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Issue 7

McCartney v McCartney [2008] EWHC 401 (Fam) – Bennett J.

The Open Offers:

1. The Wife (40), acting in person with McKenzie friends, already owned 2 properties within the UK and sought by her open offer a clean break as based upon an annual need for herself and the parties' child (4 years) of £3.25mpa representing a Duxbury award of c.£99.5m. She also sought two properties owned by the parties in Hollywood and New York, capital of £8m to £12.5m for a London home and £3m for another New York property, between £500k and £750k for an office in Brighton, the transfer of a mortgage and another property in relation to which her family were involved, chattels and compensation for "loss of earnings contribution and conduct". Overall the value of the defined claim was £125m (see para 3). An earlier open offer, when legally represented, had sought c £50m. (para 116).

2. The Husband (65) in his open offer proposed a clean break settlement at a value of c £15m. This included a deduction for conduct, capital which the Wife held or had held, security expenses for 2 years, the Wife's 2 UK properties and her relatives mortgage and property, chattels and a balancing lump sum once certain art works were returned to the Husband. In addition, there was to be provision for the daughter by way of £35k pa ppo and £25k pa for a nanny as well as school fees, extras and health cover (para 4). His earlier open offer had proposed c £20m (para 116).

A Brief History:

3. The parties had met in 1999, become engaged in July 2001 and married in June 2002 and separated in April 2006. A partnership of c 3 years 10 months (para 6), albeit the Wife claimed the parties had cohabited from March 2000 and, therefore, the length of the partnership was 6 years. There was no decree nisi, the parties having previously agreed to stay the proceedings to enable a decree to be pronounced with consent in May 2008 on the basis of 2 years separation (para 7).

Respective Cases:

4. The Husband's case was that the Wife's award should reflect the enormous introduction by him of pre-marital wealth and the short duration of the marriage as assessed based upon her

needs only as reduced for her post separation conduct (para 8). There was no entitlement to a share in the marital acquest.

5. The Wife's case was that she was already wealthy in her own right when they met. She claimed she had an established career and the relationship with the Husband had constricted her career progress for which she sought compensation. She claimed that she had contributed to his career during their relationship and counselled his children after the loss of their mother. She claimed that the Husband had capital value of c £800m and that she was entitled to a share of the marital acquest and that there should be an award which reflected his conduct post separation (para 9).

Findings:

(a) Wife's premarital position:

6. The Court found that the Husband's evidence had been balanced, consistent, accurate and honest. In contrast, whilst the Wife was a "kindly person devoted to charitable causes", much of her evidence was found to be inconsistent, inaccurate and less than candid (paras 15 and 16).

7. After reviewing the Wife's claims (paras 18 to 27) concerning the extent of her pre-marital career and income, the Court concluded (para 28) that, whilst she had modelled successfully and was a public speaker; investigation into her earnings and assets at 1999 did not bear out her claims that she was already wealthy and independent. Her claims to earning a significant pre marital income were not borne out by her tax returns and her claims that she gave away 80% of her income at source were inconsistent with the documentation and her claim to having £2m to £3m in savings, was again unsupported by any documentary evidence. Her evidence in this regard was "wholly exaggerated" and this reflected upon her claim to compensation (para 36).

(b) Wife's Claim to Cohabitation:

8. The Court after reviewing the Wife's claims as to the parties' cohabitation from 2000 (paras 37 to 51) concluded (paras 51 to 64) that the parties; had only been in a settled relationship from the date of their marriage in 2002 and not 2000.

(c) Wife's Claim to Compensation:

9. The Court had next reviewed the Wife's claims that she had suffered a loss of earnings and career (paras 65 to 83) and concluded that the Husband had in fact encouraged and lent his support, name and reputation to her business and charitable activities and that the documentation available showed her income had increased rather than decreased during their time together and no question of compensation therefore arose (para 84).



