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Guidelines on Compensation – VP v JP [2008] EWHC 112 (Fam) (The President)

1. Introduction:

1.1. In the recent period there have been a number of High Court decisions which have thrown further light on the incremental approach, post **McFarlane /Miller [2006]**, following a divorce distribution.

1.2. Both **CR v CR [2007] EWHC 3334 (Fam)**, **Bodey J** and **P v P [2007] EWHC 2877 (Fam)**, **Moylan J.** have already received commentary in the legal press and the reader will already be familiar with the judgments in question.

1.3. However interesting those cases may be, both were decided before two decisions, which are now reported and which, it is suggested, have moved on the jurisprudence in this area – albeit, to some, not in a desired direction.

1.4. In both, the President presided. The first is **VP v JP [2008] EWHC 112 (Fam)** and the second is **B v B [2008] EWCA Civ 543**. In the first, the President lays down guidance as to the approach to claims of compensation for “relationship generated disadvantage” and in the second, the President is part of the Court of Appeal, in which Hughes and Wall LJ give the leading judgments with which the President concurs and which judgments appear to re-introduce the concept of the “yardstick of equality” as a cross check to the Court’s fair and non discriminatory approach as opposed to there being any overriding “principle of equality”, which had been most commentators conclusion of the outcome of the decision of the Court of Appeal in **Charman [2007]** in which, of course, the President himself gave the leading judgment.

1.5. For the purposes of the present article it is the first of these interesting decisions which is now considered in the light of the President’s guidance to approaching compensation claims.

2. VP v JP [2008]:

2.1. The case involved an application for an increase in periodical payments on the basis that the wife and childrens' needs had increased since the original order and that she was due compensation following **McFarlane /Miller**.

2.2. The husband was 43 and the wife was 45. They married in 1990. There were two children, both boys, aged 13 and 11, who lived with the mother. They both attended private fee schools (para 1). Before having the children, the wife had been a personnel manager with prospects of rising to director level. The husband was a city solicitor who was made a partner. Before starting the family, the wife had an opportunity for a new position which would have required a move of home. The husband would not agree as he did not want to jeopardise his own career prospects.

2.3. Originally, on divorce (2001), there had been, on a consent order, a 60/40% split in favour of the wife of the capital assets amounting in total to £776k, including pensions (para 2). Based upon a gross income of £534k pa and £330k pa net, there had been, in addition, to school fees etc. a ppo to the wife of £33k pa and to each of the children an ample £24k pa (para 3).

2.4. Both parties had sold and bought alternative properties by the time of the variation proceedings, the wife's being more than the sale proceeds of the FMH and she had clearly, made savings from the ample maintenance provision made to her (para 6). There had been a variation application in 2005 dealing, principally, with RPI provisions to the ppo (para 9).

2.5. The wife now claimed that the previous income cushion intentionally provided by the original order was no longer there and her outgoings needs were £102k pa and she had subsidised the, now, shortfall out of family inheritance and the childrens' maintenance, which itself was no longer in surfeit. She also added to her claim a further £28k pa as a premium for compensating her for loss of her earning capacity (para 11).

2.6. The President considered that there were economies which reasonably were to be made in her budget paring the same down to £58.5k pa for herself and acknowledging that the childrens' maintenance at another £24k pa each still contained a surfeit above their needs which also remained available to the wife.(paras 29 to 30).

2.7. The President reviewed the wife's earlier career and the development of her child related responsibilities and concluded that the decision not to pursue her career once the children came along had been consensual and, subsequently, her failure to return to work had been caused by the husband's understandable reluctance in view of the demands of his career and the wife's related acknowledgment that he needed her support. In the event, the wife was only likely to gain part time employment at, say, £7.5k pa and possibly £20k pa full time when the children were independent (para 38 to 40).

2.8.At paras 41 to 58, the President reviewed under the heading of "Compensation" the earlier case law from **McFarlane/ Miller [2006]** to **Charman** and **CR** and observed (para 52) in relation to the decision of **RP v P [2007]**:-

“Further, I would endorse the warning sounded by the judge against the introduction of an approach which seeks to separate out and quantify the element of compensation, rather than treating it as one of the strands in the overall requirement of fairness in the assessment of the parties' joint contribution to the marriage, where the wife, as a result of joint marital decision has sacrificed her own earning capacity in the interests of the bringing up the family. Attempts under the rubric of Compensation to isolate and quantify the level of income or earning capacity sacrificed by a wife years after the event for the purpose of calculating a premium element on the award, constitutes a search for precision which is to be discouraged both on the grounds of policy and practicality, and which goes beyond what is required or generally appropriate in the exercise required of the court under s.25.”

