Barristers' Chambers

www.ashleymurraychambers.co.uk

R v R [2012] EWHC 2390 Macur J. Issue 32

A 'Master Class' in Applying the Primary Principles of Fairness and Ensuring Equality of Division of Company Assets:

Introduction:

1. It will not have escaped the reader's attention that the almost manic scramble by different High Court Judges to restate the law relating to financial remedies appears over the last two months to have gone into temporary remission. Lest complacency should creep in, be warned that this is, probably, only because Mostyn J may well have taken a break in the Long Vacation.

2. The present state of affairs where it is possible to cite a High Court decision for almost any proposition one may care to advance and occasionally on the same principle in opposite directions (eg. *to name but one* - for leave to appeal the prospects of success (**FPR 2010 r 30.3 (7)**) a la Mostyn J in **NLW v ARC (2012) EWHC 55** have to be 51% likelihood of success or a la Moor J in **AV v RM (2012) EWHC 1173** have to pass only the lesser test of 'real as opposed to fanciful') is, plainly, absurd and indicative of a less than disciplined situation in our Higher Courts and an absence of direction from the Court of Appeal. This is a lamentable position and one which is fuelling litigation rather than encouraging compromise.

3. The answer, in my opinion, can only be, ultimately, by an amendment of **section 25** and a statutory presumption of equality, with the burden of proof on the spouse claiming 'good reason' to depart from equality with costs order consequences in the pursued hopeless case. The result would be a clearer understanding of the starting and probable end position in most financial remedy cases on divorce by the man and woman in the street – an understanding which the current system disgracefully denies them whilst also expecting them to pay for their lawyers to reach, supposedly, a more bespoke outcome based on the almost 'mystical' statutory exercise of judicial discretion.

4. With respect or not, it is time our Legal System woke up to the realities of most litigant's lives and finances – and in this, I certainly do include myself as a practicing barrister. The main reason there are ever more LIPs is because for many the cost of 'going to law' has got out of control. The 'chaotic state' of legal principle in the area of financial remedy creates a costs 'quick sand' environment for the lay client, which is only further exacerbated when they are advised there can be no guarantees of outcome. Part of the remedy, therefore, will be, by reform, making the legal outcome more certain from the outset and the other part will be by ensuring that the risk of spiraling costs is shared between the client and his lawyers – by some element of fixed costs. The return for the lawyers will be more clients being confident to give instructions.

5. Set against the above, I wanted to share the recent decision of Macur J as a 'best practice' judgment dispatched in a refreshingly short and easily understood format, instead of the *legal treatises*, which have become such a common feature of our High Court decisions nowadays.

The Background:

6. This was the Wife's claim for financial relief. The marriage had lasted 27 years. The Wife was 58 and the Husband 61. There were two adult children. The pot was c.£7.7m. Included was the value of the Husband's successful business, which paid him £24k pm but of which its capital value he claimed was 'illiquid'. The Wife's financial position, as a solicitor, now suspended from practice, was so 'dire' following the collapse of her firm that she had taken out an IVA and was reliant on loans from family members. Not surprisingly, she had suffered physical and mental health problems and had a 'minimal' future earning capacity. She had the uncertain potential of significant recovery in ongoing contentious professional litigation.

7. The Husband claimed the Wife's debts were her sole concern and his marital contributions had been greater and the company had grown post the separation justifying to him a greater share of the existing marital equity. The Wife relied on her historic contributions in money and other terms to the success of the company, the shares of which had formerly been equally owned between the parties until their first separation in 2008. She also relied upon her

contributions in caring for the home and family as well as her contribution from her solicitor's practice.

8. Macur J found that the marriage had previously benefitted from the Wife's legal practice and her debts had resulted from her '*misfortune rather than mala fides*' and were to be treated as a top slice from the parties' distribution before division between them. She also found the Husband was self deluded in claiming the cause of the success of the business was due to him alone – rather the Wife's contribution thereto had been considerable and its post separation expansion, therefore, a result of both parties' pre-separation efforts, of which, in the earlier periods, the Wife's had outmatched the Husband's.