(d) Wife's Claim to Exceptional Contribution:

10. The Court reviewed her claim to her contributions (paras 85 to 96) and immediately accepted that because of the difference in ages, it was the Wife upon whom the later demands of their daughter's care would fall against a present sharing of the time between the parents with the child. The Wife claimed to have made an exceptional contribution, including that of being the Husband's "full time wife, mother, lover, confidante, business partner and psychologist" (para 91). However, the Court concluded that again she had exaggerated her evidence in this regard and the same was "devoid of reality" (para 101).

(e) Wife's Claims to Husband's Capital Value:

11. The Court determined (paras 109 and para 132) that the Husband's net worth was c £400m including £240m of business assets. There was no evidence supporting the Wife's claims of £800m. His net income was c £5.3m pa. The Husband claimed that his asset worth between marriage and separation had increased by c £39.5m which had included some £12m in passive growth (para 110). The Wife's net assets were £7.8m (paras 134 and 180) and largely, as the Court found, the result of the Husband's generosity to her and his "without prejudice" interim lump sum payments of £5.5m. The Court found also that the Wife had attempted during their relationship to recover monies from the Husband on the basis that she owed the same in mortgages whereas she had no such loans. Such behaviour by her was found to be "distinctly distasteful" and damaged her credibility (para 144).

(f) Husband's Claims to Wife's Overspend and Costs Waste:

12. It was submitted, too, that the Wife had overspent on herself by c £1.262m and incurred additional futile costs on the value of the Husband's assets in 2000 when she had claimed the parties had first cohabited. The first issue of overspending as an add back item was supported in Martin v Martin [1976] Fam 335, the second in relation to wasted fees was a matter for costs questions later (para 160 to 165). The Wife had not been entitled to consider in this case that the level to which she perceived she had lived in the marriage should or could continue after the parties separation in April 2006 (para 169). The Court, in accounting for the necessary re-adjustment period in any marriage breakdown, viewed £500k of the £1.262m spent as unjustified (para 179) and had added the same back in the Wife's assets of £7.8m (above).

General Section 25 Review:

(a) Accommodation needs:

13. The Court reviewed the Wife's capital needs (paras 181 to 187) and concluded that her present home acquired with the help of an interim lump sum provided for her primary accommodation with her daughter and that to assist in recovering her earning capacity she



should also have a London 3 bedroomed flat of c £2.5m cost, albeit her other claim to a additional properties to those she already owned, were rejected.

(b) Earning Capacity:

14. After considering the evidence of the Wife's earning potential ,the Court concluded that she did have an earning capacity, without the advantage of being the Husband's wife, of £75k pa gross, which she would attain over the next two years assuming she adopted a less confrontational stance in public (para 197).

(c) Reasonable Needs:

15. The Court considered that any review of the open offers put forward by the Wife undermined her claim for a £3.25m pa needs budget for herself and her daughter, since capitalisation amounted to £99m whereas she had been prepared to accept £50m in one of her two offers (para 210) Overall, the Court assessed her needs as a self sufficient woman at £600k pa (para 239) and warned as here that a Court would take a robust line and prune expenditure drastically where a litigant seeks to over egg the budgetary requirements so as to deprive the Court of any sensible assistance (para 230).

16. As for the child's provision, the Husband's offer at £35k pa ppo was seen as appropriate and the nanny allowance increased only to £30k pa with the Husband meeting as agreed the school fees and additional security costs for his daughter whilst she remained a dependant (para 241).

(d) Conduct:

17. The Court further rejected both parties attempts to introduce evidence of the other's conduct both during their relationship and post separation as disproportionate and unreasonable and more to do with an impending libel hearing in the High Court brought against a national newspaper by the Wife in respect of allegations that she had leaked the contents of Court documents and the veracity of the allegations made therein (para 298). The Husband's case in any event concerning his case of conduct merely sought a modest deduction of the Wife's award as a result representing just over 5% thereof.

Fairness – "Needs, Compensation and Sharing":

18. After considering the **section 25 (2)** criteria (para 299), standing back, needs, compensation and sharing are to be addressed (see **Miller (2006)** and **Charman (2007)**).

