Barristers' Chambers

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Case Update Flyer Issue 5
Charman v Charman [2007] EWCA 503

This appeal, having regard to its extraordinary wealth factor, was always likely to be something of a disappointment to a Profession set on a quest of gaining general direction, post **McFarlane / Miller (2006).**

However, there are some nuggets within the judgment of the new President in this area of ancillary relief.

The format of addressing each case from the perspective of "the sharing principle" unless there exists good reason not to do so, as a development by **McFarlane / Miller (2006)** of the "yardstick of equality" approach (**White (2000)**) is given formal approval.

Both "matrimonial" and "non matrimonial" assets are to be addressed under "the sharing principle", the latter giving greater reason for departure from that principle.

"The sharing principle" will, however, give way to "need" and vice versa, where, thereby, this results in a greater share to a spouse.

The argument that a resource is a "unilateral asset" and not to be shared is not to be encouraged in other than the short marriage and nor should there be encouragement to the argument that a dual career spouse is to be able to retain his or her "sole" assets. However, Parliament is to be encouraged to enable parties to gain greater recognition to nuptial agreements into which they have chosen to enter.

There may be an advantage to tarrifs in respect of the "special contributor" type case.

Charman v Charman [2007] EWCA 503

1.1 The Appeal by the Husband was against the award by Coleridge J to the Wife of 36.5% of the asset worth of £131 million, providing her with £48 million. The basis of the appeal being, broadly, that the Court below had not recognised fully, by the award, the Husband's special contribution to the wealth created and had included trust assets, (the "Dragon Trust"), which should have been excluded in the overall assessment of the matrimonial pot.

1.2 The Husband claimed that the award should be no more than either a total of £20m or £28m on the facts, the Wife already holding assets valued at £8m of these amounts (para 2).

1.3 The Court acknowledged that there had been a concession at the hearing by the Wife that the Husband was a special contributor and that this was reflected in the imbalance of distribution awarded, but also the judgment made it clear that the Court had also accounted for the difference following the distribution of the "inherent risk" in the Husband's asset share compared with that to be held by the Wife (para 5).

2.1 The Wife (54) was unemployed and a magistrate and lived in Kent in the last FMH and the Husband (54), as CE of Axis Holdings, lived in rented premises in Bermuda as a non UK resident. His income was £2m pa but he had announced his intention to retire at 56 (para 11).

2.2. The parties' had two adult sons and there was a childrens' trust set up some time before which was worth £30m, but which had, by agreement, been excluded from the parties' assessed asset value.

2.3 The parties engaged in 1973 and married in 1976. Both, then, had been working full time and neither had any capital assets. The Wife was last employed in 1982, before she gave birth to the first of the children. The Husband had gone on to achieve significant commercial success on an international scale.

3.1 The Court dismissed the submissions that the Court below was in error in including the Dragon trust assets as part of the Husband's resources. The President stated (para 57).

"Prior to the decision in White, the elaborate enquiry in the present case as to the attributability of the assets in a trust to a party as part of his or her resources would probably have been unnecessary. But, whenever it is necessary to conduct such an enquiry, it is essential for the court to bring to it a judicious mixture of worldly realism and of respect for the legal effects of trusts, the legal duties of trustees and, in the case of off-shore trusts, the jurisdictions of off-shore courts. In the circumstances of the present case it would have been a shameful emasculation of the court's duty to be fair if the assets which the husband built up in Dragon during the marriage had not been attributed to him."

3.2 In **McFarlane /Miller (2006)** The House had moved away from interpreting the "yardstick of equality" as a check only, towards one where it was the "guideline or starting point" (see Lord Cooke in **White (2000)**). This "sharing principle" applies unless there is good reason to depart from it (para 65). The President stated:

"…subject to the exceptions identified in **McFarlane /Miller (2006)**...., the principle applies to all the parties' property (both matrimonial and non matrimonial) but, to the extent that their property is non-matrimonial, there is likely to be better reason for departure from equality".

3.3 Before applying the "sharing principle" it would be necessary for the Court under **sec 25 (2) (a)** to ascertain the parties' resources (para 66) and it was acknowledged that there was an argument that the "principle" could be applied against a party's earning capacity, as such a resource, but this issue must be left to another case.

