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Sharing Non Matrimonial Assets 'as rare as a White Leopard': JL v SL (No.2) [2015] EWHC 360 (Fam). Mostyn J.

Introduction:

Practitioners will find a helpful analysis in this latest judgment of Mr Justice Mostyn which again re-states and attempts to further clarify the approach surrounding pre and post accrued value in divorce disputes. Clearly, His Lordship has been a long standing advocate in practice and now on the Bench for the principle of excluding non matrimonial assets from the division of parties' resources on divorce, subject, of course, to 'needs' and in this instance he likens the occasions when it will be justified to take any account at all of non matrimonial resources to that of the very rare existence of the white leopard. The judgment also provides additional assistance where there has been an 'intermingling' of non matrimonial resources.

Facts:

The case had been before Mostyn J just a month before in an appeal in relation to the treatment in the final hearing of the claims for financial orders upon divorce by the district judge of the Wife's receipt of inheritance monies during the marriage. Mostyn J had allowed the appeal, finding as he did that the district judge had erroneously interpreted the wife's actions in moving some of the money from the inheritance into accounts in the husband's name to gain the best interest return and also in giving him a proportion of the inheritance to enable him to access the same more easily should she predecease him, as being evidence of her intention to share the same with the husband in the event of a divorce. However, His Lordship had then been unable to go on to look afresh at the section 25 exercise in the light of the need to seek out further evidence at this second hearing in relation to the late disclosure by the Husband of the sale of company shares by him which he had informed the district judge were worthless but were when sold worth a net £586k and the further receipt of the Husband of another £100k in redundancy monies.

Judgment:

His Lordship sought to emphasise that non matrimonial assets were now, absent of need, very unlikely to be the subject of the Court's sharing powers following the Court of Appeal case of **Jones** (2011) and **K v L** (2011) 2 FCR 597). He observed that this meant it remained important to identify what was matrimonial and non matrimonial property and stated at para 25:-

> *"This seems to me to mandate that the court should always attempt to determine the partition between matrimonial and non-matrimonial property. Once it has done so the matrimonial property should usually be divided equally and there should usually be no sharing of the non-matrimonial property".*

Equally, Mostyn J re-emphasised (para 27) that matrimonial property, whilst normally to be divided equally, will not invariably be so divided – and this includes the classic matrimonial asset, the marital home (cf **Vaughan** (2007) 1 FLR 1108 Wilson LJ and **N v F** (2011) 2 FLR 533).

Helpfully, His Lordship suggested that the approach to be adopted by the Court where a non matrimonial asset has been intermingled (ie by being "part of the economic life of [the] marriage…utilised, converted, sustained and enjoyed during the contribution period") into the family finances during a marriage, should be guided by the following process (para 28):-

> *"i) Whether the existence of pre-marital property should be reflected at all. This depends on questions of duration and mingling.*
> *ii) If it does decide that reflection is fair and just, the court should then decide how much of the pre-marital property should be excluded. Should it be the actual historic sum? Or less, if there has been much mingling? Or more, to reflect a springboard and passive growth, as happened in Jones?*
> *iii) The remaining matrimonial property should then normally be divided equally. …"*

And (para 29) after observing that the approach of excluding the non matrimonial property was preferable to simply permitting a judge to intuitively assess to what extent its presence should be reflected in the percentage share imbalance of the total assets to be awarded to the one who had introduced it, His Lordship stated:

> *"It can be seen that this technique maintains the purity of equal division of what is found to be the matrimonial property and in my judgment is the path that should be generally adopted. However the fact of mingling may nonetheless lead to an unequal division of the matrimonial property, most likely where it is the matrimonial home which was provided solely by one party, as was the case in Vaughan".*

In terms of post separation accrued assets, His Lordship gave further insight to the appropriate approach of the Court. First, there are those assets which are in existence at the date of separation of the parties and which are the result of their mutual, albeit in most cases, different efforts; such assets he stated (para 41):

> *"…remain matrimonial property but the increase in value achieved in the period of separation may be unequally divided. I emphasise may. Obviously passive growth will not be shared other than equally, and there will be cases where on the facts even active growth will be equally shared, as happened in **Kan v Poon**."*

*His Lordship compared this to the recent analysis undertaken by Roberts J in **Cooper-Hohn v Hohn*** **(2014) EWHC 4122 (Fam) and found that, whilst at first sight he had been concerned that he had spotted 'a white leopard', Her Ladyship had, in fact, followed the same approach. In particular, Roberts J had had to determine in Cooper-Hohn's case "***whether and to what extent the new work and new investments created by the husband in the period after the parties separated (fell) to be considered in the character of matrimonial property in which the wife should be entitled to a share or whether some or all of it (fell) at a point too distant from the essential character of the matrimonial partnership to qualify.*" In conducting that exercise Roberts J., in relation to a matrimonial portfolio which had "exploded" in value during the separation by $550m, had determined that the cause of the increased value was:

