking to prove to establish the factors relating to the choices and arrangements made by the parties during their marriage, and thus the way in which and the principles by which they have run their lives, and
- ii) why and how they should be taken into account.

Part 2 to follow

**Ashley Murray
Ashley Murray Chambers
Liverpool**