9. The Judge resolutely focused upon the principles and rationales expounded in the leading cases of **McFarlane/Miller (2006)** and **Charman (2007)** and resisted applying several other decisions which she was referred to and which she categorised as 'fact specific', declaring:-

> *'the exercise of my judicial discretion must seek to achieve a fair outcome in the particular circumstances of this case paying due regard to section 25(2) of the Matrimonial Causes Act 1973 as interpreted by the House of Lords and Court of Appeal in* **Miller, McFarlane** *and* **Charman'**

10. The Husband had argued the Wife should not have parity of division, but have her 'needs' met only, especially as, in particular, he was to retain the less 'copper bottomed' company asset. Macur J did not agree. The Wife's contributions were, at least, equal. Any post separation company improvement was not a 'post separation accrual', but rather a latent (ie 'springboard') development of the company from the marital period. The company was 'a cash cow' for the Husband and giving the Wife a modest lump sum and the equally modest other assets held (ie FMH equity, policy etc) would not be fair overall, since the company was marketable and not illiquid and it was just a case of the Husband choosing the right time to sell it, which he would do.

11. Parity, however, should not require, in her Ladyship's view, the transfer of shares to the Wife, save as a last resort, in recognition of the Husband's antipathy to the Wife and the potential of his actions 'adverse to her prospective minority shareholding spawning satellite

litigation'. An injunction against the Husband acting in such a way may be ineffective and the Wife, in any event, would continue to receive until she obtained full payment of her overall capital share, ongoing maintenance through the Husband from the profits of the company. Should, however, the Husband seek in the future, to argue his inability to pay the full award, then in that event the Wife should receive a transfer of that share value representing the balance.

12. Accordingly in meeting all of these requirements, Macur J determined that there was company capital available of between c.£1m and £1.6m immediately and a realistic potential of further capital through the company in future years. Hence, on a deferred capital clean break, the order made would be, with the Wife retaining the FMH and other modest assets, for a lump sum of £4m including an immediate payment of £1.25m to meet the Wife's IVA, debts and legal costs, another £1.25m in c 18 mns, when the Wife could pay off the FMH mortgage and the balance of £1.5m some 2 years beyond that with these sums secured by the issue of company loan notes and earlier payment of these sums if the Husband sold the company sooner.

13. In the meantime, until the full payment, the Wife's income 'needs' of £12k pm, subject to certain credits, would be met by a substantive maintenance order reduced, broadly, pro rata as the first lump sum/FMH mortgage were paid. Any recovery by the Wife from her outstanding litigation would be shared equally

Commentary:

14. After, reduction of the overall 'equity' value held for the Wife's debts as a matrimonial liability, the Judge secured in a workmanlike fashion, both parity and reasonable security for the Wife of eventual payment of her capital due. The 'mechanics' of the order made displayed an intuitive use of the tools available to the Court in the provision of loan notes to secure the lump sums, whilst applying any interest payable on the same to be credited against the maintenance award.

15. The Judge was rightly sceptical about the effectiveness of an injunction to prevent the Husband undermining the Wife's eventual recovery should she retain shares but have no effective day to day company management. Experience teaches that only an effective shareholder agreement will protect such a position fully and where the position calls for the same, it is suggested this should be the position adopted.

16. Based upon the likely sale of the company in the foreseeable future (H being 61), the capital clean break only did not fall foul of the 'double recovery' principle of preventing both capital and the income gained from the same resource being gained, since the likelihood was that any ongoing maintenance after the company sale would, substantially, reduce or 'wither on the vine' once the Wife received her due share.

17. Finally, the approach of the Judge in rejecting the application of other fact specific High Court decisions as if they were binding precedents equivalent to determinations of the Court of Appeal or the Supreme Court, which they are not.

Ashley Murray
Ashley Murray Chambers
Liverpool