Barristers' Chambers

www.ashleymurraychambers.co.uk

Jones v Jones [2011] EWCA Civ 41 Issue 25

Introduction: The importance of this decision has been somewhat obscured by the open criticism expressed by the Court of Appeal at the length of Charles J judgment at first instance. However, the obvious frustration of Wilson LJ expressed in his leading judgment on this appeal at the wide academic discourse undertaken by Charles J (previously summarised in **Flyers 19** and **20**) should not deflect the reader from noting that the Court of Appeal have, effectively, overruled Nicholas Mostyn's decision, then as a deputy High Court Judge, in **GW v RW (2003) EWHC 611,** wherein he sought to recognise a 'fledged career' introduced by one of the parties at the start of a marriage as an important contribution factor, which could justify departure from the sharing principle.

Facts in Jones: The husband now aged 58 and the wife 44, were married in 1996. They had treated a child of the wife by an earlier marriage as a child of their family. They had separated in 2006. Before their marriage, the wife was already of independent means provided by over indulgent parents and such provision was likely to continue and the husband had been the owner of a specialised oil industry equipment supply company for some ten years. During the course of the ancillary relief proceedings (2007), the husband sold the company for £32m, which netted down after various deductions including tax to £25m. However, he had maintained originally that the proceeds thereof had been just £3m. At trial, Charles J had found the net value of their assets was still £25m after allowing for a staggering £1.7m in legal costs of the proceedings.

The Wife wanted £10m. The husband had made an open offer of £5m, but argued on a 'needs' basis that it may be fair to award her just £3m. It was agreed that at the start of the marriage the value of the company had been £2m. Charles J had awarded the wife £5.4m. The wife's appeal sought to challenge the calculation of Charles J that the husband had, in effect, introduced 60% of the eventual net sale value of the company at the start of the marriage. In making his assessment, Charles J had stated about the husband:-

(a) that the "success and position [of the company] in the market was based on his early working life and the knowledge and experience he gained at that stage and then on his hard work … over the years": [79];

(b) that the husband had not disclosed the negotiations for sale because he considered it unjust to have to make payment to the wife out of the sale proceeds of a company which "represented the product of his working lifetime": [155]; and

(c) that the proceeds of sale of the company were "the product of his life's work, skill and business decisions": [425(iii)].

The Appeal: The Court of Appeal considered that, in effect, having determined the introduced value was £15m (60%) of the eventual £25m later obtained by sale, Charles J had, even allowing for 'the spring board effect' of enhanced value already inherent in the company at the outset of the marriage and passive growth thereafter, factored in a considerable margin of capitalised value within that figure for the husband's 'fledged' experience in the industry which he had introduced to this marriage – i.e. his already established earning capacity (see **GW v RW**).

Having regard to the doubts already expressed by Lord Mance about the recognition of such a 'fledging' approach as being imprecise in calculation and possibly discriminatory in **McFarlane/Miller (2006) UKHL 24,** the Court of Appeal, considered that whilst a person's established earning capacity would be relevant in a given case in assessing comparative incomes and the fairness of an award overall, its capitalisation as an asset by itself when considering the capital for distribution between the parties was inappropriate (paras 23 to 27).

As Charles J had based his 60% finding upon the 'fledging' approach, the Court of Appeal made their own assessment of the position. In doing so, Wilson LJ, obiter, expressed doubts about the validity of Charles J's suggestion at first instance, generally, that in cases where there may be good reason to depart from equality under the sharing principle and the needs of the claimant spouse can be met below an equal share, that this needs figure could then inform the level of departure which would be fair in applying the sharing principle. Wilson LJ said this was 'confusing and unhelpful' and inconsistent with the guidance from **McFarlane/Miller** and **Charman (2007).** The needs and sharing strands were separate exercises.

Taking the value of the company on sale at £25m net and the agreed value at the start of the marriage of £2m, the Court of Appeal considered that for two reasons it would be appropriate, initially, to adjust the start value upwards to £4m and then by an investment allowance to £8.7m/£9m. These were, first that, whereas normally a forensic accountant's value appraisal will, in adopting the maintainable earnings of a company, have also identified any 'springboard' effect inherent therein, there will be rare cases of which, on the Judge's findings, this was one, where this will not be the case. Indeed, there was evidence before Charles J that shortly after the marriage the husband had

received an offer for the company of £6/7m. Second, there was a need to take account of the passive growth element of the introduced value throughout the marriage to sale (see **Rossi (2006) EWHC 1482**) and it was appropriate that this should reflect the industry investment return for the relevant period**.** (Ardern LJ expressed the view (minority) that it may be fair to account for both passive and active growth of such an introduced non matrimonial asset –see para 60).

Overall, the Court of Appeal concluded that as the husband could be seen as introducing an asset worth c £9m which at the end of the marriage sold for £25m, then the subsequent balance, being £16m should be divided equally and the Wife's award upon the appeal increased to £8m (para 53).

Commentary: The Court of Appeal have, clearly, now rejected the argument that the introduction of an established earning capacity('fledging') into a marriage should be regarded as an asset in itself to be assessed in the overall capital distribution upon marital breakdown. By expressed doubt, the Court has also suggested that any overlap of the three strands so as to justify adopting a needs level at less than equality as the indicator of the level of departure under the sharing principle is inappropriate.

The Court was, plainly, unhappy at the return of yet another lengthy judgment from Charles J. However, as one of our most senior family High Court judges, Charles J's extensive discourse in the many other areas of ancillary relief, as set out in his first instance judgment, remains a helpful guide to the present law.

Ashley Murray
Ashley Murray Chambers
Liverpool