"*the husband's investment eye coupled with his ability to drive change and so achieve levels of profit which are demonstrably in excess of any conventional rates of investment return" (para 185)".*

And so, as His Lordship again observed, Roberts J (in para 195) had reached this conclusion:

> *"Whilst I shall come on to the precise figures once I have considered the issue of overall computation and special contribution, it is not my intention that this wife should receive no share of the assets which fall outside the marital acquest in this case. She will receive a share and that share will form part and parcel of the overall award which I will make on the basis of fairness to both parties. There is no question of her entitlement to any element of post-separation accrual being triggered by a 'needs' argument but I take the view that, notwithstanding the exponential increase in the growth of the Fund post-separation, its genesis as a matrimonial asset is a factor of considerable significance. That factor must, in my view, find its reflection in the overall quantum of the financial award she will receive at the conclusion of these proceedings. It goes to the heart of what I consider to be fair in the overall context of the case."*

Hence, His Lordship considered that Roberts J had concluded that the portfolio fund in **Cooper-Hohn's case** retained its matrimonial character but the wife would share unequally in the increase in the value achieved by the husband alone in the period of separation.

By contrast, Mostyn J considered that where the post-separation accrual relates to "*a truly new venture which has no connection to the marital partnership or to the assets of the partnership then the post-separation accrual should be designated as non-matrimonial property and save in a very rare case should not be shared*". In His Lordship's view, this had been the approach adopted previously in the case law and more recently by Moylan J in ***SK v WL*** **(2010) EWHC 3768 (Fam)** and Roberts J in **Cooper-Hohn's case.**

However, both Moylan and Roberts JJ had adopted the percentage technique to assessing the fair proportion of the post accrued value in each of those cases. In Mostyn J's view, the percentage route risked "a lawless science and an unreasoned expression of instinct and intuition". His Lordship stated that, whilst he accepted that Wilson LJ in **Jones** had approved the percentage technique as a valid counter check of the fairness of the outcome achieved, his view remained that:

> *"...the preferable approach where there is a significant amount of active post-separation growth of a matrimonial asset is first to determine the share of the pool in the absence of that growth (usually an equal share) and then to determine the share of the growth (usually an unequal share)".*

In His Lordship's judgment, on the facts of the present appeal, the receipt by the husband of the £586,334 in July 2014 on the sale of his shares was of non-matrimonial property. Whilst he concluded the husband had tried to mislead the Court in this respect, the fact was that the first tranche of shares was not received by him until (March 2013) some 20 months after the separation. In addition, the shares were in a new company deriving from a new job which the husband took 11 months after the separation. The remaining tranches had been received over two years after the separation. Accordingly, His Lordship stated (para 52):

> *"In my judgment this new employment, and the benefits the husband received from it, is to be described as a new venture and not as a continuum. It was not even in the same sector as his previous job. Not even on the most liberal interpretation of the facts could it be said that he was trading with a marital asset which existed at the point of separation. I agree with ..(the district judge).. where she described the husband's work as "his post matrimonial job".*

Commentary:

The needs of the parties often mean that issues of pre and post accrual and the intermingling of non matrimonial sourced assets are of little practical application in many cases. However, when they do arise in cases where otherwise the needs of the parties are catered for, the approach of the Court cannot always be said to be consistent at local level. Lord Nichol in **White** (2000), is often quoted in relation to the Court's approach to looking at the timing of the non matrimonial value introduced and the extent to which the same has been used and intermingled with the other financial resources in the case in determining the extent to which it is fair to take account of the non matrimonial contribution.

However, Lord Nichol did little more than signpost the relevant areas of consideration. There is no doubt since the **Jones** and the **K v L** cases, the guidance which has followed from the Court of Appeal has firmly, absent of need, indicated that the default position should be that non matrimonial value introduced by one spouse in a marriage is to be regarded as an unmatched contribution, which is to be excluded from the principle of sharing. This applies whether the non matrimonial value comes in at the start of the marriage or after the parties have separated and Mostyn J restates the importance in such cases of ensuring that the non matrimonial asset values are identified. He also pins his colours firmly to the primary route of assessment identified in the **Jones** case of the non matrimonial asset value before the Court in any given case and rejects the percentage counter check borne out of the individual judge's unreasoned intuition as "lawless science". A view which may not be shared by the purist, but which would certainly encourage greater clarity of advice given to the paying litigant as to the likely outcome at a much earlier stage of the proceedings.

Helpfully, too, in overturning the first instance decisions in this case to include both the Wife's inheritance receipt and the Husband's post separation share sale and redundancy proceeds, he provides a valuable practical insight to the appropriate approach to situations not infrequently before the lower courts.

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