3.4 In reality, the three principles identified in **McFarlane /Miller (2006)** of "need, compensation and sharing" were merely a description of the various elements of **sec 25 (2) (b) to (h)**.

3.5 Where "need" presented a greater share to a spouse to that of the "sharing principle", then the former must prevail and, where it presented a lesser share, then the latter should prevail. By contrast, however, it remained, again, for another occasion, which would prevail, if the principle of "compensation" was in conflict with the other components of **sec 25 (2)** (para 73)**.**

3.6 The Husband had complained that the Court below had not adopted the "serial approach" of proceeding through the **sec 25** exercise and checking its provisional award, arrived at in this way, against the "yardstick of equality" and the overriding principle of fairness, but had approached the matter in a "top down" manner from the position of equality. The Court disagreed and found that the Court below had, indeed, approached the evaluation in the very way argued for by the Husband, namely the **sec 25** factors, followed by a check of the percentages arrived at followed by the "yardstick" exercise.

3.7 There would be cases where the assets were so substantial that the issue of "needs" and "compensation" would be subsumed in the "sharing principle", so that it would be legitimate to consider the percentages at an earlier stage, instead of provisionally quantifying the award in accordance strictly to the **sec 25** exercise first (para 76).

3.8 Further, the Court did not accept the approach (see Mance LJ in **Cowan (2002)**) in substantial cases of determining the parties' respective needs first, subtracting the same from the overall resource value and then considering to what extent the "sharing principle" should apply to the balance. In such cases, the "sharing principle" catered for "needs" etc so that an expensive evaluation of the budgets of each party would be unnecessary (para 77).

4.1 As to special contribution, there will be cases where the wealth generated is so extraordinary that its size alone reveals the contribution made is deserving of the label "special", in others there will have to be an assessment of the genius in business or otherwise involved. However, large windfalls of wealth, such as the unanticipated sale of development land or the takeover buy out of an ailing company will not be "special" (para 80).

4.2 The Court was not in favour of treating wealth generated beyond a certain level as being outside the "contribution to the welfare of the family" at **sec 25 (2) (f)** and, therefore, not subject to the "sharing principle". The President stated (para 81):

"In our view the size of the property in the present case should not compel departure from the usual conclusion that wealth generated by a party during a marriage is the product of a contribution on his or her part to the welfare of the family."

5.1 The Court wished to dispel a misapprehension on the approach to "unilateral assets" (c.f Burton J in **S v S (2006)**), namely those assets which were the result of the business contribution of one spouse, in which the other spouse had had little involvement. Such an approach (by Baroness Hale) was within the circumstances of a short partnership and where part of the source of the "matrimonial assets" considered, had been the result of the husband's pre marriage plans with another. Hence such an approach was not intended for general application (para 83).

5.2 The example given by Baroness Hale in **McFarlane / Miller (2006)**, where dual career parties may share some assets together but retain others not for mutual sharing was considered to be an exception which had been supported by Lord Mance, but which should, in view of the dislike of Lord Nicholls for such an exception to the "sharing principle", be strictly limited, at this stage. It was, however, noted that this area may be a pre-cursor of future development. The President stated (para 86):

"Lord Mance may there have foreshadowed future, albeit, no doubt, cautious, movement in 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."

6.1 The Court was not prepared, akin to the approach in **Lambert (2004)**, to set a threshold of wealth above which a case could be said to reveal the factor of special contribution. However, where special contribution was identified in a case, it was useful to observe that there was going to be an imbalance in favour of the "special contributor" of not less than 55/45% and probably not more than 66/33% (para 90).

6.2 The Court below was considered, in an apportionment to the Husband of 63.5% of the combined resource value, to have allowed c.3% enhancement above 50% to the Husband for the imbalance of risk argument in the case and c 10.5% above equality for the "special contribution". This was considered as appropriate in the circumstances of the contribution in question (para 92).

7.1 Again, there may be an issue for development in another case whether there should be a different approach adopted to post separation assets (para 104)

7.2 Finally, the President, in a review of the Law to the present, anticipated the need for Parliament to consider reform of the 1973 Act and its greater harmonisation with other jurisdictions and the need, in socially changing circumstances, for there to be greater recognition of the parties own steps to pre-determine property distribution on divorce in the form of nuptial contracts (see para 126).

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