2.9. At para 59, the President, from his review of the authorities, extracted the following propositions as to claims for compensation, namely:-

(1) First, it is at the exit of the marriage and in relation to the division/ redistribution of the family assets that the consideration of the element of compensation immediately arises, but as a feature of the concept of fairness rather than as a head of claim in its own right;

(2) Second, on the exit from the marriage, the partnership ends and in ordinary circumstances a wife has no right or expectation of continuing economic parity ("sharing") unless and to the extent that consideration of her needs, or compensation for relationship-generated disadvantage so require. A clean break is to be encouraged wherever possible;

(3) Third, in “big money” cases, where the matrimonial assets are sufficient for a clean break to be achieved, a wife with “ordinary career” prospects is likely to have been compensated by an equal division of the assets and consideration of how the wife's career might have progressed is unnecessary and should be avoided. Where, however, that is not the case and the parties accept or the court decides that fairness can only be achieved by an award of continuing periodical payments in respect of a wife's maintenance, then the matter of compensation in respect of relationship-generated disadvantage requires consideration, again as a strand or element of fairness.

(4) Fourth, in cases other than “big money” cases, where a continuing award of periodic payments is necessary and the wife has, plainly, sacrificed her own earning capacity, compensation will rarely be amenable to consideration as a separate element in the sense of a premium susceptible of calculation with any precision. Where it is necessary to provide ongoing periodical payments for the wife after the division of capital assets insufficient to cover her future maintenance needs, any element of compensation is best dealt with by a “generous assessment” of her continuing needs, unrestricted by purely budgetary considerations, in the light of the contribution of the wife to the marriage and the broad effect of the sacrifice of her own earning capacity upon her ability to provide for her own needs

following the end of the matrimonial partnership. These considerations being inherent in s.25(a)(b)(d) and (f) of the 1973 Act.

2.10. The approach in the instant case was under category (4), as last referred to, in that this was not a “big money” case and nor was a clean break of income possible. The Husband’s net income was assessed at c £470k pa and, in the process of considering compensation as one of the strands of fairness, the President started with the wife’s budgetary needs as found by him (£58.5k pa) as (para 80):-

“represent(ing) the beginning rather than the end of the exercise required in a case of this kind where the means of the husband are well sufficient to make generous provision beyond the confines or discipline of a strict budget.”

2.11. He then, in the face of what he described as “*an amalgam of uncertainties*”, used what he conceded was a “*rough and ready*” approach to a “generous interpretation” of her needs. The result was £65k pa for her maintenance with the childrens’ maintenance provision left untouched as was agreed between the parties (para 83). The £65k pa award was cross checked against the proportion the same represented against the Husband’s overall income and its increase since the last order. There was no adjustment in the figure for the wife’s uncertain and modest immediate earning capacity.

3.Commentary:

3.1. It remains puzzling to many practitioners that the higher courts continually appear to strain at devising a myriad of reasons to limit a wife’s claim to compensation within the approach to a fair result. Any reading of either Lord Nicholls’ or Baroness Hale’s speeches appear, in contrast, to encourage recognition of compensatable losses, either in terms of a sacrificed career (type 1) or of the other spouse’s much greater earnings to which there has been a value added contribution in the divorce (type 2). (see Charles J in H v H (2007)).

3.2. It serves well to reflect that much the same attitude led to 27 years, post the MCA 1973, of limiting womens’ claims to a fair share of the marital capital under the guise of the judicial invention of “reasonable requirements” before the correction by their Lordships in White [2000] highlighted the fact that such a phrase was not even part of the statute.

3.3. Of course, the fact remains that whilst the loss of a career remains the less evidentially provable route to compensation in most cases, the loss of a chance of enjoying the husband’s greater earning capacity built up during the marriage is the enduring area of unfairness felt and actually experienced by most women as they get



divorced. Very often, an equal division of the capital will still leave the wife with the much lesser prospect of realising for the future the standard of living to be enjoyed by the husband as each leave the marriage. The reason for this is, patently, his often far greater earning potential and the real cost to the wife of the “family years”.

3.4. Any reading of the President’s approach to compensating the wife in the VP case for her loss, it is suggested, appears both contrived and lacking in reality.

3.5. Why should the wife feel “compensated” with what amounted to another £6.5k pa above her reasonable needs, as determined by the Court and just 50% of the claim advanced upon her behalf in a case where the husband’s income was huge upon any analysis of its amount or the surfeit it produced. Why should it be acceptable for a judge to justify the compensation element as being a “rough and ready” estimate and what does it really mean when a wife is told her needs are being “generously assessed”. Should such mystical criteria only be known to the Courts as the hapless litigant comes before the judgment seat or should the same be more easily identifiable to those who, after all, are paying the not inconsiderable costs of the exercise.

3.6 The Court’s constantly suggest that the central exercise under section 25 lies in the focus upon “fairness without discrimination”. What women want is fairness without *judicial* discrimination and not the present “smoke and mirrors” under an intellectual umbrella of excuses for not compensating obvious losses.

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