19. As to compensation, on the facts as found, this was simply not engaged (para 305).

20. As to whether the sharing principle was engaged in relation to any marital acquest, the “active” acquest, after excluding passive growth, was £21.5m. On the facts of this case, the Court accepted, having repeated (para 302) the passage from **Charman**, namely:-

*“It is clear that, when the result supported by the needs principle is an award of property greater than the result suggested by the sharing principle, the former result should in principle prevail: per Baroness Hale of Richmond in **Miller** paragraphs [142] and [144].”*

that, if the fair sharing of any marital acquest had any legitimate role to play in such a case and excluding for the purpose any argument the Husband may have that such an acquest was the result, in any event, of an exceptional contribution by him, then the same must be as a cross check of the provisional assessment by the Court of the Wife’s needs (para 310).

21. The Wife’s needs, on the facts of the case, were not just one of the factors to be considered but rather a factor of magnetic importance (para 311). In a case where, the bulk of the fortune emanated from the Husband before the marriage and before they even met, the marital acquest is comparably small against the total asset value, compensation is not engaged, the marriage short, the standard of living enjoyed only whilst the marriage lasted, and where the Wife’s and the daughter’s needs fully accommodated, any other approach would be manifestly unfair.

22. Applying a capitalisation to the Wife’s generously interpreted needs figure of £600k pa it must be remembered that the tables are guides to reaching a fair figure as opposed to rigid formulae (para 313). The Court had determined to take a mid way approach between the unamended **Duxbury** calculation of her needs figure of £600k pa less her earning capacity of £75k pa gross (£17m) and the amended Duxbury approach (£11m) adopted in **Flick v Flick [1995] 2 FLR 45.**), which took account of the stage free of child care the Wife could free some of her accommodation capital and with age was less likely to require the same rate of expenditure as now allowing a 40% reduction of her rate of spending (para 319). This resulted in £14m plus the London flat at £2.5m (para 321). Hence with her own asset value actual or assumed, the same equates to her having £24.3m.

Impact of Exaggeration:

23. The sharing principle is, in this case, subsumed in the Wife’s needs (para 322). The result reflected the fact that the burden was upon the applicant to make a rational and logical case for the award sought (para 323). The case was a paradigm example of the consequence of failing to put a rational and logical case and thus failing to assist the court in its quasi-inquisitorial role to reach a fair result.

Commentary:

This case has, as anticipated, far more media than legal value,

There are, however, a number of helpful aspects for the practitioner.

- The Wife's first "open offer" reflected a position c £75m less than the open offer, which she, eventually, advanced as her pre trial position. The contradiction, clearly, damaged her credibility and emphasised the need for good reason in making any unconditional open offer in advance of final trial preparation. Such early open offers may well be justified as a genuine negotiating stance to achieve settlement, but their basis should be reflected carefully in the terminology in which they are couched. Of course, the contrast in this case of the offers made on behalf of the Wife *may* have been more a reflection of her lack of matrimonial Court experience.
- In several respects, the Wife made wild assertions which she simply could not prove and all practitioners will recognise, within the judgment, the clinical approach of the Court and professionals involved in drawing her into a forensic web from which there would be no escape. If litigants in person are attracted to the Wife's encouragement in her press statements as to DIY divorces, they would be best advised to read the small print of this decision first. The damage inflicted by a loss of credibility before the Court, can be devastating where the asset value being debated is of a far more "normal" level than that of the fabulously wealthy McCartney's.
- The decision should embolden District Judges to actively penalise in an award the presentation by either party of a ridiculously high forward budget which when set out in the Form E can, effectively, torpedo efforts at an FDR to achieve settlement only for a more realistic budget to appear closer to trial without costs sanction. In fact, there is much to be said for advancing the requirement for "open offers" to be made not 14 days before the final hearing but not more than 14 days after an unsuccessful FDR so that one side's exaggeration can be exposed with more obvious costs consequences.
- At the FDR the Court is to be more pro-active in sieving the suggestion that "conduct" is to be argued. The gateway for such submissions is now extremely narrow post Miller / McFarlane (2006) and the approach of Bennett J is an object lesson in the use of proportionality to see off anything other than the obvious example of such behaviour.
- At last, the wise approach of Flick has been re-emphasised to long term capitalisation beyond child care and an age when spending habits are bound to change.